Viewer Discretion Advised

Taking Control of Mass Media Influences

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CHAPTER TWO

Getting to Know the First Amendment

Perhaps no segment of the Constitution is more misunderstood in American society than the First Amendment. Many people incorrectly assume the concept of free expression means that anybody can say anything about any subject in any place at any time and without any repercussions. Of course, as the Supreme Court has instructed over the years, the Constitution doesn't protect free speech in all circumstances and doesn't protect the speakers from the consequences of their speech. Communication, indeed, is limited by the courts in those circumstances in which there is a compelling governmental or societal interest. You wouldn't know that from the free speech absolutists who believe there should be no restrictions on their messages . . . but usually don't mind limitations on voices they don't like.

Even professional media types, who in many ways benefit the most from the freedoms provided in the First Amendment, on occasion help to create the surrounding confusion with misguided assertions. For example, in October 2005, the Media Institute and the National Association of Broadcasters Educational Foundation created a public service announcement to lend support to Freedom of Speech Week. The announcement proclaimed, "Freedom of Speech: There is a reason it's the First Amendment." The assertion, of course, was that the amendment

was ranked first by the Constitution's framers to signal its preeminence. Although the concept of free expression was, indeed, quite important to the founding fathers, it was also highly controversial—enough so that the freedoms contained in the First Amendment were not included in the original constitution. Note that freedom of speech, press, religion, and so on, as provided in the First Amendment, were concepts added in an *amendment* to the original constitution. Further—and here's the surprise for many media professionals—the First Amendment was actually third in a list of twelve amendments sent by President George Washington to the states for ratification in 1789. The first two amendments on the list, which dealt with the number of members in the House of Representatives and the process for raising congressional salaries, were never ratified. Thus, the reason the freedoms contained in the First Amendment are in the *first* amendment is that these other two amendments didn't survive the ratification process.

The First Amendment is quite remarkable in its directness, brevity, and impact: "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 redress of grievances." These few words have created the framework in which generations of Americans have been allowed to express themselves freely and hold the government accountable for its actions.

Sadly, too many Americans are not aware of the freedoms guaranteed in the First Amendment or have little understanding of what the freedoms are designed to accomplish. Surveys abound to demonstrate this disturbing ignorance of the constitutional principles that, in many ways, characterize American democracy.

A survey conducted by the McCormick Tribune Freedom Museum in 2006 raised eyebrows with its finding that barely a fourth of Americans could name at least two of the five freedoms guaranteed in the First Amendment, but over half of all Americans could name at least two members of *The Simpsons* cartoon family. The average American can also name more of the *American Idol* judges than freedoms provided in the First Amendment. Only 69 percent of Americans could name freedom of speech as guaranteed in the First Amendment and only 11 percent could name freedom of the press. Shockingly, 27 per-

cent of those surveyed could not name a single freedom of the First Amendment.

Those results are consistent with a 2005 study conducted by the First Amendment Center, with 63 percent of respondents in the survey being able to identify freedom of speech as a guaranteed freedom of the First Amendment and 16 percent identifying freedom of the press. Almost 40 percent of the public think the press has too much freedom, and over half believe citizens should be prohibited from saying things in public that might be offensive to a racial or religious group. And it doesn't stop there. Twenty-six percent of Americans strongly disagree with the statement "Newspapers should be allowed to freely criticize the U.S. military about its strategy and performance," and 12 percent mildly agree with that statement. Constitutional framers would cringe at such public disregard for the fundamental freedoms they worked so hard to guarantee.

A Knight Foundation study of high school students also found disappointing and shocking results. More than a third of the one hundred thousand students surveyed agreed with the statement "The First Amendment goes too far in the rights it guarantees," *after* being presented with the actual wording of the amendment. Only 51 percent believe newspapers should be allowed to publish freely without government approval of stories, and 32 percent believe the press has too much freedom. But while many high schoolers think the First Amendment goes too far in insuring freedom and are OK with the government approving newspaper stories, 70 percent defend the rights of musicians to perform songs with offensive lyrics. Knight Foundation president Hodding Carter III responded to these results with alarm: "These results are not only disturbing; they are dangerous. Ignorance about the basics of this free society is a danger to our nation's future."

