



Future Challenges to Freedom of Expression

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I am honored and pleased to be able to address you today on CELE's (Centro de Estudios en Libertad de Expresión y Acceso a la Información) 10th anniversary event. You have done so much to advance the cause of freedom of expression, here and throughout Latin America, that anyone who cares about that issue can only feel enthusiasm on a day like today.

Not to be carried away, however, you have asked me to speak about the challenges that will be facing freedom of expression in the next decade. I have accepted that assignment in what may be a highly parochial spirit. Because I do not feel competent to speak about freedom of speech in Latin America, I will instead discuss the greatest single threat today to freedom of expression in the United States. But this threat is important to comprehend, first, because it reveals a great deal about the inherent structure of the right of freedom of speech, that may have pressing relevance to challenges everywhere; and, second, because in the area of freedom of speech what happens in the United States poses a threat to all jurisprudence everywhere. We are, in certain respect, a highly contagious country.

I.

Let me begin with some history about the development of freedom of speech in the United States. I'm sure that you all know that our First Amendment was ratified in 1791, but I'm guessing that you probably do not know that courts played virtually no role in protecting free speech rights before the 1930s. As late as 1907, Justice Oliver Wendell Holmes could easily summarize the dominant doctrinal view of the First Amendment, which is that its "main purpose" was to prevent "all such previous restraints upon publications as had been practised by other governments," and not to prohibit "the subsequent punishment of such as may be deemed contrary to the public welfare."¹

So you make any speech criminal, and the First Amendment would have nothing to say about it. Courts would only step in to prevent prior restraints. This is the view of freedom of speech that Blackstone had in in the 18th

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¹ *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (Holmes, J.). Even as late as 1915, Harlan Fiske Stone, the future author of footnote four of *Carolene Products*, could summarize "the more important" aspects of the Bill of Rights as including "freedom of religious worship, the right peaceably to assemble, the right to bear arms, the right to be free from unreasonable searches and seizures, the right to a speedy trial by jury, the right not to be compelled to testify against oneself in a criminal trial, the right not to be deprived of life, liberty, or property without due process of law, and the like." HARLAN F. STONE, *LAW AND ITS ADMINISTRATION* 140 (1915). It is remarkable that in this long list Stone does not even mention freedom of expression.

century, and that our First Amendment was understood to incorporate by reference.

Holmes' narrow view of the First Amendment changed at the beginning of the 20th Century. Why it did so is quite an interesting, complicated, and important story. Basically our change in constitutional doctrine reflected an altered understanding of the nature of self-government.² At the end of the 19th century, Americans thought of democracy as the rule of representative political parties, somewhat the way that the UK imagines self-government as Parliamentary sovereignty mediated by political parties.

During the progressive era, however, political parties were discredited in the United States, and the nation moved toward direct democracy through institutions like the referendum, the initiative, the recall, the direct primary, the direct popular election of senators (before 1913 they were elected by state legislatures), and so on. As a consequence of this profound change in our understanding of the nature of self-government, the nation began to equate democracy with what progressives called "the organized sway of public opinion."³

The efforts of the Woodrow Wilson administration to control public opinion by prosecuting those opposed to World War I prompted American jurists to rethink the role of courts in protecting the speech necessary to form public opinion. As the great judge Learned Hand wrote in 1920 to his friend Zechariah Chafee, the Harvard Law Professor who virtually invented the idea of judicial protections for freedom of speech, "any State which professes to be controlled by public opinion, cannot take sides against any opinion except that which must express itself in the violation of law. On the contrary, it must regard all other expression of opinion as tolerable, if not good."⁴

When the Supreme Court at last began to protect First Amendment rights in the 1930s, it explicitly theorized First Amendment rights in terms of this political value of self-government. In the early and decisive case of *Stromberg v. California*, for example, the Court proclaimed that "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."⁵

A decade later the magnificent opinion by Justice Roberts in *Thornhill v. Alabama* affirmed that "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government."⁶

² ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* (2014).

