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“Reply to Berman, Brison, and Schauer”
Larry Alexander, currently the Warren Distinguished Professor of Law at the University of San Diego School of Law, has authored or co-authored numerous works on an incredibly impressive range of topics within law and philosophy. The first featured commentary on Professor Alexander’s work comes from Mitch Berman, who holds the Richard Dale Endowed Chair in Law and is professor of philosophy at the University of Texas at Austin School of Law. Berman offers a nice sample of the more provocative theses Alexander has advanced and defended, before turning a critical eye on what appears initially as a narrow target—Alexander’s denial that gerrymandering violates constitutional norms. However, Berman aims to coax from this initial focus broader criticism of Alexander’s work on matters such as the extent to which purposes (as opposed to the effects) of government matter for evaluating the constitutionality of action, the existence of any distinctly legal (as opposed to moral) principles, and the adequacy of Alexander’s originalist position on constitutional law. Philosopher Susan J. Brison (Dartmouth) and Frederick Schauer (David and Mary Harrison Distinguished Professor of Law at the University of Virginia School of Law) each take up challenges posed by Alexander’s skepticism about any special status of a right to free speech. Though each commentator is receptive to the theoretical point that speech may be merely one facet of a broader right to liberty, each raises distinct questions for Alexander. Brison is puzzled as to why Alexander appears unable to sustain his compelling conclusion for free speech skepticism. Schauer explores the relationship between, on the one hand, Alexander’s skepticism of a philosophically defensible distinction between speech and other human activities that might serve as the object of a free speech right and, on the other hand, Alexander’s inclination towards rule consequentialist defense of legal rules. It may be the case that a legal right specifically protecting speech generally promotes desirable outcomes more effectively than its absence even if there will be cases of human activity where it is unclear whether that activity constitutes speech. Professor Alexander responds first to Berman’s specific worry about gerrymandering and offers thoughts on the related worry from Berman about the status of legal principles. In considering the complementary worries from Brison and Schauer, Alexander acknowledges that their arguments point us towards the most challenging difficulty facing jurisprudence—the gap between the authority of rules grounded on consequentialist foundations and the authority of those founding moral values in those cases where the two conflict. While this difficulty is the most challenging, engaging it affords us the most illuminating lens through which we may examine legal phenomena.

Introduction

Larry Alexander has more views on more diverse topics—and certainly more views that are carefully formulated and defended—than probably any other Anglophone legal theorist writing today. In several books and over two hundred articles, essays, and book chapters, written alone or with one or another co-author from a large and impressive stable, Alexander has forcefully advanced more heterodox theses than I can count, and far more than I could possibly list in this space. Still, for those who lack deep familiarity with Alexander’s oeuvre, it behooves me to convey at least a flavor of his breadth and originality. Here, then, is a sampling of some of the striking theses he has defended across diverse areas of legal theory from jurisprudence and legal reasoning to constitutional theory to moral philosophy and the philosophy of criminal law. Alexander has maintained that, as far as judgments of blame and responsibility are concerned, there is no qualitative difference between intending harm and risking it: moral blameworthiness is always a function of an actor’s perception of risk and the reasons that explain or motivate her action. Punishment for incomplete attempts is unjust: criminal responsibility for attempts does not properly lie at any stage short of the last act that “unleashes” a risk of injury to a legally protected interest. Punishment for criminal negligence is also unjust, for persons are never blameworthy for courting risks inadvertently. There are no such things as legal principles. Nor is there a human right to freedom of expression. The purpose of law is always and only to resolve what, morally speaking, ought to be done. The proper object of constitutional interpretation is always and necessarily to ascertain the semantic intentions of the constitution’s authors. Partisan gerrymandering is not unconstitutional. There is no “overbreadth” doctrine in American First Amendment jurisprudence, nor does the First Amendment protect against compelled speech. There is no “state action” when state governmental officials violate state law. Analogical reasoning is not a genuine form of reasoning. Mistakes of law are conceptually indistinguishable from mistakes of fact. All rules are lies. And this is just a very partial and almost random list.
I am persuaded by Alexander’s arguments for several of these arresting positions. Others strike me as mistaken and one or two even a little wacky. Be that as it may, his greatest talent, in my opinion, lies in his ability to frame problems in exceptionally clear and productive terms. His particular genius, perhaps unmatched among today’s legal theorists, is to precisely identify, and to sharpen, the most formidable objections that a candidate view must meet. When he does go awry, I think, it’s frequently due (when not chiefly attributable to his penchant for contrarianism) to a failure to anticipate possible avenues for meeting the challenges he has identified, causing him to conclude too quickly that $p$ must be true on the ground that certain difficulties facing not $p$ cannot be overcome. But my key point is simply that, thanks to his uncanny nose for the vital issue or problem, Alexander’s work remains invaluable even on the occasions in which he ends up endorsing a dubious bottom line. Through his published work and by means of remarkably generous and incisive comments on working drafts, Alexander consistently zeroes in on the pivotal challenge that allies and opponents alike must overcome.

In this essay, I hope to make a small return on the favor he has bestowed on the community of legal theorists by causing trouble for some of Alexander’s positions. My central claim is this: Alexander is wrong to maintain that partisan gerrymandering does not violate the U.S. Constitution. Stated in just this form, my thesis should appear oddly narrow. Of all that Alexander has written, the reader might wonder, why tackle this one, seemingly narrow, thesis? My choice of target may seem a little like responding to an invitation to assess the second Bush presidency by criticizing a regulation on highway-rail grade crossings promulgated by his department of transportation. Though there may be more truth to the analogy than I wish to acknowledge, my hope is to draw from this single investigation some implications for Alexander’s views on other topics too—on the constitutional significance of governmental purposes, on the existence of legal principles, and on the force of originalism in constitutional interpretation.

### I. Partisan gerrymandering

Partisan gerrymandering is the practice of drawing legislative districts with an eye toward advancing the electoral prospects of a favored political party (or of retarding the electoral prospects of a disfavored party). Although the term itself is fully two hundred years old and the practice much older still, scholars have long decried it as both unjust and unconstitutional. Moreover, as recently as 2004, all nine justices of the Supreme Court agreed that “excessive partisanship” in redistricting violates the U.S. Constitution, even while splintering over whether it is constitutional to produce unconstitutional states of affairs or (2) that they are not, by themselves, constitutionally objectionable?

**A. Alexander’s analysis**

The bulk of the Alexander and Prakash analysis focuses on several “claimed harms” that “partisan gerrymanders supposedly cause.” That is to say, it focuses on the first possibility identified above. The claimed harms are that such gerrymanders “dilute” the value of votes cast by members of the disadvantaged political party, thwart the ability of a state’s electoral majority to effectively rule, produce uncompetitive general elections, produce legislative bodies that are excessively partisan and insufficiently prone to compromise, and (in violation of the First Amendment) impose burdens on citizens because of their political views.

Alexander and Prakash find all of these objections spurious. Their arguments, much simplified, are the same in each case—namely, that the baseline state of affairs against which partisan redistricting schemes produce departures are not states of affairs that the Constitution mandates. For example, a state’s citizens are not constitutionally entitled to legislative delegations that mirror the state’s partisan divide, and the Constitution does not require competitive districts. In short, “each of the many different objections voiced against gerrymandering—vote dilution, the non-competitiveness of elections, the polarization of legislatures—assumes that the Constitution establishes certain controversial districting and election ideals. The fatal flaw running through all such complaints is that the Constitution neither envisions nor mandates any such ideals.”

I believe that Alexander and Prakash are largely right about all of this. Indeed, Alexander deserves plaudits for being among the first scholars, and possibly the very first, to criticize the vote dilution objection to partisan gerrymandering. But what about the non-consequentialist objections to partisan gerrymandering, those that maintain that it is constitutionally wrongful for redistricting authorities to pursue (or to excessively pursue) partisan goals even when the district lines they produce are not, by themselves, constitutionally objectionable?

Alexander and Prakash seem to recognize, early in their article, that this is a different sort of objection. As they put it: “To many, gerrymandering... seems ethically unsavory, smacking vaguely of self-dealing. ... In drawing district lines, legislatures are stacking the deck in their favor.” The “deck-stacking” metaphor nicely captures the gist of the objection: even though there is no standard, supplied either by morality or by the rules or norms of the game, against which a (fairly) dealt poker hand “can be measured and found lacking,” we have no difficulty concluding that the dealer violates her obligations when purposely arranging the deck to produce this or that set of hands.

