11

US Constitutional First Amendment Jurisprudence: A Historical Perspective

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The focus of any discussion concerning free expression in a convocation like this one, devoted as it is to human rights, should be upon the development of doctrines that promote tolerance of all viewpoints and of speech that advances self governance. I hope that in the ensuing discussion we can explore these themes.

I am a generalist. My jurisdiction is at the appellate level and spans civil, criminal and administrative law. I face cases involving labour law, discrimination, water rights, Native American land claims, prisoners' rights, anti-trust law, and *habeas corpus* in death penalty cases, just to mention a few of the areas of my jurisdiction. First Amendment and libel law are small morsels on my plate. So I approach the topic not with the expertise of a specialist but rather as an observer of general trends and as only an occasional contributor to the decisional process in the area of freedom of expression.

With that disclaimer, let me speak first about the chequered history of the United States in this area. To do so may help us to work through and to understand the inevitable tensions that today cloud the ideal of free speech in an open society.

The First Amendment to the Constitution of the United States[1] did not have an immaculate conception. It had antecedents and an unusual conception and birth. The document produced at the Constitutional Convention held in Philadelphia in 1787 included no guarantees of freedom of speech or religion, let alone any protection for other human rights. The omission of these matters, however, was not because the framers had no concept of their importance. After all, at the core of many of the early settlements were refugees from religious persecution. (Little matter that many came to impose their own brand of intolerance on others.)

But as early as 1641 the Massachusetts General Court in a formal way proclaimed a broad statement of American liberties, which included a right to petition and a due process

1 The First Amendment states: "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."

clause. In 1663 Rhode Island granted religious freedom. In 1776 Virginia's House of Burgesses passed the Virginia Declaration of Rights - the first bill of rights to be included in a state constitution in America. And, of course, the Declaration of Independence was proclaimed on 4 July 1776.

Why, then, no Bill of Rights in our original Constitution? Most of the framers of the Constitution clearly believed in some such rights, but the range of powers, hard bargained for, vested in the new federal government was so very limited - only specifically granted enumerated powers - that it seemed to pose no threat to individual liberty. The perceived threats to liberty were from state laws and state government. Nonetheless, paranoia among those who saw a danger in a central government exacted a promise: if the states ratified the Constitution as drafted, the first Congress would be asked to adopt amendments constituting a bill of rights. The amendments proposed by James Madison, adopted by Congress and ratified by the requisite three-quarters of the states in 1791, were simply "belts and suspenders" limitations on the already limited powers of the federal government. A footnote to this history: it was not until 1941 that Connecticut, Georgia and Massachusetts finally ratified the Bill of Rights.

Since the restrictions were only upon the federal government, not upon the separate states, it was easy to paper over the differences as the states variously enforced their own perceptions of individual rights. Massachusetts, for example, could jail Baptists for protesting publicly and refusing to pay taxes to support the Congregational Church; South Carolina could persist in a state-established Protestant religion. A prohibition against a federal establishment of religion thus posed no threat to the individual states. At the same time, the views of the likes of Thomas Jefferson and other rationalists, who sought to avoid the prospect of a national religion, were thus accommodated.

The backdrop for freedom of speech and the press included an important assumption of the day: the common law protection of speech and press was only as against prior restraint upon publication; it spoke not to punishment after publication. Thus the law of libel and slander was thought to be a matter for the states - not at all involved in the protection of speech and press.

Did the newly adopted First Amendment override this assumption? The opportunity for an answer to this question arose almost immediately, when in 1798 the Federalist Congress passed the Sedition Act. This law criminalized the uttering of false, scandalous, or malicious writing against the government with intent to bring the government into contempt or disrepute or to stir up sedition.

But no Supreme Court test of this law ever came to pass. The Supreme Court in those days heard only about a dozen cases a year, for it was inadequately funded and much of the time of the individual justices was occupied in literally riding circuit about the country, hearing cases at the trial level. And the Act expired by its own terms in 1801.

