

Free Speech or Free Beer



By Paul Engel

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- Is freedom of speech actually free?
- Rights can be positive or negative.
- When you talk about freedom, do you mean like free speech or free beer?

When I hear people talk about freedom, there seems to be two different general ideas: freedom from something and freedom to do something. It reminds me of my days in Information Technology, when people described “free” open source software as “Free speech, not free beer!” When we talk about freedom today, are we talking about free speech or free beer?

Understanding Rights & Freedoms

As Americans, we often talk about freedom. We talk about freedom of speech, being free from unreasonable searches, and even the freedom to vote in elections. But have you ever really considered what it means to have freedom?

1. The condition of not being controlled by another nation or political power; political independence.
2. The condition of not being subject to a despotic or oppressive power; civil liberty.
3. The condition of not being constrained or restricted in a specific aspect of life by a government or other power: freedom of assembly.
4. The condition of not being a slave.

[Freedom – The Free Legal Dictionary](#)

The Bill of Rights was written to insure that the rights that protect our freedoms were included in the supreme law of the land. People often talk about rights as if they are monolithic things, all lumped together, but there are several ways to differentiate rights. The Declaration of Independence lists some unalienable rights, which would lead one to believe there are alienable rights. There are rights protected by the Constitution of the United States, while others exist even if they are not enumerated. As the Ninth Amendment points out:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

[U.S. Constitution, Amendment IX](#)

In today's society there are even "rights" claimed that are not legitimate rights at all. Even freedom of speech has limits, as Benjamin Franklin, writing under the pseudonym Silence Dogood, stated:

Without Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as publick Liberty, without Freedom of Speech; which is the Right of every Man, as far as by it, he does not hurt or controul the Right of another: And this is the only Check it ought to suffer, and the only Bounds it ought to know.

[Silence Dogood, No. 8, 9 July 1722](#)

So even the freedom of speech is limited to those actions that do not hurt or control the rights of another.

After the alienability of a right, the most important aspect I can think of, and the one I will be focusing on today, is the question of whether a right is positive or negative. This topic can be a bit confusing, since we normally associate "positive" with good and negative with bad. That is not the case here, since positive and negative refer to the duty of

others. So let's start by looking at these two different types of rights.

Negative Rights

Negative rights are those things which cannot be done to you. Look at the Bill of Rights and most of the rights you'll see are negative. Your right to not have a national church or to be prevented from practicing your religion as you see fit. Your right to not have your speech, press, or liberty abridged. Your right to not be unreasonably searched or seized. Not all of the rights protected in the first ten Amendments to the Constitution are negative, but the vast majority are.

It seems little counter-intuitive, but negative rights are some of the best and most powerful ones to be protected. This is because negative rights do not give you power; rather they prohibit others from exercising power over you. That's not to say someone can take a negative right too far, but I'll talk about that later. Right now, let's look at positive rights.

Positive Rights

While negative rights are those things which cannot be done to you, positive rights are those that place a duty on others. Your right to a jury trial places a duty on other Americans to serve on a jury. Similarly, your right to counsel in criminal cases places a duty on the American taxpayer to pay someone to represent you. And don't forget that someone has to pay for the judges, the courthouses, and other employees in the justice system. Even your right to vote places a burden on others, since someone has to pay to put on an election.

Since positive rights place a burden on others, they need to be both narrowly tailored and necessary to protect the other rights of the individual. Take for example, your right to a trial.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,...

U.S. Constitution, Amendment VI

Why is your right to trial important enough to warrant placing not only the burden of serving on a jury, but the costs of the trial on your fellow Americans? The answer is simple: Imagine you are the accused. Do you want a judge, a government employee, deciding your guilt or innocence? Don't you want the chance to tell your side of the story? Don't you want this done in public, not behind closed doors? Yes, the cost of maintaining a judicial system can be expensive. And yes, serving on a jury can be a hardship. In the end though, who do you want determining your guilt or innocence: Some government actor or a group of fellow citizens? If that is what you want for yourself, shouldn't you be willing to help provide that for others?

Legitimacy of Rights

Just because someone claims a right doesn't mean it is a legitimate right. Let's go back to the quote from Benjamin Franklin:

... which is the Right of every Man, as far as by it, he does not hurt or controul the Right of another: And this is the only Check it ought to suffer, and the only Bounds it ought to know.

Silence Dogood, No. 8, 9 July 1722

Your ability to exercise your rights should be restricted to not hurting or controlling the right of another. According to Mr. Franklin, that is the only boundary your right to free speech should know. Take for example the infamous "yelling fire in a crowded theater." The Supreme Court never said you

didn't have the right to yell fire in a crowded theater, only that the First Amendment wouldn't protect you from falsely doing so. By falsely yelling fire in a crowded theater, you deprived the attendees of their right to attend the event, the performers from doing their jobs, and the owner from operating the theater. We frequently see the same thing on college campuses when a group claims to use freedom of speech to deny the freedom of speech of others. That is an illegitimate use of freedom of speech, but what about other rights, especially positive ones?

The Abuse of Positive Rights

So if a right, positive or negative, cannot be legitimately used to hurt or control the rights of another, how do we deal with the flurry of "rights" that have been claimed over the years?

During the 19th century people claimed a right to own slaves. This claimed "right" was supported by both federal law (The Fugitive Slave Act) and the Supreme Court (Prigg v. Pennsylvania). This "right" clearly hurt and controlled the rights of slaves in America, under the claim that they were not persons under the Fifth Amendment.

Today we hear claims of all sorts of positive rights. From healthcare to housing, from "transgender" to zoning, we see people claiming their right to tell you how things should be. It's one thing when the people and states get together and agree that certain things like trials and juries are important enough to place a burden on the people. That is the consent of the governed. However, when an individual or a group claim the "right" to tell other people how to speak, who they must do business with, and what they are allowed to believe, that is not the consent of the governed, but the tyranny of false rights. And no, government does not have the legitimate authority to tell you to accept their decrees simply because they say so. According to the Declaration of Independence,

their only legitimate authority comes from us.

That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,

Declaration of Independence

We the People consent to a government's power when it is formed by a constitution. Any power exercised beyond those delegated to that government are illegitimate and illegal.

An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed.

Norton v. Shelby County, 118 U.S. 425 (1886)

So when governments pass laws placing a burden on you because of some alleged "right" someone else possesses, if that power was not delegated to them by the Constitution the act is void. In my view, it's because it was a power not given to government by the consent of the governed.

Conclusion

Rights are powerful and important things. So when the term is used either recklessly or in an attempt to elevate a person's argument without legitimate cause, it diminishes the value of rights across the board. So when people claim that they have a right to speak over you, freedom of speech is diminished. When government tells you what you can do with your property, your property rights are diminished. When people claim a right to education, healthcare, or any other commodity, your right to yourself, your liberty and, of course, your property rights, are destroyed. Even the right to keep and bear arms becomes abusive when it deprives someone of the right to control their property.

When dealing with rights, the first question we should ask should be is the right legitimate? Does it hurt or control the rights of another? Is it demanding of the people a duty or obligation they did not consent to? Because far too often the claims of rights and freedoms are less about protecting the rights of the individual, and more about getting someone else to pay for what they want.

So ask yourself if this “freedom” they’re talking about more like free speech or free beer?

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