



SAVING FREE SPEECH ... *from ITSELF*

By Thane Rosenbaum

Introduction

The moral legitimacy of free speech no longer makes sense to many people. Its virtues have been thoroughly abused by one set of citizens who have trampled upon the rights of others—fellow citizens who retain rights of their own, rights that should not be subordinated to the First Amendment.

Americans have never wavered from their love affair with free speech, the people's choice for the best-known and most revered amendment to its Constitution. It is an entitlement that receives unfailing popular support. And its most-favored nations status crosses party lines. Liberals and conservatives, Democrats and Republicans, find very little common ground in today's political culture. Yet, in the curious alchemy of the First Amendment, they are all unwaveringly united in the principle that Americans possess an absolute right to speak freely without government interference. So profoundly has this right been internalized in the nation's psyche that waving the American flag is tantamount to celebrating the right to free speech.

And, yet, doubt and confusion abound.

This book hopes to begin an honest conversation about what we really mean by free speech—when we invoke the right and trumpet the liberty, when we demand freedom of speech only for the issues personal to us, and when we seek to deny it for others. Do we really want free speech to be limitless? Why does the United States stand out among other Western nations in

defending the rights of bullies and bigots to prey upon marginalized groups with weaponized words? Why do we abhor governmental regulation of speech and yet think nothing of speech that is restricted by society at large? How do we account for so much intellectual hypocrisy when it comes to free speech?

This book seeks to answer these important, albeit controversial, questions.

The right to free speech is so often reflexively stated, but not so well understood. Despite all the liberating comfort it evokes, speech is not without cost. Sometimes, the cost is prohibitively high, and when this occurs, society as a whole suffers the consequences. Sometimes gravely. The truth is, speech should not be entirely free.

I can imagine the horrified reaction to this last statement. *How can he say this? Does he not understand what the First Amendment says and what it protects?* I do. But freedom does not have but one meaning—one that derives solely for the benefit of speakers. It also includes the targets of speech who have their own rights. This book is a respectful reminder of those rights, which should not be so casually canceled out by the gluttony and indecency of certain speakers.

I am proposing a new level of moral clarity around the principle of free speech.

It is not an easy undertaking, mostly because it requires that we modify our expectations of what the First Amendment actually guarantees. Doing so will lower the societal costs and improve the climate in which speech is freely offered and received.

I believe it to be a valuable and urgent national project.

We have always been heavily invested, patriotically and emotionally, in the right to free expression. But at this moment in our history, we are actually experiencing a crisis of faith in the First Amendment that is just beginning to emerge in some conversations, and there is confusion over the once-thought absolutism of its meaning.

Addressing this crisis of the inconsistent adherence to the First Amendment is long overdue. And the consequences are great, even if largely unacknowledged. The privileging of free speech has come with much pain, the kind we are expected to endure without complaint. It is a mindset that begins young, embodied in a nursery rhyme that serves as propaganda for the First Amendment:

“Sticks and stones can break my bones, but words will never hurt me.”

It is a lovely rhyme and a wonderful thought, but everyone knows that this homespun wisdom is patently false. Words hurt, they can wound, and they can be every bit as lethal as a physical blow. Threats are made through words, fights are instigated, riots incited—words manipulated in the service of violence. The special harm that words cause can linger and are often much more long-lasting than the effects of physical damage.

We have repeatedly confused and conflated hostile acts with free speech. We have allowed the First Amendment to provide cover for those who do violence and disguise it as political expression. The moral legitimacy of free speech no longer makes sense to many people. Its virtues have been thoroughly abused by one set of citizens who have trampled upon the rights of others—fellow citizens who retain rights of their own, rights that should not be subordinated to the First Amendment.

Freedom of expression should not apply to speech that is intended to cause harm—either by threatening and intimidating certain targeted audiences, or by inciting imminent violence against them, or by provoking them into a fight, or when speech is being deployed in order to deprive vulnerable groups of their dignity, self-respect, and social status. Perpetrators of such uncivil and anti-democratic acts against other citizens may feel that laws preventing them from doing so violate their freedom of speech. But what they understand to be free speech would be

wholly foreign to the Founding Fathers of this nation who had something entirely else in mind when they enshrined this new freedom in our consciousness and laws. The free speech that they sanctified had to do with the rights of citizens to criticize their government without punishment or recourse. Since that time, however, we have expanded the universe of what constitutes speech to the point where almost anything qualifies for First Amendment protection—whether it be a sincere oration or an accidental burp. Courts should reject allowing the First Amendment to be used not as a defender of liberty but as a weapon against vulnerable groups. The latest studies in neuroscience demonstrate the lasting effect that harmful speech is having on all segments of the population—some more than others. And it is time to give the constitutionality of hate speech codes another look.