³ CHARLES HORTON COOLEY, *SOCIAL ORGANIZATION: A STUDY OF THE LARGER MIND* 118 (1956).

⁴ Letter from Learned Hand to Zechariah Chafee, Jr., Jan. 8, 1920 (on file in the Chafee Papers, Box 4, Folder 20, Harvard Law Library, Treasure Room), as reprinted in Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 *STAN. L. REV.* 719, 764-766 (1975).

⁵ *Stromberg v. California*, 283 U.S. 359, 369 (1931).

⁶ *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

II.

I cannot stress too much the profound importance of the history that I've just recounted for you. Freedom of speech became a judicially protected right in the United States in order to serve a very specific purpose—to permit freedom to participate in the formation of that public opinion which, as Learned Hand famously said, “is the final source of government in a democratic state.”⁷ We never protected expression merely because it was speech. Judicial protections for freedom of expression were therefore always purposive—and that purpose was expressly connected to the facilitation of democratic self-governance.

When our courts developed essential rules of First Amendment doctrine, they did so with this purpose in mind. Our FA now contains innumerable rules, but here are three such rules that are essential to modern First Amendment jurisprudence:

Rule 1: “It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination.”⁸

Rule 2: “We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a ‘false’ idea. As Justice Holmes wrote, ‘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...’”⁹

Rule 3: “‘It is. . . a basic First Amendment principle that ‘freedom of speech prohibits the government from telling people what they must say.’ . . . ‘At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.’”¹⁰ “‘The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas. . . There is necessarily. . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.’”¹¹

⁷ *Masses*, 244 F. at 540

⁸ *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819, 828-29 (1995). See *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226 (2015) (The state “‘has no power to restrict expression because of its message, its ideas, its subject matter, or its content.’ Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”).

⁹ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988). See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1984); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 284 (1974).

¹⁰ *Agency for Intern. Development v. Alliance for Open Society Intern., Inc.*, 570 U.S. 205, 213 (2013) (quoting *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994)).

¹¹ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (quoting *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255 (1968)). “There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.” *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988). “Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views.” *United States v. United Foods*, 533 U.S. 405, 410 (2001). See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

First Amendment doctrine incorporates these three very stringent rules because they enable the First Amendment to serve “as the guardian of our democracy.”¹² The First Amendment underwrites democratic legitimacy insofar as we are free to influence public opinion and insofar as we believe that the state is responsive to public opinion.¹³ If these two conditions hold, we can believe that our government is also potentially responsive to us.¹⁴ The three essential rules of First Amendment jurisprudence are designed to safeguard the first of these two conditions.

For this reason, the three essential doctrinal rules I have described apply to the set of communicative acts which we deem necessary for the formation of public opinion. I shall call this set “public discourse.” In the context of public discourse, the rule against content discrimination ensures that persons set the agenda for government action rather than the reverse. The state cannot through content or viewpoint discrimination rule out topics or perspectives that persons wish to place on the national agenda.

The rule establishing the equality of ideas stands for the proposition that every democratic citizen has an equal right to influence the contents of public opinion. As John Rawls once put it, in public debate “there are no experts: a philosopher has no more authority than other citizens.”¹⁵ The equality of ideas flows from this premise of political equality, and not from any postulated epistemological equality of ideas, which would be incompatible with the very concepts of truth and falsity.¹⁶ If there were truly no such thing as a false idea, there could be no such thing as a true idea. If all ideas were epistemologically equal, all ideas would be hash.

Finally, the rule against compelled speech prevents forms of coercion that would interfere with the ability of persons to imagine that the state is potentially responsive to them. We are not the free authors of our own government if we are compelled to participate in the formation of public opinion in a manner that is contrary to our own will.

