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## Constitution Day, 2008

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# Constitution Day 2008

*Prepared by Robert Berry, Research Librarian, Sacred Heart University*

Americans take a great deal for granted. They have abundant clean water, a robust economy, expansive opportunities for education, and an unfettered right to publicly debate political issues without fear of persecution by their government. The world they live in is much different, for instance, from that of German citizens living under fascism; a world in which propaganda saturated the airwaves, where state censorship was harshly enforced, and where an act as seemingly innocent as listening to a foreign radio broadcast could result in a prison sentence.<sup>1</sup>

The Founders of our Republic did not take public debate for granted. They had felt, first hand, the yoke of governmental repression. They took steps to draft constitutional provisions that would restrain the federal government's power to limit political expression. They sought, as well, to encourage a vibrant marketplace of ideas and ensure that political expression was well nourished.

Guarantees of freedom of expression and freedom of conscience are set forth prominently in the First Amendment to the United States Constitution. That amendment states that:

***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.***<sup>2</sup>

Not every American believed that constitutional provisions guaranteeing freedom of expression were necessary. Alexander Hamilton, writing in Federalist No. 84, argued that because the

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<sup>1</sup>See Vandana Joshi, "The 'Private' Became 'Public': Wives as Denouncers in the Third Reich," in 37 J. CONTEMP. HIST. 419, 430, n. 22 (2002) (Discussing Joseph Goebbels' "exceptional radio measures" of September 1, 1939 that made listening to foreign radio broadcasts illegal).

<sup>2</sup>U.S. CONST. AMEND. I.

People retained all powers not specifically granted to the government in the Constitution, a Bill of Rights was unnecessary. Specifically enumerating such rights, Hamilton warned, might give rise to the pernicious notion that the government could regulate expression to whatever extent it was not specifically restrained by a Bill of Rights:

*For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power.*<sup>3</sup>

Debate over the ratification of the Constitution was acrimonious and the outcome uncertain.<sup>4</sup> At the Massachusetts convention, John Hancock, a staunch Anti-Federalist, formulated a compromise position: assent to ratification would be conditioned on the adoption of amendments designed to strengthen civil liberties and the rights of states. As political scientist Alpheus Mason noted: “The Massachusetts formula caught on.”<sup>5</sup>

The First United States Congress convened pursuant to the new Constitution of the United States of America. On June 8, 1789 James Madison introduced proposed constitutional amendments to the Constitution. Discussion commenced on the specific language that would best express rights that people felt were both natural and inalienable. Connecticut’s Roger Sherman proposed the following amendment to protect freedom of conscience and expression:

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<sup>3</sup> THE FEDERALIST No. 84 (Alexander Hamilton).

<sup>4</sup> I JOHN BACH MCMASTER, A HISTORY OF THE PEOPLE OF THE UNITED STATES: FROM THE REVOLUTION TO THE CIVIL WAR 476-79 (1911).

<sup>5</sup> ALPHEUS THOMAS MASON, THE STATES RIGHTS DEBATE: ANTIFEDERALISM AND THE CONSTITUTION 89 (1964).

*The people have certain natural rights which are retained by them when they enter into society, Such are the rights of conscience in matters of religion; of acquiring property, and of pursuing happiness & safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably Assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances. Of these rights therefore they Shall not be deprived by the government of the united States. [sic]*<sup>6</sup>

The states ratified the First Amendment in 1791. The First Amendment would eventually give rise to an intriguing body of jurisprudence. It would become clear that freedom of expression, and of conscience, were more than mere ephemera in the American political tradition.

The vigorous exercise of these freedoms came to be recognized as a process vital to sound decision-making at all levels of social organization. Justice Oliver Wendell Holmes, dissenting in the 1919 decision *Abrams v. United States*,<sup>7</sup> wrote that, although the impulse to repress some speech was understandable, the better course was to allow a “free trade in ideas.” The “best test of truth,” Holmes wrote, “is the power of the thought to get itself accepted in the competition of the market.”<sup>8</sup> Holmes did not, however, accord constitutional protection to speech where words were “used in such circumstances” and were “of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”<sup>9</sup>

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<sup>6</sup> Roger Sherman, “Proposal by Sherman to House Committee of Eleven, July 21-28, 1789,” in NEIL H. COGAN, ED., *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* 1 (1997).

<sup>7</sup> 250 U.S. 616 (1919).

<sup>8</sup> *Id.*, at 630.

<sup>9</sup> *Schenck v United States*, 249 U.S. 47, 52 (1919) (Affirming the convictions of socialists under criminal statutes for mailing circulars urging draft resistance).

A decade and a half after Holmes had written the *Abrams* decision, Hitler became Chancellor of Germany. The world then saw the consequences of unbridled and unrelenting state repression of individual liberty. Religion was suppressed. Free speech was supplanted with propaganda. May 10, 1933 marked the inauguration of book burning and an era of what historian William L. Shirer described as “the regimentation of culture on a scale which no modern Western nation had ever experienced.”<sup>10</sup>

Americans during the Second World War embraced Freedom of Speech and Freedom of Religion as icons, as was abundantly clear from many of the posters of that time. Following the war, Americans responded to Soviet repression of free expression with radio broadcasting. Organizations such as Radio in the American Sector and Radio Free Europe were founded to provide an alternative source of information for Europeans living behind the Iron curtain.

In the past few decades our First Amendment jurisprudence has developed dramatically in response to new situations, new modes of expression, new sensibilities and new technologies. To take one very recent example, digital formats, the Internet, and advances in video-editing software have now made it possible for people to create and publish video mashups that integrate pre-existing and new material. “Even though mashups likely constitute copyright infringement,” one author noted, “they nonetheless promote important First Amendment values. Many mashups contain strong political and social criticism.”<sup>11</sup> As these new modes of expression continue to develop, courts will be called upon to ensure that the marketplace of ideas is not unduly hindered.

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<sup>10</sup> WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH* 241 (1960).

<sup>11</sup> Andrew S. Long, *Mashed Up Videos and Broken Down Copyright: Changing Copyright to Promote the First Amendment Values of Transformative Video*, 60 OKLA. L. REV. 317, 318 (2007).