Carter is correct, of course. The liberty of any society is directly connected to the values and commitments of the citizens. A society that doesn't understand its freedoms or takes them for granted is susceptible to losing those freedoms. Citizens who don't see the benefit of a free press, or worse, are comfortable with government restrictions on that press, won't be available to apply public pressure should those press freedoms come under assault. Those naïve people who figure that the courts will always be there to protect constitutional liberties fail to note

that courts are highly responsive to the social pressures of the time, and that judges are appointed by politicians who are even more directly responsive to social pressure, or lack thereof.

Our nation's education system usually gets the blame for this obviously dim awareness of the country's liberties. Some blame is well deserved. Too many high schools, and even colleges, have deemphasized study of America's founding principles in favor of devoting more time to self-actualization, pop culture, tolerance, and so on. These other areas for "study" might well have some uses, but not at the expense of the society's foundational principles. Further, the ability to self-actualize and an understanding of tolerance emanate largely from the kinds of liberties provided in the First Amendment, but those connections are nowhere to be made. For various reasons the insights of First Amendment framers like James Madison and Thomas Jefferson are viewed as unnecessary, outdated, irrelevant footnotes. At colleges, the curriculums in many history departments feature more courses on world history, Asian history, South American history, and so forth than courses in United States history.

The media, themselves, must shoulder the largest burden of blame for the nation's low level of awareness of First Amendment issues. No institution, including the government, has more direct opportunity to influence and educate Americans than the mass media system. No institution has been entrusted more by the First Amendment itself to freely operate in disseminating information and ideas to the citizenry. The media, however, have failed to fully live up to their potential to enlighten the public about many issues, the value of free expression high among them.

Allowed to operate freely and as money-making institutions, the media collectively have too often been sidetracked to worry first about profits, ratings, entertainment, and sideshows, and only in a secondary sense about fueling the conversation of democracy in a way that would create public awareness and appreciation for the free flow of ideas. Poor performance by the media hardly makes the public want to rally around press freedoms. Various polls demonstrate that public confidence in newspapers and television news operations has fallen. A majority of the public believes news outlets often report inaccurately, try to cover up mistakes, and are too profit driven and biased. Beyond that, the media frequently act as their own sacred cow, seldom engaging in responsible

self-critique, pointing fingers at demagogues but not doing sufficient introspection. The media fail to sensibly explain the proper role of the press and citizens in living out the First Amendment's promise. Media-sponsored First Amendment crusades are too often focused on self-pitying battles for information from government offices, trying to avoid subpoenas, or in the case of broadcasters, pushing the envelope for the "rights" to broadcast indecent content on publicly owned airwaves. When the media's free speech role models are the likes of shock radio jock Howard Stern, the *New York Times*'s Judith Miller, and CBS Super Bowl producers defending wardrobe malfunctions, it is little wonder the public doesn't understand the broader importance of mediated free expression and won't rally for First Amendment principles, even at its own ultimate expense.

The Framers' Commitment to Free Expression

The constitutional framers saw the importance of providing the citizenry with freedoms of speech, religion, and press, largely because of their beliefs that these were basic human liberties. They also believed that free expression ultimately led to the discovery of truth and for the effective operation of a government system in which power resided in the citizenry. The free press was deemed to be an essential component of these overall liberties because it was believed the colonial press had been instrumental in fueling debate before and during the struggle for independence. In addition, the press could take on the role of surrogate of the public, gathering and distributing information in ways that individual citizens could hardly do on their own. Thus, the press could serve as a watchdog of the government, on behalf of the public, keeping public officials accountable for their actions and keeping citizens aware of government performance.

America became the ideal place for a commitment to free expression to develop because it was being settled by independent-minded dreamers who realized the need for interdependence. They could assure their own freedom to exercise religion, publish, and speak by allowing others to have theirs.