The basic idea of our FA is that when persons participate in the formation of public opinion, they are sovereign. They decide the destiny the nation. The three essential rules of First Amendment jurisprudence define and codify this sovereignty. It prevents government from interfering with the exercise of this sovereignty. But, as Alexander Meiklejohn famously noted, in a democracy “the governors and the governed are not two distinct groups of persons. There is only one group—the self-governing people. Rulers and ruled are the same individuals. We, the People, are our own masters, our own subjects.”¹⁷

Meiklejohn’s insight is fundamental. The people can not be sovereign if they can not also sometimes be subjects, for then there would be nothing left to govern. That is why classic First Amendment doctrine does not and cannot apply to every act of communication, to what Justice Souter once referred to as “speech as such.”¹⁸

Almost all human action involves communication, and if First Amendment rights were interpreted to endow persons with sovereignty every time they spoke, the People would be constitutionally prohibited from almost all forms of regulation. There would be nothing left of their sovereignty.

¹² *Brown v. Hartlage*, 456 U.S. 45, 60 (1982).

¹³ *Post*, *supra* note 2.

¹⁴ See ROBERT C. POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (2012).

¹⁵ See John Rawls, *Reply to Habermas*, 92 J. Phil. 132, 140-41 (1995).

¹⁶ Hence the Court’s ruling that within public discourse even deliberate falsehoods can receive First Amendment protection. *United States v. Alvarez*, 132 S.Ct. 2537 (2012).

¹⁷ ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 12 (1948).

¹⁸ *Glickman v. Wileman Brothers and Elliott, Inc.*, 521 U.S. 457, 478 (1997) (Souter, J., dissenting).

III.

Now contrast the narrow conception of freedom of expression that I have just developed for you with the way that freedom of expression is typically defined in international documents. Article 13 of the American Convention of Human Rights, for example, provides: “Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.”

This is a very typical, very broad-ranging declaration that seems to privilege “expression” *as such*. It seems to say that if I am communicating, I come within boundaries of the right. But think, for a moment, about the remarkable consequences of construing freedom of expression in this uncabined way, since, as I have said, virtually everything that we do as humans occurs through expression and communication. We are, in Aristotle’s formulation, the talking animals.

Let’s say that I want to create a court system. Courts strictly regulate what can be said, by whom, in what order, and in what circumstances. If a court could not regulate the presentation of speech and advocacy and testimony in this way—if anyone were free to say anything at any time-- no court could function.

Let’s say that I want to run a university. The university runs through speech. But if I cannot insure that students and faculty do their jobs, I cannot make the university run. A university cannot run if a faculty member is hired to teach contracts and instead spends his hours in class discussing football. And I, as a teacher, cannot run a class if my students are free to talk as they will.

You get the point—and I can multiply examples indefinitely. If freedom of speech is not interpreted in a purposive way, if it is not limited to some kinds of speech and not to others, if it is permitted to spread to every instance of communication, we simply have social chaos. No one could get anything done.

IV.

And if you think my examples are simply silly, consider what is happening in the United States in the context of the doctrine of commercial speech.

You will recall that during the *Lochner* era,. Our Court subjected all social and economic legislation to careful judicial scrutiny. It did so in order to preserve the autonomy of economic actors to engage in what the Court then called “freedom of contract.” On these grounds, it struck down legislation setting maximum hours of work and legislation setting minimum wages, and much, much more. The Court’s efforts to strike down New Deal legislation led to a terrible constitutional crisis that in end repudiated *Lochner*, on the grounds that government ought to be free to implement social and economic legislation in a manner that was free from continuous judicial review and harassment.

In that context, notice that virtually everything we do in the commercial arena is mediated by speech. If I impose rent control, I impose restrictions on what persons can *say* in their rental contracts. If I forbid the sale of certain products, I am preventing persons from speaking in ways that in law constitute a sale. But notice that if I attribute to commercial actors the constitutional freedom to say whatever they want—if I apply the literal words of Article

13 of the American Convention of Human Rights, I am coming very close to reinsituting the very autonomy of commercial actors that led to the crisis of the New Deal.

Our Court stumbled across this dilemma in 1976 when it reversed its own precedent and began what we now call commercial speech doctrine.¹⁹ Up until that time, the governing law had been set out in a 1942 case called *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), where the Court had held that “the Constitution imposes no . . . restraint on government” regulation of “purely commercial advertising.” The underlying logic of *Valentine* was clear: the attributes of sovereignty pertain to speech that is directed to forming public opinion, but the purpose of purely commercial advertising was altogether different. It was to sell goods.

