

# Opening Dialogue

*Lee C. Bollinger & Geoffrey R. Stone*

## Lee C. Bollinger

To set the stage for the excellent essays that make up this volume on the future of free speech, let's begin where we often do when thinking together about the First Amendment: with some basic facts and fundamental observations about the constitutional command that "Congress shall make no law . . . abridging the freedom of speech, or of the press."<sup>1</sup>

Of course, in the United States, "free speech" is not only part of the constitutional Bill of Rights; it is also a cultural and social norm by which we choose to live. Several of the essays in this volume therefore take note of how the meaning and health of "free speech" depend both on judicial interpretations of the First Amendment and on how all citizens and institutions interpret and abide by the general principle. Still, in our highly legalized, and constitutionalized, national culture, it is only natural that the interpretation of the constitutional right drives both the public and the private spheres in which "free speech" operates.

To begin, here are several observations worthy of note for those not fully steeped in the First Amendment. First, the idea of a First Amendment right of free speech, as we understand it today, is a relatively recent invention. The Supreme Court's jurisprudence on the First Amendment dates back to only a little more than a century ago.<sup>2</sup> Although the First Amendment has been part of the Constitution since 1791, the Court did not begin interpreting its meaning until 1919, in cases arising out of World War I.<sup>3</sup> (To mark the centennial of that moment, in 2019, we convened a group of prominent scholars, judges, and lawyers to create a collection of provocative and insightful essays in a book we called *The Free Speech Century*.)<sup>4</sup>

Since 1919, there have been thousands of judicial decisions about "free speech" and "free press," which together constitute a massive and complex jurisprudence around the subject of the First Amendment. You and I are the professorial by-product of that development. When we began teaching as law professors in 1973, the First Amendment was merely one part of a conventional course on Constitutional Law. Within a few years, though, the Supreme Court's First Amendment jurisprudence became so dense and complex as it decided ever-more cases on these issues that law schools and constitutional law scholars thought it appropri-

ate to subdivide the field of constitutional law into separate, free-standing courses, one of the most important of which focused exclusively on the First Amendment.

Over the past century, the scope of protections afforded citizens under the First Amendment has ebbed and flowed, although for the most part it has expanded dramatically. At the very beginning, in 1919, in the context of the hysteria surrounding World War I and the Bolshevik Revolution, the U.S. government prosecuted and punished people who merely dissented from the government's prevailing views, especially about the war and the draft.<sup>5</sup> Looking back on that era today, it is surprising that the Supreme Court chose not to use the First Amendment to protect those who challenged the government's policies from often severe censorship. From the standpoint of how our nation now views the First Amendment, this was an inauspicious beginning indeed.

Over the next few decades, though, as the Court gradually came to understand its earlier failures, the scope of First Amendment protections deepened. Then, in the 1950s, with the rise of McCarthyism, the nation slipped back into a period of severe intolerance and, once again, the Supreme Court assented.<sup>6</sup> But the arrival of the civil rights era, along with national upheavals around the Vietnam War and other highly divisive issues, led the Court, which once again learned from its earlier mistakes, to embrace the rigorous and now bedrock interpretations of the freedoms of speech and press that have since defined our nation's approach to these fundamental principles – at least until the present.<sup>7</sup>

This general framework has several defining features. For example, speech advocating illegality is now protected by the Constitution unless serious criminal acts are imminent.<sup>8</sup> What is now called “hate speech” has today been held to be fully within the bounds of the First Amendment, as are falsehoods (especially falsehoods about public officials and figures, which are protected unless they are made with knowledge of the falsehood or with reckless disregard for the truth).<sup>9</sup> Indeed, the doctrines currently limiting government interference with public discussion of public issues are highly speech protective, and over the past half-century, the Supreme Court has created a constitutional framework for the First Amendment that is more protective of speech than that of any other nation in the world, and, in fact, in history.

Not all of these doctrines are universally accepted as “correct.” But that is the central point of the right to question and to criticize. That is precisely what the First Amendment is about.

The question now, though, is what will come of all this in the decades ahead. Knowing that our highly protective free speech jurisprudence is all quite recent, that it has ebbed and flowed over time, that it is often quite controversial, and that we are an outlier among nations, may lead one to ask whether, for better or for worse, we should prepare now for a significant retrenchment.

Although there are important issues internal to our current First Amendment jurisprudence on which mainstream conservatives and liberals often sharply dis-

agree (*Citizens United* is a good example), a fairly remarkable development of the last half-century is a general convergence of agreement about the basic framework of our free speech jurisprudence even among these often competing groups.<sup>10</sup> Our overall First Amendment jurisprudence does not today pose the often radical disagreement between liberals and conservatives that characterizes the Supreme Court's rulings about such issues as abortion, affirmative action, and sexual orientation. Hopefully, the earlier periods in our history during which our nation and our courts too-often succumbed to intolerance in their suppression of free speech will continue to stand as lessons rather than as temptations.