But let me make perfectly clear what this book is not about, what I am not proposing, because when it comes to free speech, words can be deceiving.

This book is not about speech one does not like, or disagrees with, or finds offensive, or feels insulted by. This book is not in favor of restricting the free speech of those who wish to openly criticize the policies of the federal government. This book is not meant to serve as marching orders or an operating manual for any political group on any side of the liberal-conservative-libertarian spectrum.

This is a book about the social costs of speech, freely spoken, that causes actual harm—emotional and physical. Speech should not be regulated merely because it insults or offends. As legal scholar Erwin Chemerinsky has stated, “Speech can’t be prevented simply because it’s offensive, even if it’s deeply offensive.”¹ But there is a great deal of difference between offense and harm. As long as speech is being offered in a respectful, thoughtful, civilized manner, and its intention is to introduce new ideas or challenge old ones—even if unpopular, even if upsetting—

then it belongs in the mythical marketplace of ideas, and I wish such speech good luck in attracting consumers interested in its message.

Colleges and universities have a mandate to serve as catalysts for mind expansion and the search for truth. They should not become incubators of closed campuses specializing in coddled students who do not wish to be challenged or discomforted by disturbing thoughts or insensitive remarks. The whole point of a liberal arts education is the allure of the rigorous argument, the acceptance of contradiction, and the openness to judgments based on the quality and persuasiveness of ideas. The closing of the American mind under the dictatorial edicts of political correctness is fundamentally un-American. But a sensible rethinking of the First Amendment can be accomplished without contributing to this crusade of censorship that has infected American campuses. Here is just one example: An Egyptian Coptic Christian who wrote a book about Islam's centuries-old war with the west was disinvited from speaking at the US Army War College in 2019 because an outside Muslim group protested that he was a "racist" and "white nationalist."²

This book is also not making a blanket judgment about any one group. On the contrary, this book is dedicated to the idea that *all marginalized groups of minorities should be protected from true threats to their safety and citizenship.*

This book is categorically neutral between left and right-wing politics. All political ideas should be welcome in the marketplace of ideas. This book is not choosing sides. At the same time, all groups have the capacity to abuse their freedom of speech—either in the manner in which they speak or in the ferocity with which they censor. Yet groups are not monolithic—there are differences of opinion taking place within them all the time.

In these troubling times of fake news and truth decay, where political debate in the service of representative democracy is most crucial, all speech cannot be (and was not intended to be by

the drafters of the Constitution) worthy of First Amendment protection. Ideas are welcome so long as they are actually ideas delivered in good faith to enlighten and persuade, and not to deceive, inflame, incite, and bring about harm.

And because social media and the dark web are both the beneficiaries free speech and also the chief disseminators of false and harmful speech—not to mention the gatekeepers of terroristic propaganda and home recipes for how to make a bomb—this book supports the sensible regulation of the Internet, as is commonly done in Europe, in the same way that it argues in favor of government involvement in the regulation of harmful speech.

This book is a gut check for America and its love affair with the First Amendment. It is primarily about defining the boundaries and establishing the ground rules for free speech, taking into account the civility, decency, and dignity that gives speech the moral authority to be free.

I know that for many people, what I am proposing is tantamount to constitutional blasphemy, heretical and dangerous—a throwback to the pre-Enlightenment. Any criticism of the First Amendment is instantly regarded as seditious in our political culture. Sensible reform is reflexively feared. There is a curious and disturbing national group-think when it comes to the orthodoxy around free speech. More Kool-Aid has been consumed on free speech than on any other public issue. As law professor Frederick Schauer observed, those “on the side of free speech often seem[] to believe, and often correctly, that it has secured the upper hand in public debate. The First Amendment not only attracts attention, but also strikes fear in the hearts of many who do not want to be seen as opposing the freedoms it enshrines.”³

I realize that when it comes to books about free speech, very few of them re-evaluate the very premises of the First Amendment itself. Nearly all of them have nothing critical to say about the Free Speech Clause (The entire 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.”) and how it is commonly applied. Most books about the First Amendment are really celebrations of free speech. This one, however, is really more like an autopsy of an amendment. I am well aware that a discussion of the high costs of free speech will be a hard sell for many in a marketplace of ideas where all participants have bought into a happy monopoly with an efficient market immune from government regulation. If you are among such satisfied consumers of free speech, I respectfully ask you to withhold judgment. Let me try to sell you something else. Would that not be the perfect demonstration of why we have freedom of speech to begin with?