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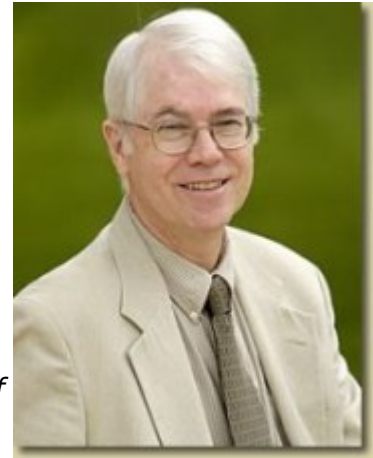
## Hillsdale College

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#### The Liberal Assault on Freedom of Speech

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### The Liberal Assault on Freedom of Speech

America has less freedom of speech today than it has ever had in its history. Yet it is widely believed that it has more. Liberal law professor Archibald Cox has written: "The body of law presently defining First Amendment liberties" grew out of a "continual expansion of individual freedom of expression." Conservative constitutional scholar Walter Berns agrees: "Legally we enjoy a greater liberty [of speech] than ever before in our history." Both are wrong.

Liberals and libertarians applaud what Cox, Berns, and others perceive as an expansion of free speech. Conservatives sometimes deplore it, rightly assuming that the expansion in question leads to greater scope for nude dancers, pornographers and flag burners. But from the point of view of the original meaning of free speech, our speech today is much less free than it was in the early republic.

#### Campaign Finance Regulation

In 1974, for the first time in American history, amendments to the Federal Elections Campaign Act (FECA) made it illegal in some circumstances for Americans to publish their opinions about candidates for election. Citizens and organizations who "coordinate" with a candidate for public office were prohibited from spending more than a set amount of money to publish arguments for or against a candidate. Those who "coordinate" with a candidate are his friends and supporters. In other words, publication was forbidden to those with the greatest interest in campaigns and those most likely to want to spend money publishing on behalf of candidates.

The Bipartisan Campaign Reform Act of 2002 goes well beyond the 1974 law, imposing substantial limits on the right of political parties and nonprofit organizations to publicize their views on candidates during election campaigns. Imagine the shock of the Founders if they were here to see that government was heavily into the business of banning private citizens from pooling their fortunes to publicize their opinions about candidates for elections.

These laws do contain a notable exception. Newspaper owners may spend as much money as they wish publishing arguments in support of candidates with whom they "coordinate." This solitary exemption from restrictions on free speech is, of course, no mistake: The dominant newspapers in America are liberal, and the 1974 law was passed by a Democratic Congress on the day before Richard Nixon resigned in disgrace from the presidency.

Campaign finance regulation stands in direct opposition to the Founders' understanding of the First Amendment. For a large class of people, it effectively prohibits and punishes the most important thing that the right to free speech is supposed to guarantee: open discussion of candidates and issues at election time.

Those who favor campaign finance regulation sometimes claim that their primary concern is with "corruption and the appearance of corruption" – that is, what used to be called bribery or the appearance of bribery. But that is not the real agenda of the reformers. There is a good reason why the 2002 Act, like the 1974 law, was voted for by almost every House and Senate Democrat, and opposed by a large majority of Republicans: These laws are primarily about limiting the speech of conservatives.

Here are some quotations from the 2002 congressional debate:

**Sen. Maria Cantwell (Dem.-Wash.):** "This bill is about slowing the ad war. . . . It is about slowing political advertising and making sure the flow of negative ads by outside interest groups does not continue to permeate the airwaves."

**Sen. Barbara Boxer (Dem.-Calif.):** "These so-called issues ads are not regulated at all and mention candidates by name. They directly attack candidates without any accountability. It is brutal. . . . We have an opportunity in the McCain-Feingold bill to stop that."

**Sen. Paul Wellstone (Dem.-Minn.):** "I think these issue advocacy ads are a nightmare. I think all of us should hate them... . [By passing the legislation], [w]e could get some of this poison politics off television."

In other words, the law makes it harder for citizens to criticize liberal politicians when they disagree with their policy views.

Some congressmen were willing to be even more open about the fact that the new law would cut down on conservative criticism of candidates. Rep. Jan Schakowsky (Dem.-Ill.) said: "If my colleagues care about gun control, then campaign finance is their issue so that the NRA does not call the shots." Democratic Reps. Marty Meehan (Mass.) and Rosa DeLauro (Conn.), and Democratic Sens. Harry Reid (Nev.) and Dick Durbin (Ill.) also cited the National Rifle Association's political communications as a problem that the Act would solve. Several liberal Republicans chimed in.

What this means is that government is now in the business of silencing citizens who believe in the Second Amendment right to keep and bear arms.

