F.O.R.C.E VIDEO SCRIPT - FREEDOM OF SPEECH

Voice Over: Freedom of speech, and the right to publish even thoughts and images that others may find offensive, are among the most basic rights American citizens enjoy—and a cornerstone of the First Amendment to our Constitution. But what do we mean by free of speech? And what speech is not protected by the Constitution? Professor Sheila Kennedy has the answers, and she expresses them freely.

Sheila: Today we're going to talk about freedom of speech. As we've seen—and as you all know—ratification of the Constitution was explicitly conditioned upon the addition of a bill of rights. It's important to emphasize, as I explained previously, the Bill of Rights wasn't seen as some sort of grant of rights. To the contrary, the founders believed that humans, at least white male humans who own property, were entitled to certain rights simply by virtue of being human.
That was what was meant by the language in the Declaration of Independence that says we are endowed by our creator with certain unalienable rights. Their concern was to keep government from invading or otherwise denying us those rights.
The Bill of Rights was seen as important because it would prohibit the newly powerful central government from denying citizens of the states their unalienable rights. Remember, until after the Civil War, when the 14th Amendment was passed and became a vehicle for incorporation of the Bill of Rights, its provisions restrained only the federal government.

The philosophy of the Enlightenment, with its celebration of personal moral autonomy, animated the entire Bill of Rights, and especially the First Amendment, by forbidding government to interfere with an individual's beliefs: religious, moral, political, and personal.
The free speech clause of the First Amendment protects the rights of citizens to form opinions freely, exchange those opinions voluntarily, and to try to persuade other people of the validity of those opinions.
What people often don't recognize, however, is that our constitutional freedom of speech is freedom from government censorship, not protection from negative reaction by other people.
Throughout America's history—for that matter, throughout human history—people have tried to get governments to suppress certain images or ideas. And most of the people who want to ban this book or that painting, who want to protect the flag or religious iconography from what they see as desecration, are acting on their belief in the nature of the public good. They see unrestrained freedom to promulgate new or offensive ideas as a threat to the social fabric.

The founders weren't Pollyanna. They didn't dismiss or minimize the danger of bad ideas. They believed, however, that empowering government to suppress dangerous or offensive ideas would be far more dangerous than allowing the expression of those ideas. Once we hand over to the state the authority to decide which ideas have value, no ideas are safe. As a famous civil libertarian used to say, where fundamental liberties are concerned, majority rule is a lot like poison gas: It's a great weapon until the wind shifts.
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The Free Speech clause is the very first clause of the First Amendment. It's based on the early colonists' trust in the marketplace. If you make a better widget, it will beat out the competition. If you have a better idea, it will eventually emerge victorious. Accordingly, in our system, the antidote to bad speech isn't suppression. It's more and better speech. Every so often, we have to remind ourselves that the First Amendment was intended to protect all ideas, not just good ideas, or those with which a majority or substantial minority might agree.
As Justice Oliver Wendell Holmes memorably put it, the free speech clause of the First Amendment was meant to protect the idea we hate.

While government must respect our right to express our own opinions—while it cannot control the content of our message—it can constitutionally regulate the time, place, and manner of that expression. Such restrictions, however, must be reasonable. They have to be what lawyers call content-neutral. That means not based on the idea being expressed, and they have to apply to everyone equally. We Americans, tend to have some trouble with that last rule.
There are various philosophical underpinnings to belief in the importance of free speech. The marketplace-of-ideas defense rested on an analogy with the markets that populated the early colonies. If you made a superior widget at a competitive price, you would be rewarded with market share.
Similarly, if your idea was superior, it would prevail in the marketplace of ideas. But the marketplace analogy wasn't the only justification for protecting free expression. John Stuart Mill's 1859 essay on liberty was extremely influential among the educated colonists. Mill wrote, and I quote,
"First, if any opinion is compelled to silence, that opinion may for ought we can certainly be true. To deny this is to assume our own infallibility.

Secondly, though the silenced opinion be an error, it may and very commonly does contain a portion of truth. And since the general or prevailing opinion on any subject is rarely or never the whole truth, it's only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.
Thirdly, even if the received opinion be not only true but the whole truth, unless it is suffered to be and actually is vigorously and earnestly contested, it will by most of those who receive it be held in the manner of a prejudice with little comprehension or feeling of its rational grounds.
And not only this, but fourthly, the meaning of the doctrine itself will be in danger of being lost or enfeebled, deprived of its vital effect on the character and conduct, the dogma, becoming a mere formal profession. In effect, ineffective for good, but combining the ground and preventing the growth of any real and heartfelt conviction from reason or personal experience." End quote.
Other philosophers have offered other justifications for free expression. Alexander Meiklejohn famously proclaimed that people who are afraid of ideas, any ideas, are not fit for self-government.
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The philosophy of the Enlightenment, with its respect for the importance of personal autonomy and the integrity of an individual conscience, also militated in favor of free expression. When I offer you the resources in our final lecture, there will be many that will add to the arguments in favor of expression that is not controlled by government.
You know, it's one thing to talk about free speech. It's another to define what's meant, to identify just what it is that's supposed to be protected against government suppression. The first thing is to recognize that the use of the word speech in the First Amendment is much broader than oral communication. The amendment protects the expression of an idea, whether that expression is verbal or symbolic. That means the distinguishing between action and speech becomes kind of critical to the analysis, since freedom of speech really means freedom of communication.
Government is prohibited from censoring not just verbal expression, but what lawyers call symbolic speech: actions that express an idea or point of view through mechanisms like a march or destroying a draft card or burning a flag.
The demonstrations following the murder of George Floyd expressed disapproval of certain police tactics.

