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Free Speech And Private Enterprise: A Review Of Censorship Inc.: The Corporate Threat To Free Speech in The United States

BOOK REVIEW

FREE SPEECH AND PRIVATE ENTERPRISE

CENSORSHIP INC.: THE CORPORATE THREAT TO FREE SPEECH IN THE UNITED STATES. By Lawrence Soley. New York: Monthly Review Press. 2002. Pp. xi, 260. \$23.95 (paperback).

*Reviewed by Robert E. Riley, Jr.**

Americans typically believe that government represents the greatest threat to free speech. They can point to certain laws and precedent setting cases as examples of government's attempts to control freedom of expression. However, how many Americans would expand the discussion to examine the ways that private enterprise attempts to control free speech? Professor Lawrence Soley¹ does exactly that in his book *Censorship Inc.: The Corporate Threat to Free Speech in the United States*.²

Soley thoroughly documents and critically analyzes the efforts of private parties to stifle. His thesis is that American corporate growth combined with the judicial system's willingness to recognize artificial entities as possessing the same rights guaranteed to individuals creates an expanding environment where private property rights are trumping free speech rights.³ Although Soley makes a convincing case to support his argument, he sometimes lets his general suspicion of corporations and conservative politics color his analysis with the almost cliché leftist doctrine that big business is the enemy.

Soley's purpose in writing this book was "to stimulate a debate about what constitutes censorship in the 'land of the free.'"⁴ Accordingly, this review will examine Soley's arguments and challenge some of his assertions. Part I will discuss the historical incidents of private organizations limiting citizens' free speech. Part II will look at more modern attempts to silence speech through the use of strategic lawsuits against public participation known as "SLAPPs." The elevation of pri-

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1. Colnick Professor of Communications and Professor of Journalism, Marquette University, Milwaukee, WI.

2. See LAWRENCE SOLEY, CENSORSHIP INC.: THE CORPORATE THREAT TO FREE SPEECH IN THE UNITED STATES (2002).

3. See *id.* at 16-20.

4. *Id.* at xi.

vate property rights over constitutionally guaranteed rights as evidenced by covenants, conditions, and restrictions ("CC&Rs") and publicly financed shopping malls will also be covered. Part III will analyze private organizational attempts to censor news content through advertiser and conglomerate pressures on the media.

I. A TRADITION OF AMERICAN PRIVATE CENSORSHIP

Soley meticulously reviews employers' tactics to limit employee speech.⁵ Using perhaps the ultimate employee speech-limiting situation, the company-owned town, Soley explores the lengths to which employers were willing to go to limit criticism. This discussion demonstrates that whatever private censorship we are currently experiencing, it is not new. Rather, it is simply a more modern version of a very old struggle.

The analysis begins with the pervasiveness of "company-owned towns." Approximately 2,500 company-owned towns were built between 1830 and 1930, encompassing everything from New England mill towns to Western mining towns.⁶ By owning employee housing, town roads, local stores, and often times employing private police forces, companies exercised social control.⁷ For employers, stifling the free speech of unhappy workers was a primary goal.

Because such towns were frequently located in remote areas, few alternatives existed for the employees when the company controlled the local movie theater, library, or other information outlets.⁸ If an employee spoke out against the company or took issue with a company favored position, the employee could be fired from work, blacklisted to prevent reemployment, and evicted from company-owned housing.⁹ With organized labor just beginning to have an American presence, there was precious little redress for wronged employees.

Soley argues that New Deal laws such as the Wagner Act and court decisions such as *Marsh v. Alabama*¹⁰ helped eliminate the ability of companies to coerce free speech by providing for greater union organizing activities and retention of free speech rights on private property.¹¹ However, the company-owned, which directly exploited citizens and suppressed their speech, evolved into "company-dominated towns" utilizing indirect, paternalistic pressure.¹² Company-dominated towns in

5. *See id.* at 23.

6. *Id.* at 26.

7. *Id.* at 27.

8. *Id.* at 25.

9. *Id.* at 31.

10. 326 U.S. 501 (1946).

11. *See SOLEY, supra* note 2, at 26.