Indeed, in many domains, outcomes that would be acceptable or entirely unproblematic if produced randomly or “innocently” are impermissible when achieved purposefully. To anticipate an observation Alexander and Prakash will make, consider the assignment, within a multi-judge district, of individual judges to hear a particular lawsuit or to sit on a particular panel. This could be done randomly but needn’t. I do not think that it would violate the Constitution were the chief judge to assign judges by taking account of such considerations as the length of each judge’s backlog of opinions or their relative subject-matter expertise. Yet it clearly would violate the Constitution were the chief judge to make assignments based on predictions regarding the side that particular judges would likely favor. No litigant has a constitutional entitlement that Judge A will preside over her case or that Judge B will not. But the litigant does have a constitutional right that Judge A not be withheld from her case or that Judge B not be assigned to it because of predictions that the former would likely rule for her or that the latter would likely rule against her. Analogizing to the uncontroversial judgments I have just expressed regarding the
obligations of poker dealers and of chief judges cloaked with the power of assignment, we might reasonably surmise that citizens who (as Alexander and Prakash persuasively argue) are not constitutionally entitled to any particular districts or any particular political outcomes that districts might produce are nonetheless constitutionally entitled to a redistricting process in which certain considerations are not acted upon.

Stated differently, these other cases lend support to the belief that redistricters face a constitutional duty not to draw lines for the purpose of realizing partisan advantage, or not to draw lines for the purpose of realizing excessive partisan advantage. This could be a deontological command or it could have an indirect consequentialist grounding. Either way, the question that Alexander and Prakash must address is this: Why is reasoning broadly along such lines inadequate to support the widespread judgment that excessive partisanship in redistricting is unconstitutional?

Acknowledging that “the self-dealing objection to gerrymandering has the most appeal,” Alexander and Prakash devote a page and half to articulating and then addressing it. Their analysis is sufficiently important and sufficiently short that it is worth reproducing almost in full:

Those who press the self-dealing objection insist that it is unfair to let legislators draw district lines when they are likely to draw lines that further their personal or ideological interests. Is that not analogous to allowing one litigant to pick the judge or panel of judges to hear his case? Just as we require blind or randomized selection of judges and panels of judges . . . perhaps the Constitution likewise demands randomized districting.

This objection perhaps has some validity as a matter of fair play. But does it state a constitutional complaint? If so, its implications go far beyond political and racial gerrymanders. . . . The practical upshot of this objection . . . is to deem unconstitutional any districting scheme that is legislatively constructed with some of its electoral and policy outcomes relatively transparent. This objection would thus appear to mandate computer-generated districting schemes or their functional equivalents, using parameters that are totally or relatively opaque with respect to electoral and policy outcomes.

The self-dealing complaint also casts doubt on all manner of statutes. Legislation granting franking privileges, excluding legislators from the ambit of statutes, and increasing spending and cutting taxes in election years—all of these measures arguably stack the deck in favor of incumbents. . . . Ultimately, we take no stand on this objection or the various replies to it insofar as fairness and sound policy are concerned. Our focus has been on whether partisan and other gerrymanders are constitutional wrongs in a world in which other, non-blind, non-randomized districting schemes are not. Because from before the constitutional founding down to the present, district lines have been drawn by legislators conscious of demography, we seriously doubt the contention that anything in the Constitution mandates computerized or randomized districting. Perhaps, however, the Supreme Court will instruct us otherwise.

B. Assessment
The first thing to note about this analysis is that the very first sentence misdescribes the objection that it seeks to evaluate. Understood in its more natural—and more forceful—form, the objection is (to a first pass) that it is unfair (or otherwise wrongful) for the legislature actually to draw lines with certain proscribed purposes (i.e., drawing lines for the purpose of furthering their electoral self-interest or the electoral interest of their party). The objection is not that it is unfair (though it might well be unwise or imprudent) to create or maintain a system that facilitates or enables legislators to draw district lines with the proscribed purposes. That is to say, Alexander and Prakash locate the claimed wrong at the wrong level. The self-dealing objection maintains that legislators violate the Constitution when they do a certain complex act (draw the lines of electoral districts, enact a redistricting scheme, or the like) to achieve certain ends or motivated by certain reasons (partisan advantage). The objection does not locate the constitutional violation in the possibility of legislators acting on this motive.

This is not a quibble, for the body of Alexander and Prakash’s argument against “the self-dealing objection” all depends upon this misdescription. The core of their argument—advanced, in slightly different language, no fewer than six times over a one-and-one-half-page discussion—is that the Constitution does not “mandate[] computerized or randomized districting.” Fair enough. But the self-dealing objection as I have just described it neither maintains nor entails otherwise. The self-dealing objection holds that, even insofar as redistricting authority is properly assigned to agents, including elected representatives, who are permitted to attend to a variety of considerations, there are some factors that the agents may not consider (or may not weigh too heavily) as reasons for or against this or that placement of a district line, and that one of the excluded factors concerns the partisan outcomes that the districting scheme would likely produce. Compare: it is wrongful for an instructor to assign higher or lower grades to student papers based in whole or in part on whether the paper defends a position with which the instructor agrees or on whether the paper cites work of the instructor; but it does not follow that any grading system that allows (in the sense of “makes possible,” not in the sense of “permits”) instructors to do so is impermissible or that papers must be computer-graded. I suspect that it is precisely their misdescription of the objection as one that attaches to the allowing of a wrongful possibility and not to the actualizing of it that leads Alexander and Prakash to the mistaken conclusion that the fact that redistricting by legislatures is constitutionally permissible (i.e., that the Constitution does not prohibit legislative redistricting tout court) rebuts the self-dealing objection.

Now, there is another possibility. Reference in the passage’s second paragraph to the “implications” of the self-dealing objection, and to its “practical upshot,” suggest that Alexander and Prakash might be contending, not that the self-dealing objection itself maintains (or entails) that “the Constitution . . . demands randomized districting,” but that, as a practical matter, the only way that courts could effectively administer a constitutional command against excessive partisanship in redistricting decisionmaking is by adopting and enforcing a prophylactic rule that prohibits all redistricting by legislative bodies.

But, for two reasons, this charitable reconstruction of Alexander and Prakash’s reasoning will not help them. First, it is false that courts could craft no doctrinal tests, short of a blanket rule that state legislatures be barred from exercising any redistricting authority, that could adequately police the excessively partisan redistricting that the self-dealing objection, rightly understood, forbids. Second, even were my first response mistaken, and even were we to agree with Alexander
and Prakash that a broad prophylactic rule categorically forbidding state legislatures from making redistricting decisions would be inappropriate, the correct lesson to draw would be that the constitutional vice that the self-dealing objection identifies is nonjusticiable; the lesson would not be, as they contend, that partisan gerrymandering is constitutionally permissible.

So much for the core argument developed in the first, second, and fourth paragraphs quoted above. The third paragraph advances a distinct argument, although, like the argument already discussed, it assumes the form of a reductio. The first reductio was that a constitutional ban on excessive partisanship in redistricting entails the unacceptable conclusion that the Constitution requires random or computerized redistricting. That claimed entailment, I have explained, is false. The second reductio is that if a constitutional ban on excessive partisanship is grounded in “self-dealing” concerns, then other practices that should strike us, even on reflection, as constitutionally unobjectionable would also emerge as unconstitutional.