Burning a flag sends a clear message of disapproval of America. The reason so many of us react viscerally to flag burning is precisely because we get the message and we disagree with it. Some actions really are the expression of an idea.
On the other hand, some spoken behavior isn't the expression of constitutionally protected communication. If your old flame is following you around, leaving threatening messages and threats, that's stalking, a behavior that government can and should punish. If someone calls you on the phone every half hour and berates you, that's harassment, not protected communication. Crimes like fraud and torts like libel and slander are verbal in nature, but that doesn't mean that they are insulated from government sanctions.

So before deciding whether a given behavior is protected by the First Amendment's free speech provisions, it becomes really important to determine whether that behavior was intended to send a message, to communicate an idea. It doesn't have to be a good idea. In fact, it can be positively awful, but it does have to be the expression of an idea, of a message.
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The basic rule government has to follow in free speech cases is something lawyers call content neutrality.

Government can't pick and choose among ideas, suppressing some and not others. While very reasonable time, place, and manner restrictions are constitutionally permissible, they have to be content neutral. A content-based law or regulation discriminates against speech or symbolic speech based on the substance of what it communicates, the idea being expressed. In contrast, a content-neutral law applies to expression without regard to its substance.
The supreme court is likely to strike down regulations that discriminate on the basis of the idea being communicated. If a city allows a pro-choice march, for example, it must also allow a pro-life march.
If the statehouse steps are routinely used by environmental groups and voting rights groups, then the local KKK, loathsome or not, must be allowed to use them on the same basis as everyone else.

A major problem with government regulation, not just in the area of free speech, but in all lawmaking, is something lawyers call overbreadth and vagueness. This goes back to a fundamental element of the rule of law.
Laws must be sufficiently specific to allow citizens to know what behaviors are required or forbidden. Regulation of speech is unconstitutionally overbroad if it extends to a substantial amount of constitutionally protected expression.
Overbreadth is closely related to its constitutional cousin, vagueness. Regulation of speech is unconstitutionally vague if a reasonable person cannot distinguish between what is allowed and what isn't. I'll provide additional resources to clarify and expand upon these very basic principles of free speech jurisprudence.
Over the years, the courts have developed other rules to help them differentiate between constitutionally protected and unprotected expression. There's a strong presumption in American law against what we call prior restraint: efforts to prevent a publication or an utterance in advance.
We've seen this recently in cases where President Trump tried to prevent John Bolton and his niece from publishing information that would be damaging to his re-election efforts. The long-standing American approach is to allow such publications and then allow the person who was claiming to have been injured by it to sue for damages.

So President Trump can sue for defamation after the fact. And if he can prove that the books were false, he can recover monetary damages and suppress further publication. The only exceptions to the rule against prior restraint would be things like disclosing troop movements in time of war, or identifying spies who are still working and whose lives will be endangered by disclosure, obvious dangers of that sort.
Obscenity has always been a very difficult free speech issue. Supreme Court Justice Potter Stewart famously said, "I can't define it, but I know it when I see it." Obscenity is not constitutionally protected, but determining what's obscene has proved to be exceptionally difficult.
As Nadine Strossen wrote in her book "Defending Pornography: "If it turns me on, it's erotica.; if it turns you on, it's porn." And as we all recognize, material that one generation consider scandalous is ho-hum to another.
The internet has made all of this more difficult. To the extent that obscenity is partially defined as a violation of community standards, the question has become, which community? The Scandinavian village where transmission began; servers in Russia, Japan, and the west coast that conveyed it; or the Tennessee city where the content was downloaded?

Some terms and concepts occur frequently in free speech jurisprudence. A public forum, for example, sometimes also called an open forum, is open to all expression that is protected under the First Amendment. Streets, parks and sidewalks have traditionally been considered open to public conversation.
The Supreme Court ushered in a contentious and ongoing public debate beginning with the case of Buckley vs. Vallejo, and continuing through cases like Citizens United, when it treated money as a form of speech. Proponents of that reasoning equate political spending with political speech. If government can't stop me from standing on a street corner and announcing my support for candidate A, government shouldn't be able to keep me from buying advertisements for candidate A. Opponents of that view respond that the ruling is giving wealthier Americans bullhorns through which to speak, while less-affluent Americans are left to whisper, essentially giving richer people a bigger say in elections and government.