It was fortunate, perhaps, that no test case reached the Court, for the Court might well have sustained the legislation.

During the statute's short life there were, however, more than two dozen arrests, a dozen prosecutions, and ten convictions for criticizing the government's conduct during the anti-French hysteria. When Jefferson took office in 1801 he pardoned the seditionists. Thus the potential first great challenge to the clause "Congress shall make no law ..." never was. And the Supreme Court remained quiescent on speech and press issues for a remarkably long time thereafter.

The Fourteenth Amendment, passed by the Congress in the aftermath of the Civil War and ratified in 1868, imposed for the first time broad, sweeping limitations upon the states. It provided, *inter alia*, "... nor shall any State deprive any person of life, liberty, or property, without due process of law".

Essentially, no court-made development of First Amendment law had occurred prior to the Civil War and it was a long while after the war before the implications of the Fourteenth Amendment's effect on First Amendment jurisprudence emerged. The only contemporaneous use was President Lincoln's reliance during the war, I believe, on the First Amendment in ordering two Illinois newspapers reopened after both had been shut down by Union General Ambrose Burnside for publishing "disloyal and incendiary sentiments".

It is important to note, too, that John Stuart Mill's general essay "On Liberty of Thought and Discussion", published in 1859, in which he advanced his notion of the "market place of ideas", ultimately had a profound effect on American First Amendment jurisprudence, becoming the philosophical underpinning of Oliver Wendell Holmes's later classic dissents urging the importance of freedom of speech. But these dissents did not come until the early twentieth century. The Supreme Court was not even a "player in the field" until well into that century.

The United States has a short history compared with many countries of the world, but its citizens have even shorter memories. Today we tend to think of freedom of expression and the First Amendment as inseparable and always so, but in fact we did not move beyond common law ideas of freedom of the press until well into the twentieth century. Although one was free to publish, punishment could follow. Alexander Hamilton described freedom of the press as consisting of the right to publish, with impunity, the truth so long as it was for good motives and for justifiable ends, though it may reflect on government, magistrate or individual. Few in government, of course, would think criticism of national policy could ever be well motivated or for justifiable ends.

Our modern law defining freedom of expression is a post-World War I phenomenon. The persistent myths that colonial America was a society that cherished freedom of expression, and that colonists sought religious and political freedom for all, have been debunked by reliable historians. Americans did not think in terms of freedom of thought and expression

for the other fellow who expressed hated ideas or ideas that were strangers to his own. Tolerance was not an American virtue.

In the early 1900s, when immigration was high, new ideas - socialism, syndicalism, and other "foreign notions" - were emerging. To compound the unease, war clouds were gathering and popular fervour for laws to silence radicals and pacifists reached high pitch. Congress saw no First Amendment impediment to its passage of the 1917 Espionage Act, later strengthened to make it a crime "to use language intended to bring the form of government of the United States into contempt, scorn, contumely and disrepute" or to talk about the government in terms "disloyal, scurrilous and abusive". The *New York Times* would have raised the stakes even higher than criminal sanction - it editorialized that agitators should also lose their civil rights. Hundreds of newspapers came under investigation for suspected seditious writing. Editors were arrested. Foreign-language newspapers were required to print translations. Later, during World War II the Smith Act, another anti-sedition act, was passed by the Congress.

It is against this backdrop that our Supreme Court cases should be reviewed.