Sen. Jim Jeffords (Ind.-Vt.) said that issue ads "are obviously pointed at positions that are taken by

you, saying how horrible they are." "Negative advertising is the crack cocaine of politics," added Sen. Tom Daschle (Dem.-S.D.). What these quotations show – and there are many more like them – is that the purpose of campaign finance regulation is to make it harder for conservatives to present their views to the public about candidates and issues in elections.

In its shocking December 2003 decision in *McConnell v. Federal Election Commission*, the five most liberal members of the Supreme Court upheld this law and saw no conflict with the First Amendment guarantee of freedom of speech and of the press. Yet it is impossible to imagine a more obvious violation of the First Amendment, unless the government were explicitly to authorize the Federal Election Commission to close down conservative newspapers and magazines. In his powerful dissent in the *McConnell* case, Justice Clarence Thomas wrote:

The chilling endpoint of the Court's reasoning is not difficult to foresee: outright regulation of the press. None . . . of the reasoning employed by the Court exempts the press. . . . What is to stop a future Congress from determining that the press is 'too influential,' and that the 'appearance of corruption' is significant when media organizations endorse candidates or run 'slanted' or 'biased' news stories in favor of candidates or parties? Or, even easier, what is to stop a future Congress from concluding that the availability of unregulated media corporations creates a loophole that allows for easy 'circumvention' of the limitations of the current campaign finance laws?

With the National Rifle Association announcement that it intends to acquire a media outlet in order to get around Congress's unconstitutional restrictions on issue ads during elections, Justice Thomas's nightmare might come true even sooner than he anticipated. We are already hearing statements suggesting that any media owned by the NRA will not count as "real" media. At some point, perhaps in the very near future, the Federal Election Commission may find itself deciding which newspapers and broadcast stations are "real" news media (and can therefore be permitted their First Amendment rights) and which ones are "slanted" or "biased" (thus whose First Amendment rights must be denied).

### **Censorship Through Broadcast Licensing**

Reading today's scholarship on freedom of speech, one would hardly guess that government control over the content of speech through licensing requirements – supposedly outlawed long ago – is alive and well. The amazing ignorance with which this matter is usually discussed today may be seen in the following quote from legal scholar Benno Schmidt, the former president of Yale:

The First Amendment tolerates virtually no prior restraints [on speech or the press]. This doctrine is one of the central principles of our law of freedom of the press. . . . [T]he doctrine is presumably an absolute bar to any wholesale system of administrative licensing or censorship of the press, which is the most repellent form of government suppression of expression. . . ."

Schmidt fails to notice that every radio, television, and cable broadcaster in America is subject to a "wholesale system of administrative licensing," i.e., the "most repellent form of government suppression of expression."

Broadcasters have to obtain a license from the Federal Communications Commission. Stations receive licenses only when the FCC judges it to be "in the public interest, convenience, or necessity." Licenses are granted for a limited period, and the FCC may choose not to renew. The FCC has never defined what the "public interest" means. In the past, it preferred a case-by-case approach, which has been called "regulation by raised eyebrow."

During most of its history, the FCC consistently favored broadcasters who shared the views of government officials, and disfavored broadcasters who did not.

The first instance of serious and pervasive political censorship was initiated by Franklin Roosevelt's FCC in the 1930s. The Yankee Radio network in New England frequently editorialized against Roosevelt. The FCC asked Yankee to provide details about its programming. Sensing the drift, Yankee immediately stopped broadcasting editorials in 1938. In order to drive its point home, the FCC found Yankee deficient at license renewal time. They announced,

Radio can serve as an instrument of democracy only when devoted to the communication of information and exchange of ideas fairly and objectively presented. . . . It cannot be devoted to the support of principles he [the broadcaster] happens to regard most favorably. . . .

In other words, if you want your broadcasting license renewed, stop criticizing Roosevelt.

The FCC soon afterwards made exclusion of "partisan" content a requirement for all broadcasters. It was understood, of course, that radio stations would continue to carry such supposedly "nonpartisan" fare as presidential speeches and "fireside chats" attacking Republicans and calling for expansions of the New Deal. In the name of "democracy," "fairness" and "objectivity," the FCC would no longer permit stations to engage in sustained criticism of Roosevelt's speeches and programs.

In 1949, the FCC announced its Fairness Doctrine. Broadcasters were required "to provide coverage of vitally important controversial issues . . . and . . . a reasonable opportunity for the presentation of contrasting viewpoints on such issues." In practice, the Fairness Doctrine only worked in one direction: against conservatives.

During the Republican Eisenhower years, the FCC paid little attention to broadcasting content, and a number of conservative radio stations emerged. After John Kennedy was elected in 1960, his administration went on the offensive against them. Kennedy's Assistant Secretary of Commerce, Bill Ruder, later admitted, "Our massive strategy was to use the Fairness Doctrine to challenge and harass right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue."