In 1976, however, in *Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), our Court declared that because commercial speech facilitates a “free flow of commercial information” that “may be of general public interest,” it merited constitutional protection in order to safeguard “the essential role that the free flow of information plays in a democratic society.”

But the Court was very aware that this holding posed the threat of resurrecting *Lochner*. And so the Court very self-consciously created forms of protection for commercial speech that were far less strict than those accorded to public discourse.²⁰ It said that commercial speech could be compelled,²¹ for example, and that the state could engage in content discrimination by suppressing “misleading” advertisements.²² This meant that in the commercial marketplace all opinions are not equal; some are downright fraudulent;²³ some are outright misleading. Other technical difference followed from this analysis. Commercial speech, unlike public discourse, can be subject to prior restraints; chilling effect analysis does not apply to CS, nor does the third party standing aspects of overbreadth.

How did the Court justify these lesser protections? The best explanation I can offer is that stated, quite clearly, by the Court itself in the 1970s and 80s. The Court announced that commercial speech should be constitutionally protected so as to safeguard the circulation of information. It therefore focused its analysis on the need to *receive* information, rather than on the rights of speakers to *participate* in the formation of public opinion. Two years after *Virginia Pharmacy*, for example, the Court declared in *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 783 (1978), that

*the First Amendment goes beyond protection of . . . the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller’s business as because it furthers the societal interest in the “free flow of commercial information.”*⁵⁷

And in the authoritative case of *Central Hudson Gas & Electric Corp. v. Public Services Commission*,⁵⁸ the Court flatly pronounced that “[t]he First Amendment’s concern for commercial speech is based on the informational function of advertising.”⁵⁹

Notice that the core rules of FA jurisprudence that I have described primarily protect speakers. They are designed to make speakers sovereign in determining the shape of public opinion. For this reason, a FA jurisprudence

¹⁹ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

²⁰ Robert C. Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867 (2015).

²¹ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

²² *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980).

²³ *Illinois ex Rel. Lisa Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003).

directed at protecting the rights of listeners to receive information possesses entirely different properties than what we may call “ordinary” FA protections.

1. Compelled speech—increases flow of information
2. “All ideas are equal.” Epistemological equality to participate in the formation of public opinion—equal sovereignty of democratic citizens. But if we are focusing on listeners, what is important, as Meiklejohn has said, is NOT that everyone gets to talk, but that everything important gets said. If I am focusing on the audience, speakers do not matter. What matters is the reception of information. All speakers are therefore not equal. Consider the running of a town meeting—we prevent speakers who are redundant, because they do not serve any purpose
3. No content discrimination. This means that the state cannot set an agenda. We do not want the state setting an agenda for an audience any more than we want it setting an agenda for speakers. But it is also clear that an audience has an interest only in accurate information, not in falsehoods. And for that reason, we say in our commercial speech doctrine that “[t]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely.” *Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976)). But this means that content and viewpoint discrimination is pervasive within the regulation of CS.

The three rules that I said at the outset of my talk constitute the essence of FA doctrine do not apply at all to CS. And that is because CS is about the right of listeners to receive information, not the right of speakers to participate in the sovereign act of forming public opinion.

Until the last decade, this roughly described our CS jurisprudence. It is this jurisprudence that allows the FTC, for example, to police advertisements that are false or misleading. It has allowed endless regulatory interventions to *compel* speech, from nutritional information on food packaging, to warning labels on drugs, to content information on the clothing that each of you are wearing. Indeed, as direct command and control regulations are increasingly seen as intrusive and overly clumsy, information forcing regulations that give consumers informed choices have become of greater and greater significance in the arsenal of state regulators.