This supposed entailment is no more persuasive than the first, but for different reasons. Start by replacing the vague invocations of “the self-dealing objection” and the notion of deck-stacking with a more precise formulation of the rule or principle under consideration. This will be contestable, but for reasons I have given elsewhere, the most plausible conception of the relevant constitutional principle holds (to a first approximation) that a legislature violates the Constitution if, in the pursuit of partisan advantage, it creates a districting plan that it expects to deliver a partisan return that is excessive relative to the partisan return that would be expected under the districting plan that the legislature would have enacted were it not motivated at all to realize partisan outcomes.12 Two key points about this proposed principle warrant emphasis. First, a legislature (or the political party that dominates it) is permitted to pursue some measure of partisan advantage, but not too much.12 Second, the baseline for evaluating magnitude of partisan advantage sought is counterfactual not normative: it is constituted by the electoral outcomes that would be expected under the scheme that the legislature would have adopted had partisan advantage not been among the considerations that shaped or informed its redistricting decisions.13

With this candidate principle in hand, we can see immediately that it has literally nothing to say about the other practices that Alexander and Prakash mention. This is a principle governing what we might fairly term “partisan greed” in redistricting or, somewhat more broadly, in the structuring of electoral rules and systems. It is not a principle forbidding all manner of legislative actions that could reasonably be described as a form of self-dealing. Alexander and Prakash might object that this narrower principle is unstable all by itself and is only sensible if understood as an instantiation or implication of a more general principle that does forbid all manner of legislative self-dealing. But they would need an argument for that claim, and they provide none.14 Moreover, I am deeply skeptical that a persuasive argument is available to them. Though I cannot pursue the issue further in this space, it seems to me that proponents of this narrower principle could rely upon any number of plausible distinctions to resist the broader principle—distinctions sounding in differences between, for example, partisan-advantage and incumbency-protection, constitutive or structural rules and regulatory rules, purposes attributable to the legislation and motives that individual legislators might have for voting for some particular legislation, and so on.

To summarize: Alexander and Prakash acknowledge that the self-dealing objection to partisan gerrymandering is the most promising one; they even confess to feeling some attraction to that view, but they end up rejecting it on grounds that are infirm. In short, Alexander has not established that excessively partisan gerrymandering is not a constitutional wrong. Admittedly, I have not established that it is. Because the belief that excessive partisanship in redistricting is unconstitutional is so widespread, and because Alexander himself grants the pull of a rationale that sounds in a certain sort of corruption of the process (“self-dealing”) as opposed to one that rests on any supposed harms that partisan redistricting necessarily causes, I have contended myself by modestly bolstering the intuitive case for this claim and by showing that the reasons Alexander gives for resisting that pull do not persuade.

II. Beyond Partisan Gerrymandering

I said earlier that I would draw from my critique of Alexander’s position on partisan gerrymandering some insights regarding other theses he has defended. For want of space, this examination must remain only suggestive. I do not claim that the criticisms I advance here are remotely sufficient to demonstrate that the other Alexanderian positions I discuss are incorrect. My more modest goals are, first, to introduce a few of the bracing and heterodox claims for which Alexander is well known, and second, to provide some reasons to doubt them.

A. Purpose skepticism

The account I have offered of the unconstitutionality of excessively partisan gerrymanders is explicitly purpose-based. Accordingly, the account fails if the constitutionality of given state action never depends upon the purposes that animate it. And although I believe that Alexander does not deny the constitutional relevance of purposes in his pieces that squarely address partisan gerrymandering, he has elsewhere pressed just that concern.15 In a nutshell, “Effects, not governmental purposes, must be what ultimately matter.”16 Alexander’s skepticism that actions can ever be unconstitutional in virtue of the purposes on which the governmental actor acts thus provides additional grounds for his conclusion that partisan gerrymanders are constitutionally secure.

Recall my earlier suggestion that a constitutional prohibition against excessive partisanship in redistricting could rest on either deontological or indirect consequentialist grounds. Alexander clearly rejects the first possibility. But what about the second? Even if effects of governmental action are what ultimately matter, why couldn’t this ultimate concern crystallize into constitutional rules or principles that turn upon governmental purposes on the understanding or expectation that, at least in some contexts, a purpose-based rule would produce better state of affairs than would a purely effects-based rule?

As it happens, Alexander considers just this possibility but refrains from endorsing it. “The principal problem with this argument,” he contends, “is that it results in different treatment of identical laws in separate but otherwise similar jurisdictions.”17 I am unsure why this is any more of a problem (let alone a significantly greater one) than the fact that effects-based rules result in different treatment of identical laws that have been adopted for identical reasons in separate jurisdictions. In any event, if this is the principal problem with constitutional rules and principles that turn on purposes, then Alexander has given us little reason to doubt that at least sometimes purpose-sensitive constitutional rules can be successfully defended on ultimate consequentialist grounds. And while I cannot mount in this limited space a complete indirect consequentialist case for a purpose-sensitive constitutional rule against excessive partisanship in redistricting, it seems to me that the prospects for a successful defense along these lines are strong. To offer
a very modest down payment on that promissory note, here’s just a snippet of reasoning that might plausibly feature in such a case: When an elected official knows with high confidence which of her constituents her political fortunes depend upon and which are politically irrelevant to her, she knows whom to listen to and whom she can safely ignore; in a severe partisan gerrymander, the representative does know this, as do her constituents, causing constituents from the opposition party to become politically disaffected and further dampening the civic republican instinct, already far from robust, that contributes to informed and effective collective self-governance.

B. Against legal principles

In the previous section, I spoke of “rules” and “principles” interchangeably. But which is the (claimed) constitutional norm against excessive partisanship in redistricting—a rule or a principle? That depends, of course, on just what distinguishes the two, and that’s a matter of some controversy. Many commentators follow Dworkin in identifying two distinguishing features: rules (including standards) are binary (or have infinite weight), whereas principles have variable weight; and rules have canonical form whereas principles do not. Another possibility is that rules and standards are the “obvious” law constituted, for example, by the communicative content of statutes and judicial holdings, whereas principles are the “unobvious” law that undergirds, arises from, or justifies the obvious law. Whatever the best grounds of distinction may be, let us assume arguendo that the supposed constitutional norm against excessively partisan gerrymanders is a legal principle, not a legal rule. If so, that would, for Alexander, be another mark against it because legal principles, he has argued, do not exist (or, at a minimum, should not be deployed in judicial decisionmaking).

Alexander’s argument for this surprising position is subtle and complex. But here’s the crux, from an article co-authored with Ken Kress:

> Legal principles are either normatively unattractive or superfluous. If legal principles dictate outcomes different from what moral principles and legal rules dictate, they are normatively unattractive. If, on the other hand, they dictate the same outcomes that legal rules and moral principles dictate, they are normatively superfluous. If normative unattractiveness or superfluity counts against the metaphysical existence of a norm, then the case we make against legal principles is a case against their existence.

This claim, if true, would imperil the supposed constitutional principle against excessive partisanship in redistricting if that principle were, in addition to a legal principle, a moral principle too. But let us further suppose that it is not, that no true moral principle has just this content. Instead, let us assume—as Alexander himself is willing to entertain, though does not ultimately endorse—that true principles of political morality dictate that legislatures may pursue no partisan advantage when redistricting and even, more generally, that “fairness requires [a wholly] outcome-blind process for drawing district lines.” These assumptions, when added to the Alexander and Kress position on legal principles, do provide further grounds—grounds not adduced in the pieces (discussed in Part I) that squarely concern gerrymandering—against the claim that excessively partisan gerrymanders are unconstitutional.

But is the Alexander and Kress skepticism of legal principles warranted? I do not believe that it is. The fly in the ointment, I think, attaches to their contention that “legal principles [that] dictate outcomes different from what moral principles . . . dictate, . . . are normatively unattractive.” Normatively suboptimal I will concede; normatively unattractive, however, is too strong. The putative legal principle we have been entertaining could be rendered as “some reliance on partisan advantage is permissible, but too much is not.” The moral principle, we are supposing, holds that “legislatures may take no account of expected partisan outcomes when selecting redistricting plans.” If the moral principle is not legally valid, then a legal regime that includes this putative legal principle is more attractive morally than one that does not. In short, the norm could be a principle rather a rule, it could be legal rather than moral, and it could be a normatively attractive addition to a legal regime that lacks the moral principle.

In saying all this, I believe that I am doing no more than reiterating an objection that Brian Leiter had made in reaction to a draft of the Alexander and Kress article. Leiter’s suggestion, Alexander and Kress acknowledge in a footnote, was that “instead of characterizing legal principles as ‘incorrect’ moral principles, we should instead characterize them as ‘non-ideal’ moral principles.” Alexander and Kress do not take that advice, but nor do they explain why not. I believe that they should have and that, were they to do so, their strong conclusion would not survive.

C. Originalism

Even if Alexander’s wholesale dismissal of legal principles is ill-founded, he has at least one remaining basis for rejecting the particular anti-excessive-partisan-gerrymandering principle that I have advocated: originalism. In a host of articles, Alexander has defended a particular brand of constitutional originalism that is presently in disfavor. Against all forms of non-originalism, and also against public meaning originalism, Alexander has maintained that constitutional interpretation is necessarily the activity of trying to discern the meaning that the Constitution’s authors intended to convey by means of the language they used. Unless the intended meaning of any constitutional provision is or entails that excessive partisanship in redistricting is prohibited, then no such norm can be part of our constitutional law.

