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FORUM

A Look Back at Washington State's Senate Bill (SB) 5843: Constitutional or Not?

Alexandra Orbuch

Introduced by the Washington State legislature in January 2022, Senate Bill (SB) 5843 attempted to criminalize statements made by elected officials or candidates that:

(a) Are intended to incite or produce imminent lawless action and do incite or produce such action resulting in harm to a person or to property; (b) Are made for the purpose of undermining the election process or the election results; (c) Falsely claim entitlement to an office that an elected official or candidate did not win after any lawful challenge made pursuant to this title is completed and the election results are certified.

The bill failed to gain sufficient support in the house, so it failed. But the politicians opposed simply struck it down with no discussion as to *why*. Because they stayed silent, I am here to discuss the serious constitutional issues with the latter two types of speech banned by the bill (sections b and c), as they shunt aside the "imminent lawless action" test and a host of other legal precedents.

Washington Governor Jay Inslee put out a statement in support of SB 5843, alluding to President Trump's message preceding the January 6 Capital riots. "The defeated president and his allies…are perpetuating the belief that this election was stolen from them," he said. The language of the bill itself echoes this fear, highlighting "false statements and claims regarding the validity of the 2020 election" as the cause of "January 6."

Inslee declared that Trump "yell[ed]" fire in the crowded theater of democracy," harkening back to *Schenck v. United States*, in which the Supreme Court said that "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre." Schenck created the "clear and present danger" test, which protected speech unless there is a "clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

Inslee seems to have missed the memo that the "clear and present danger" test is no longer the free speech barometer. *Brandenburg v. Ohio* replaced it with the "imminent lawless action" test, which forbids curbing speech unless it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." The court made an important distinction in its ruling, writing that "the mere *abstract* teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." (emphasis added).

While SB5843 does include speech likely to incite imminent lawless action as *one* of its offenses (section a), it also lays out two other types of speech that would qualify: speech "made for the purpose of undermining the election process or the election results" and speech "falsely claim[ing] entitlement to an office" after losing an election.

Banning the latter two types of speech is unconstitutional. In order to fall outside of protected speech as set forth in Brandenburg, it would not be enough for a statement to attempt to "undermin[e]" elections or "falsely claim entitlement" to a political office. The burden of proof is much higher than that. The statement would need to call for lawless action in such a way that the speech mobilized action on the part of the parties on the receiving end of the speech. Moreover, the bill forgoes any mention of a timeframe at all for the latter two types of speech, completely shunting aside the "*imminent"* portion of Shenk's free speech metric (emphasis added).

The bill's attempt to purge false claims of entitlements to political office is one that swims against the tides of precedent even beyond Schenck. In *Bond v. Floyd*, the court unequivocally declared that "erroneous statements must be protected to give freedom of expression the breathing space it needs to survive." 3. Further, in *U.S. v. Alvarez*, the court asserted that banning lies "would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition."

In Alvarez, Justice Kennedy wrote that "when the Government seeks to regulate protected speech, under the First Amendment the restriction must be the least restrictive means among available, effective alternatives." There is almost always "an available, effective alternative" to censoring false narratives, one more in line with

the value of freedom so integral to the American ethos: "counterspeech." The court had faith in the intelligence and judgment of the American people, and rightfully so. Alvarez was "perceived as a phony" and "ridiculed" even before his FBI investigation. "There is good reason to believe that a similar fate would befall other false claimants," said the court.

The court aptly reminded the public that "the remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth." Calling "speech we do not like" illegal is contrary to established law and legal precedent.

When the "government seeks to orchestrate public discussion through content-based mandates," we wade into dangerous territory. Governor Inslee and the Washington legislature would do well to remember that American society "has the right and civic duty to engage in open, dynamic, rational discourse." As the court so trenchantly wrote, "truth needs neither handcuffs nor a badge for its vindication." It is not–*and ought not be*–the government's place to police electoral discourse. America's distinctiveness lies in the freedoms enshrined in its Bill of Rights. We live in a constitutional Republic, not a fascist censorial regime dedicated to protecting the government from even the most indistinct whiff of 'untruth' or critique.

In *U.S. v. Alvarez*, the court proclaimed that "[a]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." It stated that content-based speech restrictions are relegated to limited "historic and traditional categories [of expression] long familiar to the bar."

These "categories" include incitement, obscenity, defamation, child pornography, fraud, fighting words, true threats, and speech integral to criminal conduct. Obscenity and pornography are clearly not at issue here, so I'll table discussion of them. As for the fraud exception, it applies solely to false commercial advertisements and considering Inslee's legislation has nothing to do with commerce and advertising, the fraud exception to the first amendment is inapplicable here.

In *U.S. v. Williams*, the court declared that the speech integral to criminal conduct, "offers to engage in illegal transactions," do not fall under "First Amendment protection." Solicitation of crime is illegal, but abstract advocacy of illegality *is not*. The scope of the speech integral to criminal conduct is limited to the "imminent lawless action" test set forth in Brandenburg. And, as already discussed, two-thirds of the criminalized actions set forth in the bill would not pass the test.

Also subject to the "imminent lawless action" are fighting words, "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

The court has made it very clear that words are protected unless they "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." *Cohen v. California* further narrowed the definition, ruling that speech that does not directly aim its message at an individual or group is in fact protected by the first amendment. Thus, making a statement challenging or lying about election results would not apply. In the court's words, "an 'undifferentiated fear or apprehension of disturbance'…is not enough to overcome the right to freedom of expression."

The last exception to protection under the first amendment are true threats, which "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." The court, in *Virginia v. Black*, limited true threats to speech "with the intent of placing the victim in fear of bodily harm or death." SB 5843 targets political speech, not speech threatening physical violence, therefore the true threat exception is neither relevant nor applicable. Clearly, neither speech "undermining the election process or the election results" nor speech "falsely claim[ing] entitlement to an office" fall under the categories of speech that the Supreme Court has said the First Amendment does not protect.

Both the spirit of the proposed legislation and the language itself, taking issue with subjective 'lies' that may be otherwise deemed as opinion, conjecture, or assessments differing from the 'conventional wisdom' or infringing upon the comforts of elected officials, are ultimately dangerous attempts to legislate contrary to the intent of the Founding Fathers and the subsequent clarifications by the Courts defining protected rights under the Constitution.