

## Civil Liberties: The Delicate Balance

(07/02/20)

---

It is a delicate process to define civil rights and liberties. Many people believe that freedom of action and freedom of speech gives them the right to do whatever they want. The concept of a “protest” is thought by some to be a legitimate petition to the government. There must be a balance between civil liberties and behavior which is not disruptive.

Take speech, for example. Free speech only pertains as between citizen and government. Free speech in the workplace may not exist at all unless, for example, attempt at unionization is at issue. There may be matters of religious freedom and nondiscrimination in the workplace, but free speech as we understand it, vis-à-vis government, does not exist in the private workplace. That is a surprise to many people.

Even with regard to so-called public free speech, there are limitations. There is no free speech defense when a couple of people sit down and plot the murder of a third person. Planning violence is not free speech. Engaging in activity through speech which represents a “clear and present danger” is not speech. The Supreme Court of the United States used to say that commercial speech is not speech, but that has changed over the years. The corporations have the right to make political contributions, without much limitation or reporting, essentially as a matter of “free speech”. Some people think that this *Citizens United* case has gone much too far in recognizing commercial “free speech” and many liberal groups want to see that decision reversed.

Free speech, even where the government is involved, also requires that the speaker use a public forum. A person cannot exercise their right of free speech in the middle of a busy intersection in New York City, Williamsport, Pennsylvania, or anywhere else.

Freedom of action, as such, is not a protected right under the United States Constitution. Naturally, free speech, the right to petition the government, religious freedom are all a form of “action”. Those who believe that they can do whatever they please so long as they are not hurting someone else may be asserting a private philosophical imperative, but not a constitutional right. How then did the United States Supreme Court, in *Cantwell v. Connecticut* and in the *Doe* cases, determine that the government could not restrict the right to contraception or limit abortion in the first trimester? This is not a free speech right, it is not a right endorsed by freedom of religion, and it cannot be found anywhere in the United States Constitution. The Supreme Court of the United States developed a concept of so-called penumbral rights. The penumbra is what shows around the edges of the moon during a solar eclipse. Others say that the right to abortion and contraceptives is not a matter of penumbral rights, difficult to justify under our antique constitution, but rather relates to the inherent rights of mankind under the Fifth Amendment to the United States Constitution, which subsequent United States Supreme Court decisions have said also apply to the States by virtue of the 14th Amendment. This ambiguous right is

sometimes referred to as substantive due process based upon the so-called “rational relationship test”.

We can argue until the cows come home whether the Constitution really protects a woman’s right to choose what to do with her fetus in the first or second trimester, but no one can find that explicitly in the United States Constitution and it is only by interpretation that we update the constitution in ways acceptable to the public. The same is true with decisions permitting gay marriage. The door swings both ways, of course. Gun rights have been strengthened by the Court, interpreting the Second Amendment in a way difficult to find in the Constitution or in the debate of the Founders of this country. The Second Amendment clearly implicates the right to bear arms, in order to maintain a militia. We do not have militias anymore; we now have the National Guard. Therefore, when the United States Supreme Court strikes down regulation of handguns promoted by a city where gun violence is an epidemic, is that what the Second Amendment is talking about?

The bottom line is that there is both liberal and conservative activism in terms of trying to update a Constitution that was adopted in 1789, and which did not even contain the first ten amendments, the so-called Bill of Rights. It was only the promise of a Bill of Rights that convinced some of the states that were holdouts to vote for the United States Constitution. The Civil War Amendments did not come about until 1865.

There is a delicate balance between civil rights and liberties as opposed to an orderly society. Should a publicly available resource, such as a cakemaker, be forced to put messages on cakes for a gay couple? Is this a genuine contest between the right of a private businessowner to believe however he or she sees the world, or is it a matter of discrimination by a publicly accessible enterprise?

Today, we are faced with protests around the country. There are those who call these protests constitutionally permitted or even mandated. Any and all protests must be compliant with our constitutional and regulatory framework. No one has a right when they protest to damage or destroy business, to kill people, or to endanger others with gun fire. A protest is not rioting in the community, physically attacking police or preying upon other minority communities. The United States Constitution does not endorse and never has permitted such conduct. On the other hand, those who want to defund police, do away with government or feel the compulsion to exercise other nihilistic principles, have every right in a public forum subject to reasonable time and place restrictions, to advocate their point of view. Voltaire is credited with saying that while he might detest the views of others, he would defend to the death the right to express those views. Interestingly, Voltaire was a grotesque anti-Semite who was clearly a hypocrite. Yet, this great philosopher of the Enlightenment, who helped to bring about our modern thought processes concerning political freedom, was a bigot. Sometimes those who shout and scream most loudly about their rights, trample on the rights and civil liberties of others.

Those who believe that the right to protest or express divergent views carry with it the concordant right to act improperly and illegally towards others, are not exercising

American values. The balance will continue to be argued and debated for a long time to come, hopefully so long as this country remains a democratic form of government.

*Clifford A. Rieders, Esquire  
Rieders, Travis, Humphrey,  
Waters & Dohrmann  
161 West Third Street  
Williamsport, PA 17701  
(570) 323-8711 (telephone)  
(570) 323-4192 (facsimile)*

*Cliff Rieders is a Board-Certified Trial Advocate in Williamsport, is Past President of the Pennsylvania Trial Lawyers Association and a past member of the Pennsylvania Patient Safety Authority. None of the opinions expressed necessarily represent the views of these organizations.*