I have criticized originalism, in its intentionalist and non-intentionalist variants, elsewhere. I limit myself here to a single observation, albeit one with an admittedly ad hominem cast. Many non-originalists (and not only the doctrinaire Dworkinians among us) believe that the law consists of or includes principles that do not reflect the semantic meaning or the communicative content of any provision of the constitutional text or of any precise judicial holdings. Investigations into the coherence, intelligibility, and attractiveness of putative constitutional principles are just the sort of thing that such scholars would and do sensibly undertake. And it is the sort of investigation that Alexander too engages in time and again—not only in his work on partisan gerrymandering on which I have focused, but also across a variety of topics that would seem to fall under the First and Fourteenth Amendments. The puzzle is why he should do so. Why, as an originalist, does his case against, say, partisan gerrymandering, depend on anything other than the results of an historical inquiry into whether “no excessive partisan gerrymandering” was any part of the intended meaning of any clause of the Constitution? Why doesn’t he think that explorations like his own are simply beside the point?

To be sure, Alexander might understand himself to be engaged in a wholly detached scholarly service. That is, he might believe that the sort of inquiry he undertakes is entirely irrelevant to an understanding of what is a correct account of the content of our constitutional law, but might nonetheless proceed solely for the benefit of the benighted many who fail to appreciate its irrelevance. That is possible. But that is not how his work reads to me. It reads as the work of a constitutional scholar who believes that the constitutionality of extreme
partisan gerrymanders depends at least in part on the results of investigations into what might be loosely described as parochial or domesticated political morality. That is not a crazy belief. Many or most non-originalists, I venture, would subscribe to it. Insofar as Alexander does too, then perhaps he is a closet non-originalist. If he refuses that compliment (as we can safely predict he will), then he might reflect on how best to explain what looks like a dash of scholarly schizophrenia. In any event, readers of Alexander’s work on partisan gerrymandering who believe, on reflection, that it is a sensible and appropriate exploration for constitutional theorists to undertake (whether or not they are persuaded by the conclusion he reaches) might take that judgment as at least some defeasible evidence against the originalism he avows.

Conclusion

Bucking common academic and judicial wisdom, Larry Alexander has argued in a series of articles that partisan gerrymandering, even when extreme, does not violate the U.S. Constitution. I have argued here that he is wrong about that. The best argument for the orthodox position, I have claimed, sounds in impermissible “self-dealing,” or a corruption of the redistricting legislature’s decisionmaking process. The reasons that Alexander has given against this argument are not persuasive.

But Alexander’s position on partisan gerrymandering, even if it stands on its own bottom, so to speak, does not stand alone. It fits within a network of other views that Alexander has championed that, if not strictly necessary to generate his constitutional defense of extreme partisan gerrymanders, strengthen that heterodox position. Those other views include doubt that governmental purposes can ever be constitutionally relevant, skepticism that legal principles that are not identical to moral principles exist, and insistence that (“mistaken” judicial precedents possibly aside) the proper determinants of our constitutional law are solely the semantic or communicative intentions of the Constitution’s authors. I have provided some grounds, admittedly very incomplete and telegraphic, for rejecting each of these claims.

Naturally, I would like to see Alexander abandon each of the positions that I have challenged here. I do not, however, anticipate quite that outcome. He is too clever and too creative (dare I add “also too obstinate?”) to quickly relinquish these several long-held views. In the Alexanderian spirit, then, I would count this brief tribute a success if it identifies for him, as he has so often and so profitably identified for all who toil in any of his wide-ranging fields of legal theory, some worries that his provocative arguments still must meet.

Notes

3. Ibid., 14.
4. Ibid., 8.
5. Ibid., 9.
8. Ibid., 57.
12. I’ll have nothing to say here about how much is too much.
13. When criticizing the “vote dilution” rationale for the unconstitutionality of (excessively) partisan gerrymanders, Alexander observed that what we need, but don’t have, is “some normative principle to tell us when we have drawn district lines and produced the partisan mix of policies we should produce, and when we have drawn district lines and produced the wrong policies.” Alexander, “Still Lost,” 328. If the counterfactual baseline I have proposed is correct, then we would not need the sort of normative principle that Alexander rightly claims eludes us.
14. A possible argument might derive from Alexander’s rejection of legal principles that are not also moral principles. (See Section II.B.) The gist of the argument would be that the narrower putative principle is not a valid moral principle whereas the broader one is. As I will explain, I do not think his denial of legal principles is well taken.
26. Yes, I do dare—though I also gird myself for the anticipated (and perhaps not wholly unjust) tu quoque.
Larry Alexander’s Free Speech Scepticism: An Antidote to First Amendment Fundamentalism?

Susan J. Brison
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I last had the pleasure of having an intellectual exchange with Larry Alexander at a Roundtable at the University of Melbourne Law School in December 2011 on the theme “Freedom of Expression: Universal or Particular?” In my presentation to the Roundtable, I argued that, if the question presupposes that there is a special right to freedom of expression, then the answer is “neither.” This position sets me apart from most of my compatriots, with the notable exception of Larry Alexander, since free speech theorists in the United States tend to assume that (1) we in the U.S. understand (and protect) free speech in a way that other, less enlightened, countries would do well to emulate, and (2) there must be a sound philosophical basis for a fundamental human right to free speech, even if we do not (yet) know what that is. Both of these beliefs are held so fervently that those who are not true believers are frequently not even taken seriously in academic or popular debates about free speech controversies. But, as Kathleen Sullivan has pointed out, those who, arguing for the regulation of harmful speech such as hate speech, question the foundation of the supposed right to freedom of expression “deserve a response that goes beyond the rote and reflexive invocation of free speech as an article of faith. The appeal to the First Amendment as self-evident truth may be no more effective, as Professor Henry Louis Gates, Jr. recently cautioned, than Samuel Johnson’s attempt to refute Bishop Berkeley merely by kicking a stone.”

The participants in this Roundtable, free speech theorists from countries around the world including Canada, Israel, Singapore, Germany, Israel, Australia, and New Zealand, took it for granted that the right to free speech is far from absolute. It was assumed that some restrictions on speech, such as laws against Holocaust denial or speech inciting racial hatred, are permissible, and perhaps obligatory, in order to protect other rights such as the right to dignity or the right to equality. I found this extremely refreshing. I suspect, though, that Larry Alexander, the only other participant from the United States, found this virtual consensus to be not refreshing, but somewhat alarming.

In my presentation, I argued that although there is, as a matter of contingent historical fact, a right to free speech embedded in the U.S. Constitution, there is no sound philosophical basis for giving such a right priority when it comes into conflict with other rights, such as the right to equality (or the right to be free from discrimination, harassment, or intimidation), nor is there reason to think that there is such a thing as a universal human right to free speech. My view is not that there is no right to free speech, but rather that there is no special right distinct from a general right to liberty. That is, free speech is not a special right in the sense that there is something special about speech itself, as opposed to all other human conduct, that requires us to grant it favored status.

My thinking about free speech began, over two decades ago, in puzzlement over why, in some hate speech and pornography cases in the 1980s, the U.S. courts ruled that the right to free speech takes priority over the right to equality. Even more puzzling was that no argument was given for this prioritizing. The courts ruled, in several cases, that even if pornography or hate speech constitutes a form of harassment or race- or sex-discrimination, it is protected under the First Amendment. In his opinion in American Booksellers Association v. Hudnut ruling unconstitutional an anti-pornography ordinance that had been adopted in Indianapolis, Judge Frank Easterbrook conceded the empirical claims made in the ordinance concerning the harmfulness of pornography. He wrote, “we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, ‘pornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women’s opportunities for equality and rights [of all kinds].’ Indianapolis Code § 16-1(a)(2).” Easterbrook concluded, rather stunningly, given the nature of the harms catalogued, “Yet this simply demonstrates the power of pornography as speech,” which, because it is speech, must be protected.

Likewise, in John Doe v. University of Michigan, an opinion ruling unconstitutional a University of Michigan policy on discrimination and discriminatory harassment, Judge Avern Cohn wrote, “It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict. The difficult and sometimes painful task of our political and legal institutions is to mediate the appropriate balance between these two competing values.” Judge Cohn concluded, “While the Court is sympathetic to the University’s obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech.”

