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Title:

Emerson, Thomas I. The Affirmative Side of the First 32 Amendment, 15 Georgia L Rev. 795 (1981)

Date:

2020-07-28

Citation:

Kenyon, A. (2020). Emerson, Thomas I. The Affirmative Side of the First 32 Amendment, 15 Georgia L Rev. 795 (1981). Communication Law and Policy, 25 (3), pp.386-389. <https://doi.org/10.1080/10811680.2020.1766896>.

Persistent Link:

<https://hdl.handle.net/11343/276519>

This is the author’s postprint of:

Andrew T. Kenyon (2020) ‘Emerson, Thomas I. The Affirmative Side of the First Amendment’, 15 Georgia L. Rev. 795 (1981), Communication Law and Policy, 25:3, 386-389, DOI: 10.1080/10811680.2020.1766896

Emerson, Thomas I. *The Affirmative Side of the First Amendment*, 15 GEORGIA L. REV. 795 (1981).

One of Thomas Emerson’s lasting contributions to understanding free speech is his emphasis on the *system* of freedom of expression, as his well-known book is entitled.¹ Free speech needs broad analysis that pays attention to supports for, as well as limitations of, speech; the freedom encompasses practices, principles and institutions as well as rights; and it is the structures underlying speech that should concern legal scholarship. The point is frequently recognized—scholarly references to a system of free speech following Emerson are common²—but the positive or affirmative dimensions of Emerson’s approach are not always brought out. (The literature uses many terms for these aspects of the freedom; here I use both “affirmative,” after Emerson, and “positive,” which has currency across relevant disciplines.) While positive dimensions are evident in much of his work,³ they are encapsulated in *The Affirmative Side of the First Amendment*.⁴

The article is now somewhat poignant, for at least two reasons. The first is the confidence it displays in U.S. constitutional law developing and better supporting the system of public speech. While Emerson recognizes that U.S. affirmative doctrine is relatively inchoate, he sees the courts as moving towards clarifying and strengthening it: “the courts are on a one-way road: to the extent that they are willing to act, the result can

¹ THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970) (“SYSTEM”).

² See, e.g., Danielle Keats Citron & Neil M. Richards, *Four Principles for Digital Expression (You Won't Believe #3)*, 95 WASH. U. L. REV. 1353, 1381 (2018); MIKE ANANNY, *NETWORKED PRESS FREEDOM* (2018); RON LEVY & GRAEME ORR, *THE LAW OF DELIBERATIVE DEMOCRACY* 77 (2017).

³ See, e.g., EMERSON, *SYSTEM*, *supra* note 1, at 627-673.

⁴ Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GEORGIA L. REV. 795 (1981) (“Affirmative”).

only be an expansion, not a restriction, of the system of freedom of expression.”⁵ In many way, U.S. courts have not acted since then and such development has not (yet) come to pass, even as the environment in which public speech occurs has transformed. Second, the article generally makes quite modest proposals for supporting speech.⁶ Law can go much further, as examples from other jurisdictions illustrate.⁷ But Emerson argues—like most U.S. commentators—for relatively small legal change. Perhaps the battle is symbolic as much as substantive.⁸ Even so, *The Affirmative Side of the First Amendment* remains valuable for highlighting an aspect of free speech that warrants attention.

In general, Emerson moves analysis from private free speech interests towards public aims and considers how these aims can be supported.⁹ Doing this involves recognizing the freedom’s positive dimensions—the aspects of free speech that require state action in their support—as well as its negative ones. A system of free speech that includes affirmative dimensions is often referenced in later scholarship.¹⁰ One could just

⁵ *Id.* at 849.

⁶ *E.g.*, Emerson appears to suggest quite limited government support in response to financial inequalities affecting mediated speech (*id.* at 823).

⁷ *See, e.g.*, POSITIVE FREE SPEECH: RATIONALES, METHODS AND IMPLICATIONS (Andrew T. Kenyon & Andrew Scott, eds., 2020, *in press*).

⁸ In that it would resemble media access debates; *see, e.g.*, JEROME A. BARRON, PUBLIC RIGHTS AND THE PRIVATE PRESS 15 (1981) (media access “is really a controversy about symbolism.”)

⁹ ANANNY, *supra* note 2, at 27.

¹⁰ *See, e.g.*, in U.S. scholarship: ANANNY, *supra* note 2 (citing SYSTEM on free speech including positive dimensions); VICTOR PICKARD, AMERICA’S BATTLE FOR MEDIA DEMOCRACY 191 (2015) (citing *Affirmative* as an example of scholarship on positive First Amendment freedom); Marvin Ammori, *First Amendment Architecture*, 2012 WIS. L. REV. 1, 18 (2012) (citing *Affirmative* as an example of a affirmative- or equality-based First Amendment models); LAURA STEIN, SPEECH RIGHTS IN AMERICA 122-123 (2006) (citing SYSTEM on free speech including positive dimensions); Virginia Held, *Access, Enablement, and the First Amendment*, in PHILOSOPHICAL DIMENSIONS OF THE CONSTITUTION 158, 170 (Diana T. Meyers & Kenneth Kipnis, eds., 1988) (citing SYSTEM on the freedom’s positive dimensions). *See, e.g.*, in non-U.S. scholarship: Thomas Gibbons, *Providing a Platform for Speech: Possible Duties and Responsibilities*, in POSITIVE FREE SPEECH: RATIONALES, METHODS AND IMPLICATIONS (Andrew T. Kenyon & Andrew Scott, eds., 2020, *in press*) (citing SYSTEM on positive dimensions of free speech); GAUTAM BHATIA, OFFEND, SHOCK, OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION 290 (2016) (citing *Affirmative* when arguing freedom includes positive dimensions); Martin Bullinger, *Freedom of Expression and Information:*