Although the First Amendment restrains government from interfering with the expression of ideas, government has more authority in government sponsored environments. So if you work for the government or you're a student in a public school, your free speech rights in those environments are far less extensive. The Supreme Court has also approved rules for government-subsidized organizations like the NEA and Planned Parenthood that would be unconstitutional if applied to non-subsidized organizations or citizens.
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You should also be aware of the legal distinction between hate speech and hate crimes. Hateful speech, no matter how hurtful, is constitutionally protected. Hate crimes are not.
The answer to that is that the architects of our constitution believed that self-government requires the free and uninhibited flow of information. They wanted to be extra certain that government kept its hands off that information. So while the Free Speech clause protects all expression, the First Amendment also emphasizes the importance of protecting the specific kind of expression that we call journalism.
Now, note that the Constitution doesn't protect people called journalists. It protects the act of journalism, in order to ensure the availability of information that is in the public interest and necessary for self-governance. You know, the founders weren't naïve. They recognized that what they called The Press, and what we call the media, got it wrong a lot of the time. The newspapers of their own time were partisan rags that make our own politicized outlets look positively statesmanlike by comparison, hard as that may be to believe.

But the founders also believed that only the freest, most robust exchange of argument, information, even gossip, would safeguard liberty. Neither freedom of speech nor freedom of the press rested on the notion that ideas are unimportant—that sticks and stones can break my bones, but words will never hurt me. The founders knew that ideas are often both powerful and dangerous and hurtful. But, as I said earlier, they believed that giving government the power to determine which ideas and information could be transmitted or expressed would be infinitely more dangerous.
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Finally, what does the First Amendment have to say about compelled speech? If government can't censor your expression, can it force you to express an idea? The answer is no. Government can't censor speech and it cannot punish a person for refusing to articulate, advocate, or adhere to a governmentally approved message. Interestingly, the recent efforts to have faculty members at public universities use appropriate pronouns has been attacked as compelled speech. What the courts will have to say about that is, at this point, unknown.
Arguably the most famous case of compelled speech was Barnett versus West Virginia Board of Education, in which the Supreme Court held that the free speech clause protected Jehovah's Witness students from being forced to salute the flag or say the Pledge of Allegiance in public school, something their religion regarded as idolatry.

The court didn't base its decision on the effect of the compelled salutation on their religious beliefs. Instead, it ruled that government did not have the power to compel speech. And it primarily relied on the free speech clause of the First Amendment rather than the Free Exercise Clause, which is interesting. Among the resources that I will be sharing with you will be additional resources about that very important case of Barnett vs West Virginia Board of Education. Before we get into a discussion of specific issues that are hot right now, let me emphasize again that the most prevalent misunderstanding about free speech, and for that matter, about the whole Bill of Rights, is that it is concerned only with government control of communication.

If your mother or your employer restricts what you can say, that is not censorship for purposes of the First Amendment. When a television network discontinues a show because someone on that show said something that network disagreed with or felt was inappropriate, or when Walmart refuses to stock a book or video of which it disapproves, those are not violations of freedom of speech. Only the government can violate your civil liberties.
So how does that bedrock principle affect some of the debates Americans are having right now? For example, Americans are having an epic debate about symbols like the Confederate flag and statues that were erected to honor Confederate soldiers. Well, when Nascar says no Confederate flags at its events, it can do that. Nascar isn't government.

The arguments about statues are more complicated because most of them have been erected and maintained by units of government. Keeping them up or taking them down thus becomes a political issue. But taking them down does not constitute censorship because a local government can decide what to say by erecting a monument or removing one. This is an issue that creates a lot of heat, but in most situations doesn't implicate the free speech clause of the First Amendment.
Another truly epic confrontation concerns government requirements for wearing face masks in public to combat the coronavirus pandemic. People resisting the wearing of masks have insisted that those mandates constitute government overreach and that they amount to compelled speech and violate their First Amendment rights. But the courts have long held that government can require measures like quarantine and mask wearing to protect public health, just as government has the right to require you to buckle up or refrain from smoking in bars and restaurants. If you think about it, government requires us to wear clothes in public.
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Finally, there's a fascinating case that has been filed that raises an increasingly important First Amendment free speech/free press issue. Can sources of disinformation be held liable for that disinformation?
The Washington League for Increased Transparency and Ethics has brought suit against Fox News, alleging that Fox violated that state's Consumer Protection Act by disseminating false information about the coronavirus through its television news broadcasts and by minimizing the danger posed by the virus.

The executive director of that organization says they're not trying to chill free speech, but they believed the public was endangered by false and deceptive communications in the stream of commerce. The lawsuit raises some profound questions about the nature of speech that might be considered the mirror image of falsely shouting fire in a crowded theater. In this case, Fox is being accused of shouting, "there's no fire stay in your seats," when in fact there is a fire.
Sheila: At a time when allegations of fake news are being lobbed by both left and right, it will be very interesting to see what happens with this particular effort to stem the growing amount of propaganda with which we all must contend.

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