In the United States, not only jurists but legal theorists as well seemed to agree that free speech was, in such cases of conflict, not only paramount, but so obviously so that little or no argument was needed to support the claim. I was struck again and again by the almost religious fervor with which the right to free speech was invoked. It seemed to me the First Amendment was being adhered to unthinkingly, as dead dogma (to use a phrase of John Stuart Mill’s), and invoked, in a pragmatically self-defeating way, to cut off critical inquiry into its own foundations (or lack thereof).

Attempts to analyze the basis for a free speech principle since the 1980s have been stifled by a “which side are you on?” mentality forcing those who were concerned about the damage done by some speech to take a stand on particular hate speech codes or anti-pornography legislation. As a philosopher, I have the luxury, not shared by legislators or jurists, of analyzing legal theories without being in the business of drafting laws, just as a philosopher can do research in aesthetics without creating art, or philosophy of medicine without healing patients. What is the role of philosophy in debates about free speech? I think it is to examine the underlying, often hidden, assumptions about speech, action, harm, liberty, and equality that undergird defenses and applications of the alleged right to free speech. The general thesis I arrived at is that none of the traditional or contemporary defenses of the right to free speech provides an adequate justification for a special free speech principle. In fact, there are ample grounds for adopting free speech scepticism.

Contemporary theorizing about free speech by American scholars tends to take the free speech clause of the First Amendment of the U.S. Constitution to be the articulation of a legal right grounded in a fundamental human right rather than a piece of positive law which may or may not be based on a moral imperative. Rather like warring countries that all claim to have God on their side, most contemporary U.S. legal theorists debating free speech issues argue that the First Amendment, when interpreted correctly, clearly supports their position. Virtually no theorists question whether the First Amendment is
morally justified to begin with. 10 But if the right to free speech is to be considered as prior to and more fundamental than mere positive law, if it is, rather, the principle underlying the series of cases that the courts decided (or at least those that were decided correctly), then the right to free speech must be grounded in something other than the precedents of earlier cases—it must have a foundation of some sort.

In his remarkably original book Is There a Right of Freedom of Expression? Larry Alexander argues that there is no such foundation. Given the prevalence, in the legal profession as well as in the academy, of the assumption that there must be a sound philosophical basis for a right to free speech, even if we do not (yet) know what that is, just to ask the question posed in this book’s title is a little audacious. To answer, as Alexander does, that there is no human right to freedom of expression is both daring and courageous.

It is not that Alexander considers freedom of expression to be a liberty unworthy of protection. On the contrary, in his book’s epilogue, “Muddling Through: Freedom of Expression in the Absence of a Human Right,” Alexander argues that there are good reasons for governments not to suppress speech; it is just that the existence of a human right to freedom of expression is not one of them. Indeed, one senses that Alexander’s political positions on free speech would be best supported by a defense of free speech absolutism. But Alexander has too keen an analytical mind and too much intellectual integrity to bend his theory to the practical demands of any political doctrine. Instead, he follows his rigorous reasoning to its logical conclusion—a thoroughgoing, and thoroughly defended, free speech scepticism.

If the free speech clause of the First Amendment is interpreted to mean that speech is to be granted special protection not accorded to other forms of conduct, then a free speech principle distinct from a principle of general liberty must be posited and must receive a distinct justification. Such a principle must hold that speech is special in the following way, as articulated by Frederick Schauer: “Under a Free Speech Principle, any governmental action to achieve a goal, whether that goal be positive or negative, must provide a stronger justification when the attainment of that goal requires the restriction of speech than when no limitations on speech are employed.”11

As early as 1983, Alexander had argued, in an article co-authored with Paul Horton, that it was impossible to come up with a justification for such a free speech principle.12 One way to argue this—the strategy Alexander adopted in that early article—is to examine each of the alleged justifications of a free speech principle in turn, and show why each fails to work. This is the approach Alexander takes in chapter seven of Is There a Right to Freedom of Expression?, which critiques the main defenses of free speech—both consequentialist and deontological—and concludes that “we do not have in hand a tenable general theory of freedom of expression.”13 If this chapter is more restrained (with a more modest conclusion) than the original article on which it was based, this may be because Alexander has since come up with even more compelling arguments against there being any grounds for a free speech principle.

One argument, first elaborated in his 1993 article, “Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory,”14 is developed in chapter two of this book. (Another argument—concerning a paradox of liberal neutrality—is found in chapter seven. More on this later.) Using terminology introduced by Laurence Tribe,15 Alexander distinguishes between Track One laws, defined as “laws intended to suppress messages that cause harms that the government is otherwise permitted to attempt to prevent,” and Track Two laws, defined as “laws that have ‘message effects’ but that are not enacted because of their message effects.”16 Although it may seem harsh to fault Alexander for taking up terminology Tribe introduced, I wish he had used different labels for these two forms of free speech jurisprudence. The talk of tracks is not intuitive (for this reader, anyway), and it is confusing that Track Two is presented and discussed first. It would be more in keeping with common parlance to refer instead to content-based versus content-neutral laws. However, doing so would be, for Alexander, to invoke a distinction without a difference, since, on his account, no free speech laws are content-neutral in any interesting sense.

Free speech theorists have traditionally treated content-based and content-neutral laws very differently, on the assumption that the message effects of the former would always be wide-ranging and typically violative of individual liberties, whereas the message effects of the latter would be negligible or nil. The most original (and, I predict, most influential) of Alexander’s many contributions to the free speech literature is his compelling argument that ostensibly content-neutral laws regulating speech (for example, those long-considered-to-be-innocuous time, place, and manner restrictions) can affect the messages received as much as—or even more than—the allegedly much more pernicious content-based laws.

Alexander goes even further than this in arguing that “all laws [not just laws explicitly concerning speech] affect what gets said, by whom, to whom, and with what effect . . .”17 and this deals the final, fatal blow to any attempt to ground a defense of a free speech principle in a theory that purports to distinguish speech from conduct—or laws restricting speech from laws restricting non-speech conduct.

Although Alexander’s book could well have ended with chapter seven (since he had already presented sufficient grounds for accepting his conclusion), he added a final chapter (chapter eight) on “The Paradoxes of Liberalism and the Failure of Theories Justifying a Right of Freedom of Expression.” I do not consider this chapter redundant, however, since it presents a persuasive diagnosis of “the cause of the failure to find a cogent and defensible principle justifying and delimiting a right of freedom of expression.” This failure, according to Alexander, is “part and parcel of the failure of liberalism to provide a justification for tolerating illiberal views—which toleration is for many definitive of liberalism.”18 Alexander presents a convincing argument that “liberalism as governmental nonpartisanship (neutrality) towards religion, associations, and expression is an impossibility.”19 As Alexander notes, many other theorists have addressed the paradoxical nature of liberalism insofar as it applies to freedom of religion and freedom of association, but, “with the exception of Stanley Fish, no one seems to have noticed that the same paradox infects that third liberal bulwark, the right of freedom of expression.”20 The gist of this paradox is that “if liberalism is the correct political philosophy, then it cannot attach value to messages that undermine it, just as[,] if freedom of expression is valuable, advocacy of its abolition cannot be.”21

By the end of this book, Alexander has undermined the very foundations of U.S. free speech jurisprudence. But one senses that he is not very happy about this remarkable accomplishment. One gets the feeling that he would now like to be able to start afresh, like Descartes on day two of The Meditations, by, in Alexander’s case, rebuilding the traditional liberal free speech edifice on a firmer foundation. But the best he can do, in good conscience, is to argue that there remain some rule-consequentialist considerations in favor of protecting at least some speech in at least some circumstances. But this yields, at most, a very weak defense of free speech.
Apart from the standard objections to rule consequentialism—e.g., why follow the signposts if the shortcut gets you to your goal more efficiently?—one wonders why Alexander still thinks we should act as if there is a right to free speech, even after he has argued so persuasively that no such right exists. Why doesn’t his philosophically based scepticism about free speech lead him to the normative scepticism of West, Becker, and Fish?

On the other hand, the fact that Alexander’s theorizing leads him to accept a conclusion that does not serve his more pragmatic purposes gives a kind of Kantian credibility to his account: it is clear that reason, and not inclination, is what motivates his free speech scepticism. And it is very difficult to find fault with his reasoning. One might wonder why, though, given the persuasiveness of his arguments against there being a right to freedom of expression, he is still apparently keen to act as if there were such a right. Why, in the face of all the evidence against the reasonableness of one’s belief, would one continue to be a true believer?