This strategy was highly successful. Hundreds of radio stations cancelled conservative shows that they had been broadcasting. The FCC revoked the license of one radio station, WXUR of Media, Pennsylvania, a tiny conservative Christian broadcaster. When WXUR appealed to the courts, one dissenting judge noted "that the public has lost access to information and ideas . . . as a result of this doctrinal sledge-hammer [i.e., the Fairness Doctrine]." The Supreme Court refused to hear the appeal. It saw no free speech violation in the government shutdown of a radio station for broadcasting conservative ideas.

The government also revoked the license of a television station in Jackson, Mississippi. WLTB was unapologetically and openly opposed to federal civil rights policies at the time, and would introduce NBC's news reports with this warning: "What you are about to see is an example of biased, managed, Northern news. Be sure to stay tuned at 7:25 to hear your local newscast." The D.C. Circuit Court ordered the FCC to revoke WLTB's license. In an outrageous opinion authored by Warren Burger, who was shortly afterward appointed by President Nixon as Chief Justice of the Supreme Court, the Circuit Court demanded in indignant tones that WLTB's owner be silenced: "After nearly five decades of operation, the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty." Again, the Supreme Court refused to hear the station's appeal.

Conservatives tried to use the Fairness Doctrine as well, but failed in every case. Liberal author Fred Friendly writes, "After virtually every controversial program [on the major TV networks] – 'Harvest of Shame,' . . . 'Hunger in America' [1960s programs advocating liberal anti-poverty policies] – fairness complaints were filed, and the FCC rejected them all. As FCC general counsel Henry Geller explained, 'We just weren't going to get trapped into determining journalistic judgments. . . .'" In other words, when liberals were on the air, the FCC called it journalism. When conservatives were on the air, the FCC called it partisan and political, and insisted that the liberal point of view be given equal time.

In the 1980s, President Reagan appointed a majority to the Federal Communications Commission, and it abolished the Fairness Doctrine in 1987. The effect was dramatic. Immediately, conservative talk radio blossomed. Rush Limbaugh was the biggest winner. He came along at just the moment when, for the first time since the 1950s, stations could be confident that conservative broadcasting would no longer lead to license renewal problems or Fairness Doctrine complaints and litigation.

The end of the Fairness Doctrine was a tremendous victory for the First Amendment. But it does not mean that broadcast media are now free. The authority of the FCC over broadcasters remains in place. It can be brought back with the full partisan force of the Roosevelt and Kennedy administrations as soon as one party gets control over all three branches of the federal government and chooses to do so.

### **Harassment Law**

For about 25 years, government has required businesses and educational institutions to punish speech that can be characterized as "hostile environment" harassment. This standard is so vague that the question of what constitutes a "hostile working environment" is endlessly litigated. One court ordered employees to "refrain from any racial, religious, ethnic, or other remarks or slurs contrary to their fellow employees' religious beliefs." Another court banned "all offensive conduct and speech implicating considerations of race." Of course, there are some who find any criticism of affirmative action offensive, even racist. Others are offended when someone alludes to his own religious convictions. So this policy, in effect, makes it potentially illegal for employees to say anything about their own religious beliefs or to defend the "wrong" kind of political opinions. UCLA law professor Eugene Volokh has cited a headline in a major business magazine that sums up this denial of free speech in the workplace: "Watch What You Say, or Be Ready to Pay."

### **The Founders' Approach**

Let us turn to the original meaning of free speech in the Constitution to see how far we have abandoned the original meaning of that document.

The Declaration of Independence calls liberty an inalienable right with which we are "endowed by our Creator." As human beings are born free in all respects, they are also born free to speak, write and publish.

Nevertheless, although all human beings possess the same natural right to liberty, the Founders believed there is a law of nature that teaches us that no one has the right to injure another. The most obvious kind of injurious speech is personal libel. Here is a quotation from an early libel case:

[T]he heart of the libeller . . . is more dark and base than . . . his who commits a midnight arson. . . . [T]he injuries which are done to character and reputation seldom can be cured, and the most innocent man may, in a moment, be deprived of his good name, upon which, perhaps, he depends for all the prosperity, and all the happiness of his life.

But the Founders knew very well that allowing government to punish abuses of speech is potentially dangerous to legitimate free speech. So they relied on three pillars to secure this right of free speech while setting limits on injurious speech.

First, no speech could be prohibited by government except that which is clearly injurious. Today, as we have seen, noninjurious political and religious speech is routinely prohibited and punished through campaign finance and other laws.

Second, there could be no prior restraint of speech. Government was not permitted to withhold permission to publish if it disapproved of a publisher or his views. Today, the media from which most Americans get their news is subject to a government licensing scheme that is strikingly similar to the system by which England's kings kept the press in line in the sixteenth and seventeenth centuries.

