

Book Review: You Can't Say That! The Growing Threat to Civil Liberties from Anti-discrimination Laws, by David E. Bernstein

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You Can't Say That! The Growing Threat to Civil Liberties from Antidiscrimination Laws

by David E. Bernstein

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The chiseling away of constitutional limits on government power is a topic familiar to readers of these pages. For a long time the First Amendment's prohibition against laws that infringe freedom of speech remained relatively untouched by people who would like to use state power to silence their opponents. But as David Bernstein, a George Mason University law professor, reports in *You Can't Say That!* the First Amendment is now taking some heavy blows.

The old restrictions on free speech were mostly confined to "commercial" speech, communications by businesses. That was bad enough. The new threat to civil liberties, Bernstein argues, comes from America's sweeping "antidiscrimination" laws, and almost anyone might find himself in trouble for his speech or thoughts. "Intolerant activists are determined to impose their moralistic views on all Americans, regardless of the consequences for civil liberties," Bernstein writes.

Before discussing the numerous ways this new threat shows itself, Bernstein takes on the preliminary question: Should the First Amendment take priority over the supposed need to stop discrimination? That might seem like a "no-brainer," but there are quite a few scholars who disagree, contending that, as Bernstein writes, "First Amendment rights should be subordinated to antidiscrimination claims because the 'constitutional value' of equality as reflected in the Fourteenth Amendment is in tension with the First Amendment 'value' of freedom of expression."

Bernstein quickly dispatches that argument. The Fourteenth Amendment only applies to government. When an individual says even the most flagrantly racist things, the First Amendment protects him from government sanctions — or should. The alleged “tension” between the “values” of the two amendments is merely a thin excuse for giving the state power to punish anyone who harbors the wrong sentiments. Going beyond the Constitution, though, Bernstein maintains that freedom of speech is too important to entrust to bureaucrats, judges, and those intolerant activists. “Although much private speech is wrongheaded or even dangerous,” he writes, “it is even more dangerous to put the government in charge of policing it.”

The book is loaded with cases that illustrate the author’s concerns. For example, when the San Francisco Ballet’s preprofessional school rejected applicant Fredrika Keefer because she did not have the body type expected for ballerinas, her mother sued on the basis of a city ordinance banning discrimination based on weight and height. Even though Fredrika was able to dance elsewhere, the irate mother took the matter before the San Francisco Human Rights Commission. At the time of the book’s publication, the case was still pending, but Bernstein skewers the whole controversy: “Properly interpreted, the Constitution’s protection of free expression from government interference bars San Francisco from legislating ballet standards.”

Several cases deal with bureaucrats’ attempts to punish individuals for opposing their plans for remaking the world. In one egregious case from the early 1990s, several people spoke out against a public-housing proposal in Berkeley. Personnel in the Department of Housing and Urban Development (HUD) warned them that under the federal Fair Housing Act, they could be fined up to \$100,000 each and sentenced to a year in prison for acts of “discrimination against the disabled.”

Bad publicity over the prosecution caused HUD to back down, but then Assistant Attorney General Deval Patrick stepped in. Revealing the mindset of antidiscrimination zealots, Patrick drew an analogy between political leaflets and baseball bats, arguing that it would be as bad to use one as the other if your intent was to violate civil-rights laws. Fortunately, a federal judge tossed the case out, but it would be foolish to think that the wolf has been driven far from the door.

Bernstein concludes his book with a superb chapter on the American Civil Liberties Union. Once a formidable defender of First Amendment rights, in recent years the organization has largely succumbed to pressure from various “liberal” groups that want nothing to stand in the way of their agendas of increased state control.