In an article published in the same (1983) journal volume as Alexander and Horton’s article, Schauer notes the intellectual ache . . . shared by many people now engaged in the process of trying to explore the theoretical foundations of the principle of freedom of speech. As we reject many of the classical platitudes about freedom of speech and engage in somewhat more rigorous analysis, trying to discover why speech—potentially harmful and dangerous, often offensive, and the instrument of evil as often as of good—should be treated as it is, our intuitions about the value of free speech, solid as they may be, are difficult to reconcile with this analysis. The ache, it seems to me, is caused by the fact that although the answer to “Must speech be special?” is probably “Yes,” the answer to “Is speech special?” is probably “No.”

After arguing, for nearly the entire of his book, that the answer to the question “Is speech special?” is most definitely “No,” it is puzzling that Alexander concludes his book by quoting, with approval, five paragraphs from an article decrying government censorship on traditional liberal grounds: although it makes us feel good, censorship tends to be “irrational and alarmist,” it is “inimical to democracy,” it backfires, and it “doesn’t get rid of bad ideas or bad behavior.” For reasons Alexander himself gives, however, there is no principled way to distinguish between laws regulating speech and laws regulating non-speech conduct, and so these problems cannot be seen to be peculiar to government restrictions on speech. Still, the intuition that speech must be special is so hard to shake that, three decades after his groundbreaking co-authored article, Alexander seems to still feel the “intellectual ache” Schauer noted.

I am much more sanguine about life without a free speech principle. Indeed, I am inclined to celebrate free speech scepticism as a welcome antidote to the free speech fundamentalism adhered to by so many of my compatriots. In the United States, the First Amendment is so central to our self-conception that it is a defining feature of our national identity. It is taken as a sign that we enjoy freedoms of mythic proportions. Living as I do in a country where even (especially) in times of war and economic downturn the airwaves are filled with propaganda such as the song “God Bless the USA,” which proclaims “I’m proud to be an American, where at least I know I’m free,” I am glad to be a free speech sceptic. And I am genuinely puzzled by why Larry Alexander, my companion in free speech scepticism, is opposed to the kinds of government regulation of hate speech endorsed by the other participants at the Melbourne Roundtable on “Freedom of Expression: Universal or Particular?” Could it be that he still supports free speech as an article of faith that even his own sound arguments cannot dislodge?

Endnotes

3. I say virtual consensus because I think Larry Alexander may have been the one participant who did not agree.
5. For the U.S. Court of Appeals, Seventh Circuit, 771 F.2d 323 (1985).
6. Ibid., 329. One does not, however, hear the courts declaring that, if segregation harms minorities’ opportunities for equal rights, this simply demonstrates the power of freedom of association.
8. Ibid., 863.
9. Larry Alexander reached a similar conclusion, arrived at through different reasoning, in Is There a Right of Freedom of Expression?
11. Frederick Schauer, Free Speech: A Philosophical Enquiry (New York: Cambridge University Press, 1982), 7–8. To state what a free speech principle requires is not to state that such a principle is justified. In more recent writings, Schauer has evinced a certain amount of scepticism about whether a distinct principle of free speech can be defended. In “The Phenomenology of Speech and Harm,” Ethics 103 (1993): 635–53, for example, he notes that his conclusion, viz. that we should reject the hypothesis that speech, as a class, causes less harm than non-speech conduct, “puts more pressure on the positive arguments for a free speech principle, and perhaps no such argument will turn out to be sound” (653). For insightful arguments against the existence of any justifiable general principle of free speech, see Stanley Fish, There’s No Such Thing As Free Speech—And It’s a Good Thing, Too (New York: Oxford University Press, 1994).
16. Alexander, Is There a Right of Freedom of Expression?, xi. Alexander adds a third track to Tribe’s original two: “Track Three consists of all the governmental acts that provide aid to a particular viewpoint but that in themselves do not appear to restrict anyone’s liberty,” ibid., 82.
17. Ibid., 17.
The Possibility of a Free Speech Principle

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I

Thirty years ago Larry Alexander, with a co-author, published an essay entitled “The Impossibility of a Free Speech Principle.” In that essay he introduced a theme that was to characterize much of his important work on free speech in the ensuing three decades—the essential continuity between speech and other forms of human conduct, thus making it impossible to justify, at least as a philosophical matter, a distinct principle granting speech more of a protection against governmental restriction than is granted to non-speech conduct having the same or equivalent consequences.

The theme that formed the basis of that first essay emerged on numerous occasions in Alexander’s subsequent writings of freedom of expression. He argued that speech in the strict sense could not be differentiated from the entire realm of messages, including messages received by individuals that were not consciously transmitted by anyone, that virtually all governmental (and, by implication, non-governmental) actions would have some effect on the communicative capacities of others, that the harms that come from speech are largely the same as the harms that may come from countless other causes, and that the harms we designate as offenses may be roughly the same as the harms we designate as harms simpliciter. Finally, and most importantly, he brought much of this together in a book—Is There a Right to Freedom of Expression?—in which he concluded that the upshot of the non-differentiation of speech, or expression, or communication, or anything of that kind rendered a distinct human or moral right to freedom of expression a conceptual and empirical impossibility.

II

Alexander’s basic insight is both important and correct. However we understand the coverage of a free speech principle, it is essentially impossible to locate a coherent and philosophically sound boundary between what is covered by the principle and what is not. This conclusion is easiest to defend with respect to expression, for if freedom of expression is about self-expression, then nothing differentiates self-expression by communication from the myriad other ways in which people express themselves. And if we seek to remedy this problem by eliminating non-communicative expression and thus supposing freedom of expression as a largely undifferentiated subset.

Alexander’s argument from non-differentiation has an expected conclusion, and it is one that he embraces. Freedom of speech is in the final analysis a form of freedom. Period. And just as any restriction on freedom needs to justify its interference with human freedom by demonstrating a degree of harm from the interfered with activity that is greater than the harm of the interference, so too with freedom of thought, freedom of communication, freedom of speech, freedom of expression, and any conceivable variation on any or all of the foregoing.

Alexander’s general libertarian sympathies make his deconstructionist goals with respect to freedom of expression somewhat less consequential in practice. That is, if one starts with a broad but admittedly and obviously overridable presumption against government interference with individual action and individual choice, then a vast number of speech acts will wind up being protected. If speech acts are a subset of acts, and a principle of general liberty militates in favor of an immunity for most acts, of any variety, against government restriction, then most or at least many speech acts will turn out to be protected. And thus even if there is no free speech principle, the stronger a principle of general liberty is, the smaller the consequences to speech and speech acts of the non-existence of a free speech principle. If, for example, one adopts as a baseline principle of liberty the central idea of chapter one (and only chapter one) of John Stuart Mill’s On Liberty, and thus if one accepts the legitimacy of restricting only those acts that are both harm-producing and other-regarding, then much of human conduct will be protected against restriction, because most of human conduct, especially to the libertarian, is neither harm-producing nor other-regarding. But most speech is also neither harm-producing nor other-regarding, and thus a baseline principle derived from Mill’s chapter one will turn out to make most restrictions on speech illegitimate.

Thus, the refusal to recognize a free speech principle will be more or less consequential depending on the strength of the background principle that is adopted, and against which...
a free speech principle must be measured. If the background principle is generally facilitative to governmental interference, then a free speech principle that grants special immunity to some range of speech acts will make a substantial difference. But if the background principle is generally grudging about acknowledging the legitimacy of governmental action against individual choice and individual action, as it is for Alexander, then subscribing either to the impossibility or the undesirability of a free speech principle will have few consequences in practice. Or, to put the same idea in different language, the likelihood of overlap between a free speech principle and a liberty principle grows proportionately to the growth or size of the liberty principle.

III

As Alexander knows, of course, most modern democracies do not accept strongly libertarian baseline norms. The United States may be more libertarian than Western Europe and Singapore, for example, but a wide range of interferences with human choice that trouble most libertarians is widely accepted throughout the world. The fact of acceptance does not make what is accepted correct, of course, but the fact of acceptance of a great deal of government restriction on individual choice throughout the world does make the existence (or not) of a free speech principle far more consequential. The more that restrictions on choice and conduct are accepted, the more a free speech carve-out will make a difference. And thus, as a matter of practice or non-ideal theory rather than of ideal theory, Alexander’s skepticism about the possibility of a free speech principle is highly consequential.

