

# Dialogue

**Bollinger:** Let's begin with a word about why we have brought together this group of distinguished First Amendment experts to contribute chapters to this volume. There are three primary reasons to start with. The first is reflected in our title, *The Free Speech Century*. The year 2019 will mark the hundredth anniversary of the very first decisions of the US Supreme Court interpreting these simple, unadorned words of the First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

Those three cases—*Schenck*, *Frohwerk*, and *Debs*—all emerged out of the intense emotions surrounding the nation's involvement in World War I.<sup>1</sup> A tidal wave of patriotic fervor and intolerance spread across the country, crushing dissent. Even a leader of a political party and a candidate for president of the United States, Eugene Debs, was imprisoned merely for delivering a speech in which he praised the courage of individuals who refused to be drafted. The defendants in all three cases sought the protection of the First Amendment. Justice Oliver Wendell Holmes Jr. authored the opinions for a unanimous Court rejecting that argument in each case. It was an inauspicious start for the constitutional right of freedom of speech and press, as we have come to know it. But in *Schenck*, Holmes put forward a test that had more staying power than the outcomes in these particular cases. Speech, he wrote, can only be suppressed when the government can demonstrate a "clear and present danger" of harms the government has a right to prevent.

Within a matter of months, in another similar case (*Abrams*), Holmes changed his position on what might constitute a clear and present danger and, in some of the most compelling language ever written about freedom of speech, he launched a historic mission to define and give meaning to the right.<sup>2</sup> Through thousands of cases, reams of scholarly commentary, and intense and sometimes heated public debate, there emerged in America a jurisprudence of freedom of expression that is the most elaborate, the most doctrinally detailed, and the most speech protective of any nation on Earth, now or throughout history. And

because of this unique history, it is worth stepping back after a century of experience to reflect on what we have witnessed.

The second reason for the book is related. Another of Justice Holmes' early observations was to suggest that we should think about free speech as an "experiment."<sup>3</sup> This was a way of building into our First Amendment jurisprudence a commitment to self-criticism, even skepticism, which is especially needed for an idea that so easily takes on the character and aura of a fundamental—even sacred and therefore unchallengeable—principle of the society. Approaching what we have created—whether it be with *New York Times v. Sullivan*,<sup>4</sup> which set constitutional limits on the law of defamation; or with the Pentagon Papers,<sup>5</sup> which struck the balance between the government's legitimate interests in secrecy and the public's right to know; or with *Citizens United*,<sup>6</sup> which addressed the possibilities of regulating money in politics—with a detached and critical eye is vitally important. We have sought to create and celebrate that spirit in this book.

The third reason for this volume is that, at this moment, the world may be changing in ways that unsettle and even upset some parts of the elaborate edifice of First Amendment jurisprudence we bring with us into this new century. The interests at stake in some areas of traditional doctrine may be undergoing significant changes that will call for new balances. The introduction of new technologies of communication always has profound effects on human thought and discussion, and this is most certainly true now with the internet. Meanwhile, the increasing interdependence of the modern world, shaped in large part by the internet itself, is bringing globalization to the doorstep of the First Amendment. All these changing and new circumstances by themselves constitute reason enough to take advantage of the hundredth anniversary and to ask how we should think about freedom of speech and press for the future.

**Stone:** It is interesting to imagine how challenging the task of giving meaning to the fourteen relevant words of the First Amendment might have seemed to the Justices in the spring of 1919: "Congress shall make no law abridging . . . the freedom of speech, or of the press." At first blush, the task might have seemed easy. As Justice Hugo Black declared some forty years later, "The phrase 'Congress shall make no law' is composed of plain words, easily understood. [The] language [is] absolute. [Of] course the decision to provide a constitutional safeguard for [free speech] involves a balancing of conflicting interests. [But] the Framers themselves did this balancing when they wrote the [Constitution]. Courts have neither the right nor the power [to] make a different [evaluation]."<sup>7</sup>

Anticipating this argument, Justice Holmes in *Schenck* offered his brilliant hypothetical of the "false cry of fire in a crowded theater" to demonstrate that the First Amendment obviously could not mean what it appears to say.<sup>8</sup> But that

opened up an extraordinary can of worms, because if it doesn't mean what it appears to say, what does it mean? If the First Amendment does not protect the person who falsely yells "Fire!" in a crowded theater, what other speech does it not protect? And how is the Court to answer that question? Should it look to the original understanding of the Framers of the First Amendment? To the purposes of the First Amendment? To the philosophy of free expression? To logic and to the benefits of experience over time?

It seems doubtful that the Justices in the spring of 1919 were thinking very clearly about the extraordinary array of issues they and their successors would confront over time: Was the First Amendment limited only to "political" speech, as Robert Bork would later argue?<sup>9</sup> Did it not protect artistic expression, scientific inquiry, sexual expression, and commercial advertising? What about false statements of fact such as perjury, fraud, defamation, and political lies? What about threats? What about express advocacy of law violation? Two years earlier, in his famous opinion in the *Masses* case, then federal district court judge Learned Hand had suggested that such speech is not within the protection of the First Amendment.<sup>10</sup> What, one wonders, did Justice Holmes and his colleagues on the Supreme Court think about Hand's opinion in *Masses*?

And then there is another whole set of issues. If clear and present danger is the test adopted by the Court in *Schenck*, then is that also the test when the government says "no one may give a speech in a public park," or "no one may write graffiti on a public building," or "no one may hand out leaflets on a public street"? Does the test embraced in *Schenck* apply to those cases as well? If not, why not? And what about flag burning and spending money to elect candidates, and refusing to make a wedding cake for a gay couple? Are those cases like *Schenck*, or are they different?

And, of course, it's even more complicated than that, because although Justice Holmes used the language of clear and present danger in *Schenck*, he did not repeat the phrase in the two subsequent opinions he wrote for the Court only a week later—*Frohwerk* and *Debs*. Moreover, even though he used the phrase in *Schenck*, no one today would argue that he actually applied the test—as it later came to be understood—in *Schenck* itself.

In short, the evolution of First Amendment jurisprudence over the course of the past century has been a long, complex, and difficult journey. The Supreme Court has often moved in fits and starts, sometimes forward and sometimes backward, as times have changed, the perspectives of the individual Justices have changed, and technology has changed. How we got to where we are today is a fascinating and important story, because it lays the foundation for how we might move forward into the future. The chapters in this volume seek to shed important light on the nature and wisdom of that evolution.