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The Bill of Rights Doesn't Need 'Rethinking'

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To mark the 225th anniversary of the ratification of the Bill of Rights, Arthur Milikh, associate director of the Heritage Foundation's B. Kenneth Simon Center for Principles and Politics, has offered NRO's readers a consequentialist rationale for speech and press freedoms under the heading "**Rethinking the Bill of Rights.**" The Founders, he believes, intended those freedoms "to promote understanding and civic virtues, not undermine them," which he goes on to argue our modern law has done. "Lawyers and courts" he writes, "have come to dominate all discussion of [the Bill of Rights] — offering up complicated and narrow case law as the standard mode of thinking," and thus countenancing everything from flag-burning to pornography. As a result, citizens rarely observe the "deeper designs and intentions" of the Bill of Rights.

I knew Ken Simon. For nearly two decades, I've held the Cato Institute's B. Kenneth Simon Chair in Constitutional Studies. Ken was a lay scholar of the Constitution and a great friend of liberty. I can say with confidence that although he believed, as do I, that the Founders intended our liberties to be conducive to the development of human character and sound citizenship, their *basic* rationale was in no way instrumental. Rather, those rights were believed to be inherent and essential to human dignity, even though they might sometimes be exercised irresponsibly. Yet to remedy such abuses, Milikh would restrict our speech and press freedoms through our courts.

To begin, let's look at his rationale. He speaks first of the Bill of Rights as "intended to preserve the spirit of republicanism." Thus, the Second Amendment "aims to safeguard the vigilant and manly spirit proper to self-government," and free speech is meant, among other things, "to cultivate the virtues of deliberation among citizens." Citing Benjamin Franklin to the effect that "the freedoms of speech and press are directed specifically toward 'discussing the Propriety of Public Measures and political opinions,'" Milikh adds that, "in other words, *rational*, political speech is meant to be protected and honored." (Emphasis added.)

The problem with instrumental justifications, of course, is that when the justificatory end is not served by an action (or, indeed, is undermined by it), the rationale for the action fails, even if the act might otherwise be justified on non-instrumental grounds – specifically, as a natural right. But Milikh never addresses that problem. Instead, he develops the point only implicit in his use of "rational" above: That free speech and press were meant to encourage a specific kind of virtue, he writes, "means that only certain kinds of speech are respectable." Thus, he continues,

“freedom of speech and press have limits in part because man’s speech may sometimes be directed by the ‘wantonness of his passions, or the corruption of his heart’,” in the words of Joseph Story.

We have here, then, the makings of statecraft as soulcraft, for if there are to be limits on speech and press freedoms – if only “respectable” speech is to be permitted – those limits will need to be enforced by more than social sanctions, as the examples noted at the outset make clear. And the state’s soulcraft must of course be practiced by the right people. We wouldn’t want those limits influenced or enforced by the people at the National Endowments for the Arts or the Humanities, for sure, much less the folks at National Public Radio. And heaven help us if environmental speech deemed scientifically “respectable” were determined by the National Science Foundation, or if blasphemy were determined by Dutch courts, to take an example now in the news. No, only virtuous souls are qualified for soulcraft in pursuit of virtue.

Seemingly oblivious to the problem of selecting and guarding the guardians of public virtue, Milikh presses on with what he sees as the main problem: “speech in America has come to mean the expression of unreasoned inner feeling – no matter how raw or thoughtless – which has resulted in the closing off of rational speech.” As evidence he cites not the closing off of his own missive – how could he? – but the state of speech on our university campuses. Ironically, however, it is our modern First Amendment jurisprudence that, at least at public universities, is checking campus efforts to protect infantilized behavior and limit open and rational speech.

It’s at this point in his argument that Mikikh launches into an uncertain discussion of “our deficient understanding of the law’s effects on the human character.” This, he claims, stems from our “error” in believing “that law protects any kind of non-rational volition,” from flag-burning to pornography to vulgarity and on and on. In the end, it’s unclear whether he believes that law compels decency or that decency is a precondition for law. But it is clear that he believes that our modern speech and press jurisprudence “puts the law into disrepute. Can citizens,” he asks, “revere or believe to be sacred a law if it leads to unjustified insolence and foolishness?”

Setting aside whether we’re to believe secular law is sacred, citizens can certainly revere law that allows people to be both virtuous and foolish. Indeed, the virtue of such law is that it does not judge as between the two but rather leaves it to experience to draw the distinctions. And nowhere is that more clear than in our law protecting free speech, which rests not on the content of the speech but on the right to speak. Virtuous or popular speech needs no protection. It is foolish or unpopular speech that is ever in peril. That our law today protects such speech is its cardinal virtue.

In one final irony, in support of his argument for limiting speech in the name of promoting virtue, an argument many conservatives make, Milikh concludes by urging judges to “use more than merely legal reasoning and demonstrate a capacity for psychological analysis and foresight” – that is, to become “statesmen” by “thinking through the effects of particular laws on the human character.” But it was conservative icon Justice Antonin Scalia who twice ruled against flag-burning bans, and who never tired of reminding us that the duty of the judge is to apply the law. Psychological analysis was the last thing he would have wanted judges to indulge.

Since Milikh invoked Benjamin Franklin in defense of this instrumental rationale for limiting speech, however, it is only right that Franklin's broader view should conclude the matter: "Freedom of speech is a principal pillar of a free government," he wrote in the*Pennsylvania Gazette*. "When this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins." Amen.

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