But now let us consider Alexander’s skepticism about the possibility of a free speech principle in light of his equally important work on rules and indirect consequentialism. Shortly after suggesting that impossibility of a free speech principle, he offered an analytically astute and comprehensive account of the various forms of indirect consequentialism. In “Pursuing the Good—Indirectly,” he captured and advanced on the basic ideas in rule utilitarianism, dispositional utilitarianism, and rule consequentialism generally and argued that we can often achieve greater good by indirect pursuit of the good rather than by attempting to maximize the good in and for each individual decision. Even if some particular decisions do not enhance the good, a regime of making decisions of a certain kind may maximize the good even if following that regime does not enhance the good in some individual cases.

Although this idea of maximizing the good by pursuing it indirectly is relatively familiar within the rule-consequentialist literature, it has broader implications, implications that Alexander pursued in his subsequent work on and highly sympathetic to rules and rule-based decision-making. Especially in The Rule of Rules, co-authored with Emily Sherwin, Alexander argued for both the possibility and the frequent desirability of rule-based decision-making, in law and elsewhere, and offered an important and enduring analysis of the relationship between legal rules and moral rules, as well as providing a skeptical but basically correct view about the role, if any, of legal principles in legal decision-making. At the center of his analysis is the view that legal rules can be important ways of, again, indirectly achieving morally optimal results in the aggregate in a non-ideal world, but that the virtues of rule-based decision-making can be lost when broadly based moral or other principles enter the picture.

V

So what do Alexander’s views about indirect pursuit of the good tell us about a free speech principle? Most importantly, they tell us that the difficulty or even the impossibility of distinguishing speech, expression, communication, and the like from other conduct need not be fatal to the adoption and use of a free speech principle. First, it could be that dealing with a non-distinguishable subset of a larger set may itself be good-enhancing under non-ideal conditions. Suppose I believe (as I do) that capital punishment is wrong. And suppose someone proposes that we eliminate capital punishment for all Capricorns, Libras, and Leos, but not for people born under any of the other nine astrological signs. Such a program would be from most perspectives nonsensical, given the patent scientific invalidity of the belief that anything of indicative or causal consequence turns on the sign under which one was born. Notwithstanding the underlying fallaciousness of such an approach, however, it would reduce the number of morally wrong executions by 25 percent, and from the perspective of the belief that capital punishment is wrong that would be a good-enhancing strategy. Depending on the goods we seek to maximize, therefore, it does not follow that an independently fallacious distinction is necessarily a poor way of maximizing, or at least increasing, those goods.

Moreover, the fact that drawing a distinction may be nonsensical must be distinguished from the impossibility of drawing that distinction. We can easily distinguish Capricorns from Leos, just as we can distinguish red cars from blue ones, and green-eyed people from those with blue eyes. The mere fact that such distinctions are for most purposes pointless does not mean that we cannot draw them. And thus the fact that some distinction is spurious with respect to some goal should not be confused with the impossibility of drawing the distinction.

In the context of freedom of speech, therefore, it may well be that modern liberal democracies have inherited and adopted—from history, or sociology, or popular culture, with a healthy dose of path dependence added—a principle, the free speech principle, which on closer inspection turns out to be little more well-grounded than the principle of using a defendant’s astrological sign as a marker for the justifiability of capital punishment. But it may also be that, in what the libertarian believes is our decidedly non-ideal world, accepting and implementing this ultimately poorly grounded principle will produce more liberty than would be produced by rejecting it.

In addition, and slightly more plausibly, it could well be that at some times and in some places there are admittedly contingent quantitative differences between deprivations of speech-embodied liberty and deprivations of liberties of other kinds. If and when this is the case, then a rule-based approach to maximizing liberty—indirectly—would recognize that a rule treating speech differently might well be a genuinely liberty-enhancing approach. That deprivations of freedom to speak and freedom to do anything else may be indistinguishable at a deep philosophical level does not mean that at some point there may not be more deprivations of the freedom to speak, or more consequential deprivations of freedom to speak, than of deprivations of other forms of freedom. Or, to put the same point more precisely, if speech (or expression, or communication, or whatever) is x percent of human action, it could be that at some times and in some places the deprivations of freedom of speech will be >x percent of the deprivations of freedom generally, which would justify a special protection of speech merely to counterbalance the special and disproportionate quantity of restrictions on speech.

VI

Obviously, the distinction between speech or expression or communication and other forms of conduct is far fuzzier than the distinction between Leos and Capricorns, and, indeed, the fuzziness of the distinction often emerges as a significant dimension of Alexander’s argument about the impossibility
of a free speech principle. But the fuzziness of a distinction, as Alexander of course well knows, and as his work on rules ably demonstrates, is no barrier to drawing a distinction that may work well somewhat further away from the border. As generations of work on vagueness, *Sorites* problems, and related issues have shown us, we can readily distinguish night from day even if we have difficulty with dusk, and we can understand the difference between the bald and the hairy, or between tadpoles and frogs, even though there are close cases at the borders.13 As a result, therefore, the existence of close cases at the borders between speech and non-speech conduct says little about the impossibility of a free speech principle that could well be usable at the extremes even if it presented problematic applications at its boundaries. That explicitly pornographic films are at the boundary between speech and sex (assuming they are different categories) does not mean that an opinion article in a newspaper is not clearly speech (in the relevant technical sense) and that driving a car at ninety miles per hour is clearly not.

Indeed, existing legal doctrine, whether under the American First Amendment, or under Article 10 of the European Convention on Human Rights, or the under constitutions of virtually all constitutional democracies (and, for that matter, most non-democracies), provides some evidence for the claims in the previous practice. Obviously, application of the American First Amendment exemplifies difficult boundary problems, and it is hardly clear that we can justify in a satisfactory manner the application of the First Amendment to, say, pharmaceutical advertising but not to advertisements for the sale of securities, or to nude dancing for the purpose of sexual stimulation but not to the sale of rubber or plastic sex aids for the same purpose.12 But for much of the range of application of the First Amendment, there is a somewhat settled understanding of the differences between a free speech case and various other arguable derivations of liberty that are not taken to present First Amendment issues at all.

**VII**

The conclusion to be drawn from all of the above should now be clear: it is important to distinguish the impossibility of a principle from its undesirability. In all of his work on freedom of expression, Alexander has persuasively demonstrated that distinguishing between the activities covered by such a principle and all other activities is sufficiently problematic that it may not be sensible to draw such a distinction at all. Moreover, the non-defensibility of a speech-action line may well,13 and probably should, militate against thinking of the right to freedom of expression as a deep or enduring or empirically non-contingent human right, which is the basic and important lesson of Alexander’s book.

None of this, however, goes to the impossibility of a free speech principle, unless one understands “principle” in a moralized and evaluative sense, and thus as synonymous with “valid principle” or “defensible principle” or “morally and philosophically sound principle.” But if one understands “principle” as referring only to normative structure and not normative soundness, and also as largely synonymous with “rule,” then there is nothing impossible about a free speech principle.14 There may well be much that is undesirable about a free speech principle, whether always or in particular contexts, but undesirability is not impossibility. Alexander’s analytically acute analysis of free speech ideas has shown that acceptance of a free speech principle may be far more problematic than it is fashionable to believe. But he has not shown that such acceptance, however undesirable it may be, is impossible.

**Notes**


4. “Libertarian” is an unfortunately politically charged word these days, and I mean only to suggest that what emerges from Alexander’s work on constitutional law, constitutional theory, criminal law theory, equality, and much else is a robust acceptance and endorsement of individual choice and freedom, and an equally robust skepticism about governmental action generally and governmental interference with individual choice more specifically.

5. See Frederick Schauer, “On the Relation Between Chapters One and Two of John Stuart Mill’s *On Liberty,*” *Capital University Law Review* 39 (2011): 571. Numerous self-regarding acts are obviously harm-producing, even if the harm produced is only to the actor (see Sarah Conly, *Against Autonomy: Justifying Coersive Paternalism* [Cambridge, UK; Cambridge University Press, 2013]), and numerous other-regarding acts (public performances of great music at moderate volume, for example) are harmless. Thus it is important to emphasize that the Millian principle, or at least Mill’s argument in chapter one, is about both self-regardingness and harmlessness.