I begin with the opinion in *Schenck v United States*,[2] written by Justice Holmes - famous because of the first articulation of the "clear and present danger" test but, in First Amendment jurisprudence, infamous for upholding the espionage and sedition laws. Dr Elizabeth Baer, Charles Schenck, and members of the Socialist Party were accused of conspiring to disrupt the American war effort, in particular to obstruct the draft. Schenck was Secretary of the Socialist Party and Baer acted as recording secretary for a meeting at which it was agreed to distribute 15,000 leaflets (yet to be written and printed) to men who had passed the exemption boards. Circulars were later printed and stacked in the Party's office for distribution. There is no record of who received them, how many were distributed, or what if any reaction they produced. Briefly, the circulars bore the title "Long Live the Constitution of the United States, Wake Up, America, Your Liberties are in Danger". The text argued vigorously against the draft and urged the reader to join the Socialist Party and sign a petition urging Congress to repeal the draft laws. Holmes's bias towards defending the legitimacy of any legislative action - seen by him as the will of the people no matter how ill-advised - led him without a blink to accept Congress's view that in wartime the dissemination of views opposing war and, potentially, possibly disruption of the war effort posed a clear and present danger. Holmes followed *Schenck* close on with two other opinions, *Frohwerk v United States*[3] and *Debs v United States*,[4] decided the same day in 1919. In both, Holmes found clear and present danger during wartime in socialism and pacifist efforts.

Ironically, within eight months Holmes joined Brandeis in dissent in another trilogy of sedition cases. Holmes wrote his famous dissent in *Abrams v United States*,[5] a piece that has led many to see Holmes as a great champion of free speech. For the first time, it seems, in marked contrast to his majority opinion in *Schenck*,[6] he saw the prosecution for the expression of opinion in constitutional terms. I quote from his dissent:

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2 249 US 47 (1919).

3 249 US 204 (1919).

4 249 US 211 (1919).

5 250 US 616 (1919).

6 *Supra*, n 2.

> "... 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.... we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force.... Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law ... abridging the freedom of speech'."

There we have it. At last, expressly, Holmes advances the proposition that the First Amendment is a nearly absolute prohibition against government interference with speech, far more restrictive upon government than the Blackstonian concepts expounded in an earlier day by Alexander Hamilton (that speech is protected as long as it is truthful, spoken with good motives and for justifiable ends). The majority of the Court, however, consistent with this Hamiltonian view, remained content with the formulation in *Schenck* and read the notion of immediate evils as the mere "tendency" of speech to cause or incite illegal actions.

At this juncture let us pause a moment. These words of Holmes - stirring, provocative, wise as they are - were in dissent. Only in time would they be put into practice. At the time they were written we as a nation had not - neither in our highest court, in our legislatures, nor in our hearts - yet become true believers in the efficacy of free expression.

But the dialogue had begun. By 1937 Chief Justice Charles Evans Hughes, in *De Jonge v Oregon*,[7] wrote:

> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion .... Therein lies the security of the Republic, the very foundation of constitutional government."

Yes. The dialogue had begun, and it will have no finish. Between 1917 and 1976 the Congress of the United States passed 46 laws relating to espionage and sabotage. The Smith Act, an anti-sedition act, still remains on the books.

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7 299 US 353 (1937).

In our public acts we continue to exhibit fear of exposure to "harmful" ideas - that is, ideas with which we disagree. For example, we allow the Immigration Service to deny entry to the United States, even temporarily, to people with leftist leanings. But, all in all, our jurisprudence has gradually developed favourably in support of a free speech and press.

Through the 1920s a majority of the justices continued to reject the views expressed by Holmes and Brandeis. They refused to consider the kind or degree of the threatened evil if the speech was in a class found by the legislature to be dangerous. At the same time, the same court was having no difficulty second-guessing legislatures in the field of economics, business and labour, by invalidating minimum wage laws and other laws seen as infringing on the freedom to contract. Civil libertarians, opposing judicial activism in these areas, more or less wanted more activism in striking down laws that limited freedom of speech. Justice Stone, in a famous footnote in *Carolene Products*,[8] suggested a way out: legislation restricting the dissemination of information or interfering with political activity should be subjected to more exacting judicial scrutiny than most other types of legislation. History supported this view. During the congressional debate on the Bill of Rights, Madison observed that if the amendments were to be incorporated into the Constitution, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive".

The Court had much changed its composition by the late 1930s, when it finally adopted the strict Holmes-Brandeis "clear and present danger" test.