When CS jurisprudence began, conservative justices like Rehnquist and Scalia were quite opposed to it. But then, some time during the 1990s they discovered that the attribution of autonomy interests to commercial actors could be transformed into a potent deregulatory tool. Conservative justices are now the foremost champions of commercial speech doctrine. And they have expanded it to almost give to commercial actors the same freedom that traditional speech doctrine gives to those who wish to participate in the formation of public opinion. Recent opinions by Justice Thomas and Kennedy, for example, expressly forbid viewpoint discrimination in commercial speech. [*NIFLA v. Becerra*, -- S.Ct. – (June 26, 2018); *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011)].

As a result, our Court is now routinely striking down ordinary commercial regulations on FA grounds. They striking down warnings on cigarette packs; they are striking down notices of commercial discounts for cash; they are striking down restrictions on the marketing of drugs; notices about the dangers of chemicals, and so on and on.

To give you some idea of the enormous and destructive impact of these cases. Consider the situation if you go to your doctor complaining of trouble breathing. In fact you have lung cancer, but your doctor misdiagnoses your complaint, and tells you to go home and take two aspirin. As a result of that advice—as a result of the doctor’s speech—you are injured and you wish to sue the doctor for malpractice. The doctor defends on the ground that he has only spoken, and “speech as such” is protected.

Suppose that the application of the standards of ordinary medical care would have required your doctor to diagnose

your cancer and offer appropriate advice. But, pointing to recent Supreme Court commercial speech decisions, like *Sorrell* and *NFLA*, the doctor argues that viewpoint discrimination and compelled speech are effectively prohibited by the FA.

Can that really be our law? It sounds crazy, and yet the Court's recent decision are pointing squarely in this direction. If you think that is insane, consider a recent Third Circuit opinion involving a statute regulating the speech of physicians. "[S]peech is speech," the Third Circuit said, "and it must be analyzed as such for purposes of the First Amendment."²⁴ Taken literally, the Third Circuit's approach would transform every malpractice case involving communication--every failure to warn, every misleading medical opinion--into a question of constitutional law. And think how such a doctrine would insulate lawyers, who after all do nothing but speak, from malpractice actions. At a minimum, it would turn every single ordinary malpractice case into a constitutional question.

Of course, I don't think that that will actually happen. So what is going on? The best hypothesis that I can advance is that a very conservative court is striving to reintroduce Lochnerism into the commercial sphere, and is using the FA to achieve that result. It is attributing constitutional autonomy to commercial actors, only it is using the FA to do so rather than the discredited doctrine of Freedom of Contract. It is using our precious FA as a hunting license to strike down social and economic regulations with which an increasingly conservative judiciary disagree.

That is why Justice Kagan, when this same tendency was evident in the Court's audacious use of the FA to overturn the entire New Deal structure of public unions in my country on the grounds that agency fees are unconstitutional compelled speech, accused the Court of "**weaponizing the First Amendment**, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy." *Janus v. American Federation of State, County, and Municipal Employees*, -- S.Ct. -- (June 27, 2018).

V.

In the United States, that is to say, our courts are increasingly forgetting the purposive nature of rights of freedom of expression. It has forgotten how and why these rights were developed. And it is thus refashioning FS rights as a terrible threat to commercial regulation. And this endangers the FS in the context when we need it most, to protect the ability of speakers to participate in the formation of public opinion.

All law is purposive. When we forget its purposes, we begin to put in the service of strange gods who can undermine it from within. All threats to freedom of expression do not wear the chilling mask of censorship. Many wear the sheep's clothing of greater protections for FA freedoms. We can see their teeth only when we've invited them into our homes, and then it may be too late.

So I am leaving you with this sincere warning about the purposive interpretation of your freedom of speech rights. Absent that, they can easily metastasize, as they have done in the United States, and threaten what is in fact most important to our jurisprudence of freedom of expression.

And, if you are clear about the purposive nature of free speech rights, you will be able much more easily to negotiate challenges that I know you are facing in the context of difficult new issues, like the right to be forgotten, which we can consider in our discussion period if you are so inclined.

²⁴ *King v. Governor of New Jersey*, 767 F.3d 216, 229 (3d Cir. 2014); see *Wollschlaeger v. Florida* 848 F.3d 1293, 1307 (11th Cir. 2017) (en banc).