consider Emerson's book on this point, but *The Affirmative Side of the First Amendment* has value for illustrating and updating his conceptualization. While evidently a product of its time,¹¹ the article is a reminder that free speech—and even the First Amendment—can be understood to be more than a negative liberty. For Emerson, free speech is not only about limiting the state's ability to restrict speech, as important as that is; it also involves “employing governmental powers to expand the system of freedom of expression, while at the same time controlling and limiting those powers.”¹²

Emerson recognizes challenges in developing this side of the First Amendment but argues for it. He places primary emphasis on parliament and executive action to provide “greater opportunity for expression, increased diversity, or similar improvements.”¹³ But he also recognizes a role for the courts, which is his focus in the article.

Here, I draw out three short points with wider significance for thinking about positive free speech. First, Emerson recognizes that conflicts about free speech's positive dimensions will often occur *within* the right, rather than in “balancing” free speech against some other interest. This means the “preferred-position principle”—in which courts weigh free speech more heavily than other interests—plays a lesser role for affirmative dimensions of the freedom. Instead, the “basic principle” in formulating “most doctrine dealing with the affirmative aspects of the first amendment is one of improving the performance of the system of freedom of expression.”¹⁴ It is free speech itself that underlies the doctrine.

Second, equality has a central role in free speech's affirmative dimensions. Government support needs to be distributed fairly—it cannot assist only orthodox speech—which guarantees “that some diversity . . . is built into the system.”¹⁵

An Essential Element of Democracy, 28 GERMAN Y.B. INT'L L. 88, 104 (1985) (citing SYSTEM re affirmative dimensions of free speech).

¹¹ *E.g.*, Emerson links the value in diverse speech to “a balanced presentation” on public issues (Emerson, *Affirmative*, *supra* note 4, at 804) in a manner that may now appear simplistic.

¹² *Id.* at 796.

¹³ *Id.* at 799.

¹⁴ *Id.* at 802.

¹⁵ *Id.* at 803.

Importantly, Emerson recognizes a difference in how equal protection controls positive and negative dimensions of free speech. Affirmative freedom necessarily involves discretion in a qualitatively different way than negative:

In cases of governmental promotion [of the system of freedom of expression], the facilities or funds available are nearly always limited, and thus the process of selection inherently involves the exercise of greater discretion than in situations where governmental prohibition of any communication is outlawed.¹⁶

This leads Emerson to draw a “macro-micro distinction” between levels of government intervention, with macro-level interventions being far less problematic in free speech terms. But more significant is how this affects judicial review of government actions supporting speech: it must allow for greater discretion.

Third, Emerson examines various doctrinal debates in U.S. law, considering matters including the public forum doctrine, government speech subsidies, and government-created monopolies (or near-monopolies) of speech. The detail is now less significant than the general approach, although his examples could be translated to contemporary debates. Emerson could well suggest it was unclear to what extent legal response “may be required as a matter of constitutional principle, enforceable by the courts,” although precedent suggested courts could “go a considerable distance.”¹⁷ Existing Supreme Court rulings make that position far less plausible, despite any normative arguments for it.

Emerson suggests that, while courts would often “be confined to intervention only in egregious cases,”¹⁸ their function would be “crucial . . . in keeping alive the basic principles at stake and in gradually moving toward a more refined body of constitutional law.”¹⁹ The constitutional law he imagined has not emerged, but positive dimensions of free speech do exist in U.S. law.²⁰ Just as importantly, the wider issues remain part of any

¹⁶ *Id.*

¹⁷ *Id.* at 805.

¹⁸ *Id.* at 807.

¹⁹ *Id.*

²⁰ *See, e.g.*, MARK TUSHNET, ADVANCED INTRODUCTION TO FREEDOM OF EXPRESSION 83-103 (2018) describing various areas of U.S. law that reflect positive dimensions of free speech; Frederick

comprehensive engagement with free speech as a concept and as a legal practice internationally.²¹ For those purposes, the article remains a useful source, just as it does for highlighting something that has been lost through a highly negative First Amendment.

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Schauer, *Positive Rights, Negative Rights, and the Right to Know*, in TROUBLING TRANSPARENCY 34, 43 (David E. Pozen & Michael Schudson, eds., 2018) describing the U.S. Freedom of Information Act, 5 U.S.C. § 552 (1966) as “a statutory grant of positive rights.”

²¹ See, e.g., ANDREW T. KENYON, DEMOCRACY OF EXPRESSION: POSITIVE FREE SPEECH AND LAW (forthcoming).