Third, injurious speech had to be defined in law, and punishment of it could only be accomplished by due process of law. Guilt or liability could be established only by juries – that is, by people who are not government officials. Today, clear legal standards, formal prosecutions and juries are mostly avoided in the convoluted censorship schemes employed by government in broadcasting law, campaign finance law, harassment law and the like.

As an aside, I mention one other area where the dominant view today is opposed to the older view. The Founders viewed prohibition of obscene or pornographic materials in the same light as the regulation of, e.g., sexual behavior and public nudity. Sex is by its nature connected to children. The political community cannot be indifferent to whether and how children, its future citizens, are generated and raised. That is why the laws prohibited or discouraged nonmarital sex such as premarital sex, homosexuality and adultery. Obscene words or pictures were banned because they tended to promote the idea of sex apart from marriage and children, dehumanizing sex by making men and women into "sex objects."

### **Today's Liberal View**

Why have liberals rejected the Founders' idea of free speech?

The Founders looked toward a society in which each person's right to life, liberty, property, free exercise of religion, and pursuit of happiness would be protected by government. Except for sex, marriage, and other matters connected with the generation of children, and injuries to persons or property, government would be mostly indifferent to the manner in which citizens lived their private lives. Laws would protect everyone's rights equally, but it was understood that equal rights lead to unequal results, because of differences in talent, character and luck. About a century ago, liberals began to argue that the Founders' view, which is embodied in the Constitution, is unjust in two ways.

First, they argued that by protecting everyone's property equally, government in effect sides with the rich against the poor. It protects the rich and leaves the poor open to oppression. It is not enough, in the liberal view, for government to be neutral between business and labor, between men and women, between whites and racial minorities, and so on. In each case, liberals say, justice requires that government must put burdens on the rich and powerful and give special advantages to the weak and vulnerable.

Applied to free speech, the liberal view leads to the conclusion that government must limit spending by those who can afford to publish or broadcast their views. As University of Chicago law professor Cass Sunstein writes, the traditional autonomy of newspapers "may itself be an abridgment of the free speech right." Government interference with broadcasting content through FCC licensing is from this standpoint a positive good for free speech. Without it, rich white males

will dominate, and the poor, women and minorities will be marginalized and silenced. Therefore, in the liberal view, speech rights must be redistributed from the rich and privileged to the poor and excluded.

University of Maryland professor Mark Graber endorses this view: "Affluent Americans," he writes, "have no First Amendment right that permits them to achieve political success through constant repetition of relatively unwanted ideas." In other words, if you publish or broadcast "too much," government has the right, and the duty, to silence you. Yale law professor Stephen Carter agrees: "Left unregulated, the modern media could present serious threats to democracy." Sunstein calls for a "New Deal for Speech," in which government will treat speech in exactly the same way as it already treats property, namely, as something that is really owned by government, and which citizens are only permitted to use or engage in when they meet conditions established by government to promote fairness and justice.

Arguments like these are the deepest reason that liberals no longer follow the Constitution, and why Americans today no longer know what the free speech clause really means.

One might raise the objection that these are only law professors. But their view turns out to be squarely in the mainstream. Several candidates for the presidency in 2000 from both political parties (but not George W. Bush) called for much more stringent limitations on free speech in the name of campaign finance reform. One of those candidates, Bill Bradley, proposed a constitutional amendment in 1996 that would have repealed the free speech clause of the First Amendment. Dick Gephardt, the former minority leader of the House of Representatives, has made the same proposal. In the end, even President Bush signed the Bipartisan Campaign Reform Act of 2002.

I am reminded by this of Abraham Lincoln's remark in the 1850s about those who would read blacks out of the Constitution and the Declaration of Independence: If that view is to prevail, why not move to Russia, he asked, where we can take our despotism unalloyed? Liberals today are on the verge of throwing off all pretense and admitting openly that what they mean by equality is the abolition of liberty.

There is a second reason that today's liberals see the Founders' view of free speech as oppressive. The Founders' regulation of sexually explicit and obscene pictures and words, they believe – like any interference in the sex lives of citizens – stands in the way of the most important meaning of liberty. People must be permitted, in this view, to establish their own way of life and engage in whatever kind of sex they please. A famous passage from a Supreme Court pro-abortion decision sums up this liberal view. It reads, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."

The Founders would have replied that we are precisely not free to define our own concept of existence and meaning. God and nature have established the "laws of nature and of nature's God," which have already defined it for us. Human beings, Jefferson wrote, are "inherently independent of all but moral law." If men defy that law, they are not free. They are slaves, at first to their own passions, eventually to political tyranny. For men who cannot govern their own passions cannot sustain a democratic government.

Our task today is to recover the cause of constitutionalism. In doing so, the recovery of a proper understanding and respect for free speech must be a high priority.