12. *Id.*

which employees are pressured to curtail public discourse still exist today. Citing areas as seemingly different as North Freeport, Maine, the home of L.L. Bean, and Newton, Iowa, home to Maytag, Soley makes a credible case that these towns' financial interests are so entwined with the local company that citizens feel compelled to subjugate their speech to their economic welfare.¹³ As an example, in 1996 L.L. Bean requested and received a tax agreement that provided for millions of dollars in tax rebates.¹⁴ Residents became concerned that L.L. Bean was placing the bottom line over community responsibility.¹⁵ Although numerous citizens disliked the tax plan, they were "reluctant to harshly criticize Bean. They d[idn]t want to be ostracized by their neighbors, lose their jobs with the company or get cut off from business contacts."¹⁶ Soley notes that "[w]hen public relations campaigns, lobbying, and threats to lay off employees fail to achieve the company's policy objectives, SLAPP suits, media pressure, and other techniques are used to limit the expression of opposition viewpoints."¹⁷

If one company-town's citizens self-censor their speech, is this really suppression of First Amendment rights? A more logical conclusion is that with modern society offering mobility and many alternative information sources, people are deciding that economic security is more important than the right to criticize.¹⁸ Such choices occur on a regular basis. For instance, after the September 11th attacks, some polls showed First Amendment support deteriorating in deference to increasing national security.¹⁹ Perhaps people are consciously weighing their free speech in light of their present social and economic conditions.

Soley is not afraid to examine the speech stifling efforts of his own profession, academia. Drawing a chilling analogy between the traditional company-owned town and the politically correct world of academia, Soley observes:

Today, private colleges and universities most closely resemble traditional company towns, providing housing for students and sometimes faculty, operating restaurants and stores, having their own police forces, and creating rules of behavior that students and faculty are ex-

13. *Id.* at 27-28.

14. Scott Thomsen, *Realities of the '90s Strain Bean, Freeport Relationship, Some Residents Fear Retail Giant Now Cares More About Tax Breaks and Profits Than People*, PORTLAND PRESS HERALD, Feb. 24, 1996, at 1A, available at <http://www.MaineToday.com>.

15. *See id.*

16. *Id.*

17. SOLEY, *supra* note 2, at 27-28.

18. *See* William Glaberson, *Claiming a Right Not to Know; Town Smarts as a Paper Bites the Hand That Feeds It*, N.Y. TIMES, Sept. 22, 1997, at B2.

19. *See* Amber McDowell, *Poll Shows Free Speech Support Down*, SACRAMENTO BEE, Aug. 29, 2002, available at <http://www.sacbee.com/24hour/nation/story/516894p-4102578c.html>.

pected to follow. If students or faculty fail to abide by these rules, they can be expelled or fired.²⁰

Soley's observation is accurate but does not go far enough. Colleges and universities reinforce "diversity" as being a worthy goal, yet often apply the concept more to race and gender than to the truly important concept of diversity of ideas.²¹ Can institutions that overwhelmingly favor politically liberal oriented professors really claim that they are creating an environment that encourages free speech?²²

Another historical tenant of Soley's investigation is the use of "blacklists" to suppress free speech.²³ A blacklist is a list of people "who are disapproved of or are to be punished or boycotted."²⁴ He notes that the motion picture industry developed the Hollywood blacklist in response to the late 1940s House Un-American Activities Committee investigations.²⁵ Although this is perhaps the most famous blacklist, it is not an isolated incident. Private industry used blacklisting, beginning in the early nineteenth century, to protect itself from competitive pressures and to prevent unionization.²⁶ Soley points out these similarities that many Americans might not realize exist.

By noting the historical antecedents of New England textile working papers, without which a mechanic could not get further employment, and tracing up to the current modern day whistleblower cases, Soley presents a cohesive illustration that although times may change, the tension between parties with unequal bargaining power does not.²⁷ Soley is not afraid to name names either. He backs up his analysis with specific examples of blacklisting.²⁸ He illustrates that private organizations, rather than governmental bodies, are more likely to try and suppress critical speech using blacklists.

II. CIVIL ASSAULTS ON FREE SPEECH

Soley makes an interesting and damning assessment of how American businesses use the judicial system. He notes that although citizens use the courts to obtain relief from governmental "abridgment" of free

20. SOLEY, *supra* note 2, at 47.

21. Nat Hentoff, *The Twilight of Free Speech at Colleges*, WASH TIMES, Oct. 14, 2002, at A23, available at 2002 WL2919661.