The authors in this volume take stock of where we are and where we might be headed. The problem is that the United States is not at a "normal" point in our history. What I have just described as a sort of classic framing of free speech in America is potentially thrown into question by the unnerving current state of our politics and by the continued viability of Donald Trump as a presidential candidate. Trump's return to the White House could once again hand the nation's highest office over to someone who increasingly sounds, and acts, like the totalitarian figures who defined the European tragedy of the early to mid-twentieth century. How might that affect our nation's current commitment to the core principles of free speech, and how should we address this potential threat to our democracy should it come to pass?

Before handing this over to you, Geof, let me note one other truly historical change we are currently undergoing and what consequences this change might pose for the future of free speech. Again, going back to when you and I began as First Amendment scholars, one major question was how to address the risk of monopolization of the media in this context. This was true first in the world of print media and then in the next technology of communications, broadcasting. This problem resulted in a bifurcated approach, both in public policy and in Supreme Court precedents, which forbade government regulation of print media but allowed it in the realm of broadcasting.<sup>11</sup>

Today, the new communications technology of the internet and especially its social media platforms have produced a public sphere governed by private business monopolies with a financial interest in keeping their content decisions unregulated by government. Moreover, state and nonstate actors are continuously discovering new ways to manipulate the platforms to promote their interests, suppress their opposition, and deceive the public, including through AI-supported deepfake technologies. This is a profoundly complex and important state of affairs requiring that we consider just how long this arrangement should last, what consequences might follow from doing nothing, and what "remedies," if any, might be preferable to leaving it all largely unregulated. Not surprisingly, many of our authors in this volume address these challenges.

## **Geoffrey R. Stone**

Wow, that's quite a start, Lee. Let me go back to the beginning of this project. As you've already made clear, and as we both well know, a nation's guarantee of freedom of speech and of the press is always perilous. It is important that our nation not take those rights for granted. They are, after all, essential both to our democracy and to our individual autonomy as free people. It is therefore critical that we be aware of the importance of those freedoms, of their vulnerability, and of how much we rely on them to be who we are, both as individuals and as a nation.

Are we currently in a moment of peril? I would say "no." But we are in a moment of risk. The concept of freedom of speech and of the press seems great in the abstract. But when it comes to strong disagreements among citizens, there is an almost inevitable inclination to believe that "I am right and you are wrong" and that "if I let you say what you want, that will endanger me, my values, my children, and my nation. So shut the hell up!"

It is important to recognize that resisting that response does not come naturally. To the contrary, tolerance and open-mindedness must be learned and practiced and constantly celebrated if we are to have a free and open society. If we think about our own history and look around the world today, it should be obvious that this set of values – both in individuals and in our nation – should never be taken for granted. It is something we need constantly to practice and to encourage.

Of course, you (that is the reader, not you, Lee) are completely free to disagree with this and to call me an idiot. But you should not be free to shut me up. After all, when all is said and done, I might be right and you might be wrong, and it is the fundamental understanding of potentially misplaced "certainty" that rests at the very core of our current free speech jurisprudence.

In constructing this volume, we brought together some of our nation's most insightful thinkers – from many different perspectives – about these and other issues around freedom of expression. These issues are not easy, except when stated in the abstract, as I did above. But how should these values of freedom of speech, freedom of the press, and freedom of inquiry play out in the current world and in the world of the future?

How should we deal with constantly changing technology such as social media and artificial intelligence? Of course, at least in the abstract, this is not a "new" challenge. After all, as you noted, Lee, we have had to deal in the past with the inventions of the printing press, telegraph, movies, telephones, radio, television, videos, cable, and so on. Are social media and artificial intelligence any different? What challenges, if any, do they pose that we haven't faced in the past?

And how should we deal with speech that many people find offensive, hateful, and dangerous? Are the solutions "we" reached over the past half-century still realistic and appropriate? Are things different today because of social media? Have

people become less tolerant of what they deem to be “offensive” speech than they were in the past? Have they become more aggressive in using “offensive” speech than in the past? What is best for our democracy and for our commitment to human dignity?

How do changes in modern technology affect our national security? Are we more vulnerable to potentially dangerous surveillance than in the past? Should the decisions we reached half a century ago about national security remain in place today? Recall the Pentagon Papers decision.<sup>12</sup>

And what about issues of education, both for children and for students in colleges and universities? Why have things gotten so much more explosive in recent years? How do we protect the core values of the educational process at a time when parents, children, government officials, teachers, professors, and college students often now have sharply different views about the proper goals of education, of the nature of the educational environment, and of the importance of tolerating speech that they find hurtful, offensive, wrong-headed, and destructive?

How might we address increasingly successful efforts to shield students from ideas and information that they, their parents, their teachers, their administrators, and public officials want to suppress, either because they believe those ideas to be hurtful or simply wrong? To what extent would successful efforts to suppress the expression of certain ideas and opinions benefit or damage the educational process and, ultimately, our democracy? What are the arguments on all sides of these issues?