Though much later, the *Pentagon Papers*[9] case is a good illustration of the changed attitude. These papers consisted of certain government documents pertaining to the conduct of the Vietnam War. Despite strong forebodings from the government that death of soldiers, destruction of alliances, and other serious consequences would result from the publication of the papers, the Court refused to enjoin publication. Of course, one must not lose sight of the fact that this was a prior restraint case. Nonetheless, the point can validly be made that a massive attitudinal change had taken place.

Let me circle back. I have quoted from Chief Justice Hughes's words from *De Jonge v Oregon*.[10] In that 1937 case the Court overturned the conviction of a Communist Party organizer for leading a longshoremen's strike, holding that peaceable assembly for lawful discussion cannot be made criminal. In 1940 in *Cantwell v Connecticut*,[11] the Court held that Jehovah's Witnesses could not be banned from haranguing against the Catholic Church on street corners. The Court was explicit for the first time that the due process clause of the Fourteenth Amendment bound the states to honour the religious freedom provisions of the First Amendment.

The 1950s and 1960s brought ambiguities. The "clear and present danger" test in the Communist Party membership cases gave way to a looser balancing test. At the height of Cold War hysteria and McCarthy witch-hunting the "balance" was lost to hysteria in *Dennis v*

8 *United States v Carolene Products Co*, 304 US 144 (1938).

9 *New York Times Co v United States*, 403 US 713 (1971).

10 *Supra*, n 7.

11 310 US 296 (1940).

United States.[12] The Court there upheld the constitutionality of the Smith Act, to convict Dennis and others for membership in an organization, the Communist Party, that advocated the violent overthrow of the government. It also upheld the conviction of Barenblatt, a college professor who refused to answer questions before the House UnAmerican Activities Committee.

In *O'Brien*[13] the Court upheld the conviction of an anti-war protester for burning draft cards. Here the Court held that the effect on free speech was minimal - the harm was the destruction of government records.

But two years later, in 1969, in *Tinker*,[14] the Court held that students must be allowed to wear black armbands to school to protest the Vietnam War. And that same year in *Brandenburg*[15] the Court overturned the conviction of a local Ku Klux Klan leader for violation of a state syndicalism law. The Court in expansive language stated that advocacy of law violation is punishable only if the advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

In the *Skokie*[16] case (Skokie is a small town in Illinois), the Seventh Circuit upheld the right of Nazi Party members to parade through the streets of a predominantly Jewish community (the Supreme Court denied *certiorari*), and in *Texas v Johnson*[17] Justice Brennan, writing for the Court, ruled that burning the American flag in protest is a protected form of speech. My former colleague, now Justice Kennedy, joined in concurrence.

In this flying trip through First Amendment law I have concentrated on cases for the most part posing some sort of threat to or criticism of government. But while to my mind these concerns are of paramount importance and particularly germane to the concerns of this conference, I want to talk briefly about the many other types of cases and the ways in which free expression comes into conflict with other values.

Our Supreme Court has neatly read obscenity out of First Amendment protection. It is not entitled to First Amendment protection at all. Of course, the rub is in defining obscenity beyond the simplistic "I know it when I see it".

Child pornography has been a special focus of law enforcement against both its makers and consumers, and has engaged the Court's attention as well. Bookstores are under a particular chill because of laws that purportedly would allow confiscation of their whole stock if any "unlawful" materials are found for sale on the premises.

Television, cable, radio, and now Internet websites are subject to child-protection laws and regulations that currently are under challenge. In 1996, in a very convoluted set of opinions, the Supreme Court sustained in part and invalidated in part requirements that cable operators in essence segregate "patently offensive programmes" and make them available only on request. Some justices found "proper balancing", others (Justices Kennedy

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12 341 US 494 (1951).

13 *United States v O'Brien*, 391 US 367 (1968).

14 *Tinker v Des Moines Indep Community School Dist*, 393 US 503 (1969).

15 *Brandenburg v Ohio*, 395 US 444 (1969).

16 *Collin v Smith*, 578 F 2d 1197 (7th Cir), cert denied 439 US 916 (1978).