22. See Paul Cella, *Cella's Review: Politics, Culture, The Public Square* (Aug. 31, 2002), at http://cellasreview.blogspot.com/2002_08_25_cellasreview_archive.html.

23. SOLEY, *supra* note 2, at 55.

24. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 119 (10th ed. 1998), available at <http://www.m-w.com> (enter "blacklist" in search box).

25. SOLEY, *supra* note 2, at 55.

26. See *id.* at 55-56.

27. See *id.* at 55-80.

28. See *id.* at 56-67.

speech rights, corporations actually use the courts to limit the free speech of citizens.²⁹ Soley describes the various speech stifling tools used by corporations.

Corporations attempt to get courts to issue gag orders and seal records concerning litigation. These same corporations may require legally enforceable, signed confidentiality and non-disclosure agreements.³⁰ If they still cannot win, corporations may employ "SLAPP" suits against citizens.³¹ Corporations through their lobbyists have even obtained passage of "product disparagement" laws designed to stifle agricultural criticism.³²

Soley particularly focuses on the use of strategic lawsuits against public participation, "SLAPP" suits, and product disparagement laws in order to demonstrate that modern free speech stifling by private entities is alive and well. He explains that SLAPPs are civil suits without merit utilized for intimidation and designed to suppress criticism of business activities.³³ He claims that "[m]any corporations have filed frivolous, vexatious lawsuits, alleging copyright violations, patent infringement, defamation, business torts, process violations, civil rights violations, and a laundry list of other alleged injuries, not expecting to win the suits but seeking simply to silence critics."³⁴

Citing University of Denver College of Law Professors George W. Pring and Penelope Canan, the originators of the term SLAPP, Soley believes that "SLAPPs transform public debates in three major ways."³⁵ Formerly public controversies are converted into private legal disputes.³⁶ The dispute then enters the private legal forum instead of remaining in the public arena.³⁷ Finally, by entering the legal arena, a financial burden is shifted onto the defendants.³⁸

Suing for silence is not always necessary. Soley argues that sometimes the mere threat of a multi-million dollar lawsuit is enough to quiet critics. He states that many times companies bring SLAPP suits "expecting to drop them before they go to trial."³⁹ Corporations and other private entities compound this indignity by often requiring settlement to be contingent on signing a non-disclosure agreement that prevents the critic

29. *Id.* at 81.

30. *Id.* at 7-8.

31. *Id.* at 82.

32. *Id.*

33. *See id.* at 88.

34. *Id.*

35. *Id.* at 88-89.

36. *Id.* at 89.

37. *Id.*

38. *Id.*

39. *Id.* at 90.

from commenting on the case.⁴⁰ Soley justifiably points out that because many SLAPPs are filed against investigative media outlets, public discourse can be tremendously impacted.

Soley also provides numerous examples where SLAPPs are used by businesses against individuals or organizations. Noting that motions for summary judgment often fail in SLAPP suits, Soley explains that nineteen states have adopted anti-SLAPP laws with varying degrees of protection.⁴¹ He does a particularly good job of sorting out the various types of protections afforded and explaining the nuances of each approach.

Soley documents the agricultural industry's attempts to stifle free speech by lobbying for passage of so called agricultural disparagement laws.⁴² These laws were originally justified on the grounds that "false statements create huge losses for producers of perishable products, which decay and become worthless if not sold quickly."⁴³ He claims that these disparagement laws often require food critics to prove the veracity of their statements rather than requiring the plaintiffs to prove that such assertions are false.⁴⁴ This shifting of the burden of proof may then require the introduction of scientific evidence proving that the statement is accurate.⁴⁵ Such laws are often directly targeted at animal rights groups or consumer "food police" who want to alert the public to potentially troubling issues.⁴⁶ However, the extension of product disparagement laws to non-perishable industries, such as cattle raising, appears to be a slippery slope. Soley postulates that industries such as chemical, pharmaceutical, energy, and others may also want to lobby for passage of such laws to silence critics and protect their product sales.⁴⁷

With a warning reminiscent of Eisenhower's admonishment about the military-industrial complex,⁴⁸ Soley argues that businesses, industries, and politicians are all guilty of placing profits, or campaign contributions, ahead of the public welfare and the Constitution.⁴⁹ Indeed, they are willing to risk the public's health by silencing the debate.⁵⁰ Soley

40. *Id.* at 90-91.