Another important issue concerns the opportunities available to individuals to have the freedom to speak effectively. We are well beyond the world of leafleting and giving talks in public parks. How do we ensure that individuals from varying experiences and perspectives today and in the future have reasonable opportunities to express their views to others? To what extent in today’s world do the rich and powerful (including corporations) get to dominate public discourse, and is there any way to create a more equal political and expressive environment in order to protect the fundamental democratic principles of free speech for all and, ultimately, of “one person, one vote”?

I could go on and on and on, but if you take a look at the table of contents and the wide array of essays in this volume, you’ll get the picture.

We very much hope that this collection of widely varying perspectives from a range of eminent scholars will both challenge you and lead you to talk and argue openly with friends and foes about our past, our present, and our future. What, after all, are the goals of allowing free and open discourse and disagreement, even when such a bold commitment to free speech can have significant negative as well as positive effects? As always, the stakes are, indeed, high.

## **Bollinger**

I want to pick up on your first observations about how we need to think about free speech and press: in particular, with how counterintuitive it is; how in the actual lived experience our inclination is to censor, not to be tolerant; and how it takes repeated practice and determination to live in a society that embraces the principle. This is such an important starting point. And, as you and I both know well, it was articulated so beautifully and powerfully by the great Justice Oliver Wendell Holmes, Jr., in that seminal judicial period of 1919–1920, when he first began, though in dissent, to express the reasons for giving the kind of meaning to the First Amendment that we now hold dear. These were his famous words:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment.<sup>13</sup>

There are so many things to say about the significance of this profound understanding of human nature. It grounds the constitutional meaning in a recognition that, as people, we are prone to a bad impulse that can interfere not only with discussion necessary for reaching truth, as Holmes (and others, notably John Stuart Mill) observed, but also for building a self-governing democracy, or for achieving a good life, or for any number of decisions and choices we must make as we struggle to work with others who do not see things as we do. And it's an impulse that may lead to bad speech as well as bad censorship of speech, which leads us to the further point (one also to be found in many of the essays in this volume) that the principles of “free speech” and “free press” are more than just limits on the reach of government censorship of speech: they are presented through the now elaborate jurisprudence, and in our ongoing discussions, as venues for understanding the ends of politics, social engagement, and life itself.

But, speaking less philosophically, and perhaps grandiosely, there are certainly very practical lessons in this fundamental observation. Since we are not born believing in free speech, since it is not our natural state and we must work at it, it follows that every new generation must go through some process of acquiring

both the realization that this is a better way to live, and that the capacity to live this way was hard-won, when the going gets tough. Thus, we might not worry quite so much, or be quite so shocked, when we find a new generation lacking in full appreciation of the fundamental principles of the First Amendment. And we might profitably spend more time thinking about how best to build that commitment. This should make us even more focused on how the courts, and especially the Supreme Court, talk about the First Amendment in the cases that come before them. And, perhaps most important of all, we should be all the more insistent that our educational system, in all its parts, from the beginning all the way through college and graduate school, carry the responsibility of providing both the educational opportunities and institutional behavior that will help facilitate this critical process.

## Stone

So true it is, or at least we think so. But who knows for sure? Let us now turn to the brilliant essays in this volume that explore, at a moment of great risk, these and other issues central to our democracy, our culture, and our hopefully respectful approach to disagreement, debate, and uncertainty – even though free speech is not without danger.

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ENDNOTES

- <sup>1</sup> U.S. Constitution, Amendment I.
- <sup>2</sup> See, for example, *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); and *Abrams v. United States*, 250 U.S. 616 (1919).
- <sup>3</sup> *Ibid.*
- <sup>4</sup> Geoffrey R. Stone and Lee C. Bollinger, eds., *The Free Speech Century* (Oxford: Oxford University Press, 2018).
- <sup>5</sup> See *Schenck v. United States*, 249 U.S. (1919); *Debs v. United States*, 249 U.S. (1919); and *Abrams v. United States*, 250 U.S. (1919).
- <sup>6</sup> See, for example, *Dennis v. United States*, 341 U.S. 494 (1951); and *Barenblatt v. United States*, 360 U.S. 109 (1959).
- <sup>7</sup> See, for example, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *New York Times Co. v. United States*, 403 U.S. 713 (1971); and *Cohen v. California*, 403 U.S. 15 (1971).
- <sup>8</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
- <sup>9</sup> *Matal v. Tam*, 582 U.S. 218 (2017) (protecting hate speech); and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (protecting false statements about public officials unless those false statements were made with knowledge of their falsity or reckless disregard for the truth).
- <sup>10</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).
- <sup>11</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (permitting the regulation of public broadcasting); and *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (holding that a statute that regulated the content of a newspaper was unconstitutional).
- <sup>12</sup> *New York Times Co. v. United States*, 403 U.S. (1971).
- <sup>13</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Oliver Wendell Holmes, Jr., dissenting).