6. It is true that most speech is harmless, even if not self-regarding, but most action is harmless too, and, thus, seeking to ground a free speech principle, even in part, on comparative harmlessness (see Martin H. Redish, *Freedom of Expression: A Critical Analysis* [Charlottesville, VA: Michie, 1984], requires empirical assumptions for which there is essentially no evidence. See Frederick Schauer, “The Phenomenology of Speech and Harm,” *Ethics* 103 (1993): 635.


10. Although much of the philosophical literature about rules exists within utilitarian or other consequentialist frameworks, the virtues of indirect and rule-based decision-making need not be so limited. It could well be, for example, that even individual virtue is best achieved by an individual choosing to be virtuous in a rule-based and non-particularistic way, the common conflation of virtue ethics and particularism to the contrary. See Frederick Schauer, “Must Virtue be Particular?” in *Law, Virtue and Justice*, ed. Amalia Amaya and Ho Hock Law (Oxford: Hart Publishing, 2013), 265.

11. A good recent overview of many of the issues is in Rosanna Keefe, *Theory of Vagueness* (Cambridge, UK: Cambridge University Press, 2000). As Edmund Burke put it, “though no man can draw a stroke between the confines of night and day, yet light and darkness are on the whole tolerably distinguishable.” See also Bertrand Russell, *Vagueness,*


14. It is common, however, to use the word “principle” to refer to especially vague rules. Here, op. cit. And see also Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 22–28, 72–80. But even then, one can understand the word “principle” in structural and non-evaluative or non-normative terms.

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**Reply to Berman, Brison, and Schauer**

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It is a singular honor to be the American Philosophical Association’s committee on philosophy and law’s featured legal philosopher in the committee’s newsletter. That honor is significantly enhanced by having one’s somewhat heterodox (and occasionally “wacky,” Mitch?) work commented upon by three scholars whose own work and whose persons I especially esteem. It would probably behoove me then to just say “thank you” and shut up, and I am quite tempted to do just that. However, the occasion seems to call for some sort of more expansive reply, and the comments of the commentators have provoked me to say a few things in response.

**Berman**

Mitch Berman’s comments focus principally, though not exclusively, on my (and Prakash and my) articles on gerrymandering and vote dilution. Prakash and I are surely in a tiny minority and perhaps alone in denying that gerrymandering violates constitutional norms and also in denying that there is a coherent notion of “vote dilution” beyond malapportionment. Berman accepts the latter claim and also accepts that the possible harms of gerrymandering that we identify and critique are not harms of constitutional status, assuming they are harms at all.

Berman, however, thinks there is a possible harm of constitutional status that we have neglected. Partisan gerrymanders might cause those in the minority in a gerrymandered district to become alienated from politics because their representative would have no need to take their views into account. And this alienation might in turn erode their civic republican virtues. Thus, a constitutional “principle” against “excessive” partisan gerrymandering may be warranted.

Berman is correct that the harm he identifies is not one we discussed. And it is not one that I can here summarily dismiss. I do think that any restrictions on the purposes with which legislatures act must ultimately be justified by reference to possible harms to the citizens. Constitutional law is ill-conceived if its focus is restricted to the virtues and vices of the legislators apart from the effects of such virtues and vices on the legislative product and thus on the people. That is why the unseemliness of legislative self-dealing is neither here nor there except insofar as it results in harm to the people.

The necessity of some reasonably avoidable public harm is why some of Berman’s earlier examples, such as outcome-oriented selection of judges for particular cases, are inapposite. A biased judge can produce a legal winner who should have been a legal loser. That is a real harm. To be sure, random selection might have resulted in the same (biased) judge hearing the case. But an X percent chance of harm is better than a 100 percent chance of it. The same point applies to stacking the deck in poker. And it applies as well to the denial that vote dilution and electoral non-competitiveness are real harms. For if no matter how districts are drawn, no constitutional harm can result, then why the districts are drawn in a particular way is of no constitutional moment.

So a harm to the people must be shown before a constitutional restriction on legislative purposes becomes plausible. And Berman finally gets around to identifying one—the erosion of republican virtues due to political alienation.

I have two responses. First, as an originalist, I can find no plausible basis in the semantic intentions that underlie the various provisions of the Constitution for proscribing legislative acts solely because they might erode republican virtue. (The best candidate might be the heretofore nonjusticiable Guaranty Clause of Article IV.) Second, if one is a non-originalist, why opt for such a vague “principle” as “no excessive partisan gerrymandering”? Why not a bright-line constitutional rule, such as districts must be drawn by computers and be maximally compact? If the semantic intentions underlying the constitutional text are no obstacle, why not go for a stronger rather than a weaker bulwark against harms?

Finally, a word about constitutional “principles.” As Berman indicates, I am a skeptic about legal principles as Dworkin defines them—legal norms with no canonical formulations and possessing “weight.” Even if there are moral principles that fit that description, unless they are incorporated whole hog into the law, there will be no legal principles that fit Dworkin’s description. That is because weight itself cannot be posited by lawmakers. Nor can legal principles arise in the way Dworkin suggests, namely, by being the most morally acceptable principles that “fit” the extant legal materials. For such norms, because they must “fit” the extant legal materials, which will contain some measure of morally infelicitous legal norms and decisions, will themselves be morally incorrect—or, Berman prefers, morally sub-optimal. On the other hand, they will not have the settlement virtues of legal rules—determinacy, even at the cost of some degree of moral sub-optimality. If a norm has neither the virtue of moral correctness nor the settlement virtue of determinate guidance, it has no normative virtue whatsoever. Nor would there be a truthmaker for its putative weight. Morality will demand that it always be followed, and if it consists of a plurality of principles, that those principles be followed based on their actual weight. Morally suboptimal principles, not being algorithmic rules, must have weight. But not being moral principles, they must get their weight from somewhere other than morality. Yet weight cannot be posited. I see no alternative but to deny that our normative ontology contains legal principles.

**Brison and Schauer**

Berman’s comments ranged over several topics endemic to my scholarship. Brison’s and Schauer’s comments focus solely on my skeptical explorations of freedom of expression. And both of them concur in my conclusion that there is no human right to freedom of expression, the International Convention on Human Rights notwithstanding. So, the three of us are partners in gainsaying that “crime.”

Brison notes, correctly, that I am still supportive of free speech, despite my conclusion that there is no such human right. She finds that puzzling, as if I lack the courage to face up to my convictions.
She is correct that, in the United States at this moment in time, I would advocate immunizing a large portion of speech from government regulation, even conceding that a large percentage of that portion causes harms that government can otherwise legitimately seek to avert. Why so? Why am I a free speech skeptic and yet something of a free speech “hawk”?

That is where Schauer’s remarks come in to complement Brison’s. Schauer correctly attributes to me a somewhat libertarian, distrust-of-government stance. My sense is that governments are particularly ham-fisted when it comes to regulating ideas. Space does not permit me to present the bill of particulars that accompanies this indictment. I can only here assert that it is so. And oddly, it is the absence of a background moral right of freedom of expression that makes governmental regulation of ideas more dangerous than the ideas it regulates, even conceding their potential to cause harms. A nice deontological right would serve as a constraint on governmental regulation of ideas. In its absence, treating speech as just another and not-at-all-special aspect of liberty might well lead the government to misapply the consequentialist calculus in the direction of too much suppression.

Schauer suggests that some legal, rule-defined domain of free speech could be justified in the absence of a background moral right. His is a familiar rule-consequentialist prescription, and I believe it is the correct one. Indeed, in the final, “muddling through” chapter of my book on freedom of expression, the chapter that so puzzles Brison, that is precisely what I argued we should do with respect to freedom of expression.

Of course, as Schauer well knows and has written, rule-consequentialism has its own theoretical problems. Even if we think the consequentialist calculus requires us to promulgate bright-line, blunt rules, what reason do we have to follow those rules when we believe we can produce better consequences by departing from them? Schauer calls this problem the “asymmetry of authority.” I call it “the gap.” We are talking about the same phenomenon. And I believe it is the deepest problem of jurisprudence and the most illuminating prism through which to view legal phenomena. But I have said all that many times before, and it is surely now time for me to shut up.

Again, I greatly appreciate the compliment paid me by Berman, Brison, and Schauer in commenting on my work. They have my high esteem, and I’m flattered that I have theirs.