James Madison is widely regarded as the key thinker and organizer of the First Amendment. He initiated the discussions in the House of

Representatives that eventually created the initial batch of constitutional amendments, including what became the First Amendment. It is believed he drew largely from language in the Pennsylvania Constitution, which already provided for free speech and a free press. Madison and his close friend and political ally Thomas Jefferson worked hard to craft the language of the First Amendment and shepherd it through the congressional approval and eventual ratification process. Free expression skeptics at the time warned about the potential for free press rights to be abused. Madison answered by saying, "Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than that of the press." In essence, Madison argued that the potential abuses had to be tolerated in order to get the benefits a free press would provide, namely, the knowledge the citizenry could attain as they strived for self-governance.

Protected and Unprotected Expression

Even with a constitutional provision to protect free speech and press, not all expression is actually "protected." Over the years, the courts and communication theorists have tried to sort out what kinds of messages are constitutionally protected and which ones should not be. Only the most extreme absolutist would endorse a communication free-for-all in which there are absolutely no legal or social restraints on communicators. Of course, the challenge is in finding the proper balance of allowing the free flow of ideas and expression, yet shielding society from messages that could well harm it. Theorists have worked over the years to distinguish worthwhile expression, which serves a political or social interest and should obviously be protected by the courts, from worthless speech, which does not serve a public purpose. This is not an easy task and has led to much debate and splitting of hairs.

It is absolutely clear, however, that the courts have never interpreted the First Amendment as an absolutist statement in which any and all communication is to be allowed. Supreme Court justice William Brennan, one of our nation's most powerful and articulate defenders of free expression, wrote in a 1957 decision that "it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance." Brennan went on to quote an earlier Supreme

Court opinion written by Justice Frank Murphy, which said, "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never thought to raise any Constitutional problem. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Obscenity is one of those classes of communication that is not protected by the First Amendment. Although absolutists and the many people who make money in the world of obscenity defend its production, it can be argued that obscene messages serve no worthwhile purpose and, in all likelihood, harm the society. Laws against obscenity are on the books, and the courts have consistently ruled that obscene messages are not protected speech. Defining obscenity, however, is the tricky part of the equation. The courts have tried to provide guidance to government prosecutors over the years, and the Supreme Court's *Miller* test has provided the steps to be taken in determining what material is legally obscene. The first step in determining whether material is obscene is to decide whether the material in question, taken as a whole, is offensive to the community's standards and appeals to "prurient interests." Next, the material must describe in an offensive way sexual conduct that is illegal by state law. Such conduct would be rape, child sex offenses, and so forth. Finally, the work as a whole must be deemed to lack any serious artistic, political, or scientific value. Going through this definitional gauntlet is quite challenging for prosecutors, many of whom pass on prosecutable cases just because of the difficulty of going to trial with such subjective definitional circumstances. Even though obscene communication is not constitutionally protected, it takes government prosecutors with initiative to stop the practice.

Even with the First Amendment, citizens don't have a "right" to engage in communication that could create a "clear and present danger" to the society or to incite people in a manner that would create a current likelihood of lawbreaking activity. The courts also don't protect the use of "fighting words" as free speech, the rationale being that threats and hostile name-calling could "incite an immediate breach of the peace," and make no contribution to sensible discussion of ideas.

The courts also allow governments to restrict parades, protests, and demonstrations on occasion based on what are known as "time, place, and manner" restrictions. In these matters, free speech can't be closed off altogether, but the expressions can be channeled in ways that suit the greater needs of a community. For example, a city can choose to not allow noisy parades late at night when they would disrupt the sleep of many citizens. A community can restrict the location of a demonstration so that it doesn't block the flow of traffic or create safety hazards. These sorts of restrictions on free expression can be complicated to craft and enforce, but they clearly demonstrate the government's interest and constitutional ability to limit free speech and that the First Amendment doesn't signal a communication free-for-all.

Another communication that is not protected as free speech is in the area of libel or slander. In these cases, a speaker can assume no right to defame or ruin the reputation of another person or group by disseminating falsehoods. Although there is no provision in law that prevents someone from making defamatory statements in the first place, the First Amendment right to free expression does not protect a speaker or writer from being punished after the fact for any harm created for the victim of the falsehoods. Defamatory messages distributed through the print or broadcast media are defined as libelous, and defamatory messages distributed through spoken communication are considered to be slander. Generally, penalties for libel are harsher than penalties for slander because the potential harm of mediated defamation is so much greater. It is important to note that defamation cases are not considered in criminal courts and are thus not prosecuted by the government. These libel and slander cases are, instead, considered as civil matters. Also of note, the Supreme Court has determined that persons who put themselves in the public eye as politicians, government officials, or even professional entertainers have a higher standard to meet in order to win a libel case. Such public persons, by being in positions of public interest, must prove that defamatory press reports about them were published with intent to harm, or with "actual malice." This allows the media to make an unintentional reporting error when covering a prominent person and not suffer from a libel suit. Private individuals, on the other hand, can win a libel suit without proving actual malice if they can demonstrate that the false reporting was the result merely of