17 491 US 397 (1984).

and Ginsburg) would strike down the law in its entirety, noting that "affording protection to speech unpopular or distasteful is the central achievement of our First Amendment jurisprudence".[18]

Defamation law throughout its evolution in our jurisprudence has tended to cast the balance in favour of the First Amendment. *New York Times v Sullivan*[19] is, of course, the seminal case. Despite the wrenching harm that can come to a defamed individual, our courts give no protection to a public figure no matter how libellous - untrue and scurrilous - the material, unless he or she can prove it was published with actual malice (that the statement was made with the knowledge that it was false, or with reckless disregard as to whether it was false or not).

Rights of privacy, too, are in tension with First Amendment values. Statements about an individual may be true but involve matters so intimate that the world at large should not be privy to the information. Our courts have tended to consider a variety of factors - the newsworthiness, the "shock-the-conscience" test, the status of the plaintiff. The tendency, however, seems to be to give the edge to free expression at the expense of suffering to the individual.

Commercial speech, once thought worthy of little protection, has achieve an almost exalted status. In 1996, Justice Stevens for a majority of the Court stated that "blanket bans" on truthful, non-misleading commercial speech that are "unrelated to the preservation of a fair bargaining process" are reviewed with "special care". He noted such bans are "particularly dangerous" because they foreclose dissemination of important information. The Court confessed error and admitted having wrongly decided *Posadas de Puerto Rico*,[20] which had upheld a Puerto Rican ban on casino advertising. The Court emphasized that, to withstand scrutiny, any regulation must advance the asserted government interest to a "material degree".[21]

The Supreme Court has looked at the free speech rights of secondary school students in public schools - those are students in our state educational system under the age of 18. A panel of judges in the Ninth Circuit had upheld the right of student speakers to express themselves, albeit somewhat vulgarly, in arguing for their social views in a school sponsored assembly. The Supreme Court reversed, holding that the First Amendment must give way to the school principal's sense of decorum and to the need to maintain school discipline. Suspension from school did not violate the students' First Amendment rights.

The right to engage in hate speech or to use degrading race or sex epithets has arisen particularly in the context of speech codes on university campuses. I am not aware of any cases yet headed towards the Supreme Court.

The Court recently granted *certiorari* in a case from the Ninth Circuit in which the court had held unconstitutional under the federal Constitution a provision in the Constitution of the State of Arizona that pronounced English the official language of the State of Arizona

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18 *Denver Area Educational Telecommunications Consortium Inc v FCC*, 116 S Ct 2374 (1996).

19 376 US 254 (1964).

20 *Posadas de Puerto Rico Assoc v Tourism Co of Puerto Rico*, 478 US 328 (1986).

21 *44 Liquormart Inc v Rhode Island*, 116 S Ct 1495 (1996).

and required that all business conducted by its employees be conducted in English. In essence, the court had found an intolerable burden on speech a measure that foreclosed communication by and with Arizona's Spanish-speaking population - a substantial segment in Arizona.

I have not touched on our many freedom of religion cases. Let me say only that the trend seems to be, under one rationale or another, to relax the once-rigid interpretations of the Establishment Clause's separation of church and state, in order to allow financial and other support to parochial schools and to allow use by religious groups of public facilities for meetings and the like, on an equal footing with secular groups. On the other hand, the Supreme Court, in interpreting the Free Exercise of Religion Clause, has adhered strictly to the prohibition against prayer in schools. The Court has been very protective of the individual's right to practise his or her religion.

The Court has not embraced the notion that the right to hear is a right independent of the right to speak. However, legislatively the concept is embodied in the federal Freedom of Information Act, which grants the public access, without proof of need or reason, to all government documents except those protected by privacy or security concerns. At the state and local level there exist many open-meetings laws which require all deliberation and decision-making to take place in regularly scheduled meetings to which the public has access.

Let me close as I opened - with one simple, basic truth: free expression is essential to a free people in an open, tolerant and democratic society.