41. *Id.* at 95.

42. *Id.* at 115-16.

43. *Id.* at 119.

44. *Id.* at 116-17.

45. *Id.* at 118.

46. *Id.* at 116.

47. *Id.* at 120.

48. Dwight D. Eisenhower, Eisenhower's Farewell Address to the Nation (Jan. 17, 1961), at <http://mcadams.posc.mu.edu/ike.htm>.

49. SOLEY, *supra* note 2, at 129.

50. *Id.*

views a possible solution as being the public financing of campaigns to remove the influence of big business lobbyists.⁵¹

However, the reader is left wondering what rights should businesses be afforded where their interests are concerned? For instance, should cigarette companies be banned from advertising their products because activists believe such advertising campaigns are targeted at children?⁵² Isn't this the stifling of free speech? And should corporations remain silent when activists lead product boycotts against them?⁵³ Glass company Corning Inc. lost a billion dollars in market capitalization in a single day after the local paper ran a story saying the company was in a "state of emergency."⁵⁴ It removed all of the newspaper's vending boxes from its property and deposited them in the newspaper's parking lot.⁵⁵ Did the newspaper have an inalienable right to sell its product on another party's property?

Soley's discussion is thorough but largely one sided. His argument that such disparagement laws are not truly designed to assist the family farmer or rancher but rather big business seems to discount the fact that such laws may directly impact the smaller rancher and farmer. Although his point may be overstated, it has merit. Undoubtedly, large commercial concerns and agricultural federations receive a tremendous benefit from these laws.

III. PROPERTY OVER SPEECH

One of Soley's major themes is that the places where free speech is protected are shrinking because corporate power is increasing and the influence of labor unions is declining.⁵⁶ Soley contends that the courts, and in particular decisions by the United States Supreme Court, have effectively constrained First Amendment free speech rights at malls and shopping centers.⁵⁷ By elevating commercial property owners' rights above individual's free speech rights, Soley demonstrates that the logical consequence is the current increase in common interest developments, or homeowner association governed communities, which limit constitutionally protected rights through the use of covenants, conditions, and restrictions known as "CC&Rs."⁵⁸

51. See *id.* at 133.

52. See Richard T. Kaplar, *An Irresponsible Approach to Free Speech*, at <http://median-institute.org/digest/97winter/editors/1.html> (last visited Nov. 4, 2002).

53. See Kenneth MacKendrick, *The Boycott Page*, *All Things New*, at http://www.scm-canada.org/atn/atn94/atn941_p5.html (last visited Nov. 4, 2002).

54. Glaberson, *supra* note 18.

55. *Id.*

56. SOLEY, *supra* note 2, at 135.

57. *Id.* at 136.

58. See *id.* at 173.

If there is one element of this book that Soley seems truly passionate about, it is that private shopping malls have encroached on the public sphere of free speech. He sets his argument's context with facts and figures concerning the growth of shopping malls.⁵⁹ In modern America, there is certainly no disputing that shopping malls are an important and pervasive component of our society.

What seems to really upset Soley is that shopping malls are frequently subsidized, directly or indirectly, by public tax dollars and represent themselves as being modern town squares. They often contain government functions such as police substations and post offices, and yet still feel they are "private property, where free speech may be curtailed."⁶⁰ He dutifully recites the line of federal court cases that support the stifling of political and labor protest and lays blame at the feet of conservative political ideology.⁶¹

However, it's not only the federal system that allows this contraction of free speech rights. Soley explains that while three states interpret state constitutions to recognize free speech rights in shopping malls, thirteen state supreme courts have in fact rejected "state constitutional protections for free speech in shopping malls."⁶² Perhaps just as worrying to Soley is that there is a trend for governments to abdicate accountability for traditional government services by privatizing them.⁶³ The concern is that if speech is protected from government intrusion but not private party intrusion, then merely replacing government oversight with private management creates a situation where free speech protection may be diminished. Schools are an example of this, and Soley states that such "privatization of the public sphere has substantially reduced the space available for public speech."⁶⁴

The conflict between governmental functions, such as protecting citizens' free speech rights and the capitalistic goal of making money, are increasingly common. Martin Wolf, Chief Economics Commentator for the United Kingdom's *Financial Times*, "warned that corporations may be encroaching on the realm of politics."⁶⁵ He went on to caution that corporations should "focus on the basics" and "[t]heir role is to be good

59. *Id.* at 141-42 (noting that in any given week 70% of the U.S. population shops at privately owned shopping centers and that privately owned shopping centers have increased from around 3000 in 1960 to over 40,000 today).