journalistic negligence. Thus, the courts say that public persons must put up with more public scrutiny, including accidental falsehoods, in exchange for their public roles.

On rare occasions, courts can restrict free speech as a means to support a defendant's Sixth Amendment right to a fair trial. A judge can issue a restrictive order, sometimes called a gag order, to keep the press from publishing information in advance of a criminal trial if the judge believes that is the only way to maintain conditions in which it's possible for the defendant to receive a fair trial. This practice is seldom used because of the importance of maintaining free press rights. In such cases, the judge must ascertain that the case is sure to receive a high degree of pretrial publicity, that stifling press reports of the matter is the only reasonable manner to ensure such publicity doesn't disrupt the potential for a fair trial, and that the order is designed to keep possible prejudicial information away from jurors. More common are restrictive orders from judges that limit in advance what participants in an upcoming trial are allowed to say in public. Judges can, in certain high-profile circumstances, prohibit trial participants like attorneys, witnesses, and police officers from commenting publicly about a trial before and during the proceedings. This was the case during the trial of Scott Peterson, who was tried for the murder of his wife, Laci, and their unborn child. Such orders, while clearly restricting free expression, are made to protect a defendant's opportunity for a fair trial and to limit the prospects of trying a case in the media.

Communicators through broadcast airwaves have limitations on their full free speech rights. For example, Congress has legislated, and the courts have upheld, requirements that broadcasters serve the "public interest, convenience, and necessity." In essence, since broadcasters are licensed by the Federal Communications Commission (FCC) to use publicly owned airwaves, they are expected to provide programs that serve the public. Although this is a standard that has been difficult to assess over the years, it is clearly a restriction on the free expression of the broadcast owners. Owners of newspapers, magazines, and so on have no such mandate that they serve the public interest. In the realm of political communication, broadcasters are required by law to provide access to their airwaves for federal candidates, and to provide equal opportunity for candidates to appear in nonnews programs or to buy

political advertising time. Such rules reduce broadcasters' full free speech rights in ways that print media owners' rights are not reduced. A newspaper owner can actively promote the candidacy of one politician through editorials and even free advertising. A broadcaster, however, must keep the opportunities balanced for all candidates. Does a broadcaster have full free speech rights when he is mandated to air messages that counter his original comments in support of a political candidate? In addition, the government, through the FCC, can legally restrict who can acquire a broadcast license in the first place. Citizens are not entitled to expression over broadcast airwaves, and the FCC will award licenses only to prospective owners who have no criminal background, have the financial resources to adequately operate the station, and will commit to serving the public interest. The entire licensing process is indeed a free speech restriction that is allowed by the courts. Pirate broadcasters who set up their own outlets outside of the FCC are subject to being shut down by federal marshals, fined, and possibly jailed.

The Supreme Court has also made it clear over the years that commercial speech can be regulated by the government when needed to protect the interests of consumers. The government, largely through the enforcement of the Federal Trade Commission (FTC), works to restrict false and deceptive advertising. The court has made it clear that commercial expression does not deserve the same First Amendment protection as political speech. For example, do-not-call registries to prevent phone solicitations by product marketers do not apply to political campaigns making phone calls into private homes. The FTC enforces policies that basically require commercial product messages to be truthful. (Obviously, there aren't any enforcement measures against false or deceptive political speech, as evidenced by the amount of such speech in the political arena!)

As seen in the broad areas just reviewed, even with a First Amendment, the government has maintained the power to restrict free expression in many ways, finding a middle ground between the free-for-all that would take place with an absolutist approach to free expression and the stifling atmosphere of censorship and oppression of communication.