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The Bill of Rights: Freedom of Speech

by Jacob G. Hornberger

When the Constitution was being proposed to our American ancestors in 1787, many people expressed the concern that the document failed to specify the fundamental rights of the people that would be immune from assault by federal officials.

The response to that argument was that since the Constitution expressly restricted the government to specified, enumerated powers, and since those powers did not include the power to trample on the fundamental rights of the people, it was unnecessary to expressly prohibit infringements of those fundamental rights. Moreover, the enumeration of certain rights, the responders argued, could be construed as implicitly empowering the government to trample on rights that were not enumerated.

However, people's concerns were not assuaged by such arguments. They knew, not only from their study of history but also from personal experience, that the tendency of governments throughout history was to abuse their powers, especially in times of "emergency." Thus, the American people demanded that the document be promptly amended to include express provisions for the guarantee of fundamental rights.

That's how the Bill of Rights — the first ten amendments to the Constitution — came into existence. The people feared that the federal government would somehow break out of the original Constitution's enumerated-powers straitjacket and misuse its powers to violate the fundamental rights it was charged with protecting. The enumeration of those rights and the express restrictions on government power in the Bill of Rights were to ensure that that didn't happen.

The First Amendment reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The first thing to notice here is that, contrary to popular opinion, this amendment does not give people rights to free speech, freedom of religion, freedom of the press, or freedom of assembly, or the right to petition the government for redress of grievances. In fact, the Constitution does not give people any rights whatsoever.

Instead, it operates as a restriction on the interference with rights — rights that preexist both the government and the Constitution. In other words, the reason that the Constitution called the federal government into existence was to protect the exercise of pre-existing, fundamental rights. The purpose of the Bill of Rights was to ensure that the government didn't use such power (the power to protect rights) to infringe or even destroy such rights.

The second principle to notice in the First Amendment is that the restriction operates on Congress, the elected representatives of the people. The reason that principle is important is that it recognizes that democratically elected officials are likely to use their powers to violate people's fundamental rights, including freedom of speech, press, and religion.

Thus, the First Amendment (and the rest of the Bill of Rights) operates on the implicit acknowledgment that democracy is no guarantee of freedom and, in fact, is a tremendous threat to freedom. That's why our ancestors, unlike so many Americans today, talked in terms of establishing a republic in America rather than a democracy.

Freedom of speech

Let's examine the freedom-of-speech clause of the First Amendment. Contrary to what many people think, the free-speech guarantee operates only as a barrier to censorship by government officials, not on the right of private entities to refrain from publishing material they don't like.

For example, consider a newspaper that publishes an article favoring a certain policy in the community. Imagine that opponents to that policy demand that the newspaper carry an article opposing the policy and that the newspaper refuses to do so.

Some people would undoubtedly cry, "Censorship!" and claim that the First Amendment was being violated. They would be wrong on both counts. Restrictions on the exercise of free speech are censorship and First Amendment violations only when some law or governmental action is involved. When private entities make personal decisions about what to publish and not publish, they are exercising the fundamental rights of private ownership and liberty — the types of rights whose exercise the government is supposed to protect.

Let's consider a famous example involving the misapplication of the free-speech principle in order to better understand it. In the 1919 U.S. Supreme Court case of *Schenck v. United States*, Justice Oliver Wendell Holmes wrote, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."

But Holmes got it wrong. The reason that a man ordinarily cannot scream, “Fire!” in a theater is that the owner of the theater hasn’t permitted it. That is, when a patron enters the theater, he does so on terms established by the owner of the theater, which implicitly include a rule against disturbing the other patrons.

Let’s assume, however, that for some strange reason a theater owner decides to create a rowdy environment and openly declares that anyone who enters his theater can scream, yell, dance, and even issue false warnings of “Fire!” As the owner of the theater, that would be his right, just as it would be the right of people to refrain from patronizing that theater.

Thus, freedom of speech is ultimately grounded in private-property rights. The owner of a newspaper has the right to publish or not publish materials because the newspaper belongs to him. As the owner of the newspaper, he has the right to refuse anyone’s request to communicate through his newspaper. No one has a duty to furnish someone else the means by which he is able to communicate his views. If one person can’t persuade another to publish his views, he is free to open his own newspaper.

It’s the same principle with respect to movie theaters. The owners of movie theaters have the right to restrict the conduct of patrons and, for that matter, to refuse to show R-rated movies. By doing so, they are not “censoring” their patrons or the distributors of R- rated movies; they are simply exercising their right of private ownership.

What if the Congress enacts a law prohibiting theaters from running R-rated movies? That would constitute censorship. That would constitute a violation of the First Amendment.

Radio and television stations

What about radio and television stations? Doesn’t the government regulate their speech? Doesn’t it impose hefty fines, for example, on radio stations that permit radio host Howard Stern to say vile and despicable things? Isn’t that censorship?

Absolutely, and the reason that the government has been able to get away with it is that broadcasting by radio and television stations, by virtue of government licensing, has long been considered a privilege rather than a right. The real value of ownership that radio and television stations enjoy is not in their stations but rather in their government-granted license to broadcast, a license that can be revoked or not renewed by the authorities. It is that license — and the government’s power to determine whether it should be revoked or renewed — that has long been used as the basis for the government’s regulation of the content that is broadcast over the airways.

Compare, for instance, a private newspaper and a private radio station. Under principles of private ownership (and free speech), a newspaper has the right to publish the vilest and most despicable thoughts of Howard Stern. It also has the right to refuse to publish them. Consumers, on the other hand, have the right to buy the newspaper or refuse to buy the newspaper for

whatever reason they want — either because the newspaper is publishing Stern’s thoughts or because it is refusing to do so. Government plays no role in the process.

A radio station, on the other hand, while having to deal with the same market forces in terms of private consumers, must also deal with the heavy hand of government — the heavy hand that can put the station out of business through punitive fines or revocation or a nonrenewal of its broadcasting license.

Unlike the case with newspapers, the issue of what is broadcast and not broadcast becomes politicized. The matter becomes a free-speech battleground in which one side attempts to impose its views on the other side by government force. Moreover, given the life-or-death power that the government has over its licensee, there is an inevitable tendency among radio and television owners to kowtow to and please government regulators.

Therefore, the ultimate solution to censorship of radio and television stations is not to prohibit government from censoring their conduct through fines and revocations or nonrenewals of broadcast licenses. The solution is to vest a full, irrevocable, and transferable property right in their broadcast frequencies, removing the power of government to regulate radio and television stations entirely, enabling radio and television stations to treat their ownership rights in the same way that newspaper owners treat their ownership rights. In that way, radio and television stations would be free to conduct their business in the same way that newspapers do — and consumers would be free to decide what to listen to or watch, just as they are free to decide which newspapers to read.

The most important principle involved in free speech is this: The true test of a free society in terms of freedom of speech is not whether popular and “responsible” speech is protected from government assault but instead whether the most vile and despicable speech receives such protection. After all, even in North Korea people are free to publish popular and “responsible” materials. People have freedom of speech only when government is prohibited from suppressing the most unpopular and irresponsible forms of speech.

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