60. *Id.* at 144.

61. *See id.* at 151-52.

62. *Id.* at 160.

63. *Id.* at 151.

64. *Id.*

65. World Economic Forum, *Corporate Citizenship Is Not a Luxury* (Feb. 4, 2002), at <http://www.weforum.org/site/homepublic.nsf/Content/Corporate+Citizenship+%E2%80%9CIs+Not+a+Luxury%E2%80%9D>.

businesses, not to save the planet.”⁶⁶ Increasingly, this leads to a situation where, because business executives are not democratically elected, a question of accountability arises.⁶⁷

However, the privatization of the public sphere extends far beyond the commercial realm. Soley argues that the marked increase in common interest developments, where typically a homeowners association manages common areas such as parks and enforces regulations binding on its members, creates a situation where a private party is able to pass restrictions that, if passed by a municipal government, would be unconstitutional.⁶⁸ He makes a convincing argument. Private homeowners associations are able to act as pseudo-governments by passing and enforcing covenants, conditions, and restrictions limiting or prohibiting political yard signs, the flying of flags, the displaying of religious symbols, and the distribution of leaflets and campaign literature.⁶⁹ Soley concludes that what CC&Rs effectively do is “assure that people with different cultural outlooks cannot express themselves.”⁷⁰

However, Soley notes that in many instances these restrictions are one of the primary reasons that people want to live in such communities. Where he displays his bias is when he contends that Republicans, whose ideology seems completely opposed to such restrictions, populate these areas.⁷¹ Without citing any demographic figures to support this assertion, Soley comes across as having a partisan agenda, which detracts from his largely well reasoned work.⁷²

Where Soley’s work seems most debatable is how commercial advertisers impact news media, thereby creating media self-censorship.⁷³ Although he recites numerous instances where companies have withdrawn their advertising dollars because they did not like the content of a particular news story, or where media companies have not run stories because they did not want to upset advertisers, the real question is, “What is wrong with that?” The fact of the matter is that it is a company’s prerogative to spend its resources in the manner it sees most fit. Soley’s analysis comes across as displaying a bit of an entitlement mentality, where newsrooms should be able to collect advertiser’s money on one hand, while with the other operate with complete impunity from the laws of capitalism.

66. *Id.*

67. *Id.*

68. SOLEY, *supra* note 2, at 172.

69. *Id.* at 174-75.

70. *Id.* at 178.

71. *Id.*

72. In the interests of full disclosure, the reviewer is a registered Republican who lives in a covenant-controlled community.

73. SOLEY, *supra* note 2, at 213.

However, he makes a much more persuasive case when he notes that deregulation has allowed corporate conglomerates to acquire newspapers and broadcast media, while having other lines of business that are often the subject of media stories.⁷⁴ This inherent conflict of interest seems to create exactly the set of circumstances required to allow coercive censorship. Soley cites a number of examples, such as General Electric's ownership of NBC, that demonstrate the free speech chilling effect that having a conglomerate for parent owner can create.⁷⁵

CONCLUSION

Soley makes a solid case that market forces as applied through deregulation and privatization have, rather than increasing freedom of speech, in fact fostered greater censorship. His observations that the line blurring between public and private spheres has contributed to an expansion of stifled free speech are well documented. Soley's contribution to the free speech realm is intriguing because it shifts the discussion away from government suppression to the more pervasive but seemingly little noticed area of private censorship.

If his goal is to get people thinking about what free speech really represents, then he has succeeded. This book, although occasionally one sided and illustrating certain political biases, makes the reader consider the multitude of ways that private organizations help to suppress individual free speech. Soley's work is well worth the investment of a thoughtful read as the payback is a greater appreciation of how we all-too-easily acquiesce in surrendering our free speech.

74. *See id.* at 229-30.

75. *Id.* at 230.