"The Free Speech Century:" A Retrospective and a Guide
2018 Clare Hall Tanner Lectures

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I

It is a deep, meaningful honor for me to deliver these Tanner Lectures, especially under the auspices of Clare Hall and of Cambridge University. It is unlikely anyone here today (except Jean) would know the layers of associations for me that make this particular moment much more significant than the usual lecture I might deliver. In 1983, Jean and I brought our two young children (ages 5 and 9) here to live and work at Clare Hall during a sabbatical from the University of Michigan Law School. We discovered what so many others have also, this gem of an intellectual and personal home, set in this magnificent university and charming town, which altogether provides its visitors with a magical, out-of-time experience that stays with one for life. This special bond was made still more special when I was subsequently honored, in 1999, by Clare Hall as an Honorary Fellow.

It is also personally important to me that, when I was President of the University of Michigan, which is also one of the sites of the Tanner Lectures, I, too, oversaw the lectures, and Jean and I always enjoyed our annual meeting with the other presidents and spouses of host universities. In that moveable feast of companionship, we became good friends and admirers of Dame Gillian Beer and her late husband, John. So, even though I know firsthand from that experience just how difficult it can be to find Tanner lecturers, nevertheless to be asked actually to deliver one, and for it to be with Clare Hall and Cambridge University, makes me feel the pleasures that a former cast member of Saturday Night Live feels upon being asked to return as the host.

Finally, adding further to the layers of special meaning underlying this moment, is the subject of these lectures—namely, freedom of speech and press. If anything defines my life's scholarly work, it is this—trying always to understand this extraordinary human and social development, through the prism of the First Amendment to the United States Constitution. But it also defines my life in a deeper sense. My grandmother began working as the librarian in a small-town daily newspaper in the 1930s to support herself and my father (a young boy then) when her husband died prematurely. My father then followed her and began working at the same paper, first as a paper boy and from there working his way up the ladder. This was in Santa Rosa, California, and the paper was the *Press Democrat*, much later becoming for a while a property of *The New York Times*. I was born in Santa Rosa and spent many hours at the P.D. (as it was called), absorbing the distinctive smells and whirling activities of producing a daily newspaper. Later, when I was a teenager, my father became the editor and publisher of an even smaller small-town newspaper in Baker, Oregon. I worked there as the janitor and the developer of films (among other jobs), breathing, as can only happen in that coming-of-age period, the atmosphere of journalism and the press.

When I began my career as a young law professor (at age 27) at the University of Michigan, I turned almost instinctively to the First Amendment as my field of focus. Interestingly, in the strange ways of developing scholarly expertise, the year before, as a law clerk to Chief Justice Warren Burger, I had worked on one of the First Amendment cases involving broadcast regulation. So, of course, I wrote my first article on what I saw as the puzzle of differential treatment under the First Amendment of newspapers and the new media of television and radio, the former protected against regulation and the latter subject to an approved regime of regulation.[1]

Following that I undertook a more ambitious goal of understanding the theoretical meanings of First Amendment jurisprudence, especially in the context of protecting extremist speech, which is what I pursued here in 1983 while at Clare Hall and which became a book, *The Tolerant Society*.[2] All my subsequent writings and scholarship, and the teaching I do every year, seem solidly rooted in and based on these glorious settings in which I was afforded the gift of pursuing my curiosity.

Throughout my career I have also been fortunate to have many other connections with the areas of freedom of speech and press. I have served on the Board of the Washington Post Company, including the time in which the newspaper was sold to Jeff Bezos. As President of Columbia, I am a voting member of the Board that selects the Pulitzer Prizes, a process I admire greatly. As an academic leader, in the odd way in which life works, I have had far more than my share of free speech controversies and issues. And I have been involved in more litigation about the First Amendment than I would care to recount, especially as a defendant.

All this brings me to the subject of my lectures this afternoon, and to another layer of meaning. These lectures happen to correspond almost perfectly with the publication of a book my good friend and long-time First Amendment colleague Geof Stone, of the University of Chicago Law School, and I have been working on for the past two years. It is titled *The Free Speech Century*, and is published by Oxford University Press, and I will draw on it for these lectures.[3] We invited 16 scholars and practitioners to reflect on the first one hundred years of First Amendment jurisprudence and to begin to grapple with some of the most significant questions we face now and will continue to face in this next century. Framed by a dialogue and epilogue between Geof and me, the essays offer reflections and critiques of the first one hundred years of cases, address some specific areas of controversy (e.g., campaign finance, campus speech, national security and publication of state secrets), assess the international implications of First Amendment jurisprudence, and try to come to terms with issues raised by the newest communications technology, namely the Internet and its various platforms and search engines.

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[1] Lee C. Bollinger, Freedom of Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media, 75 MICH. L. REV. 1 (1976).
[2] LEE C. BOLLINGER, THE TOLERANT SOCIETY (1986).
[3] THE FREE SPEECH CENTURY (Lee C. Bollinger & Geoffrey R. Stone eds., 2018).

Few people realize that all that we take today as constituting the rights of freedom of speech and press is only a century in the making. Not until 1919, in that period beset with fears and profound feelings of insecurity arising out of the First World War, the Communist Revolution in Russia, supposed international conspiracies to subvert democracies, labor movements, and immigration and foreigners, did the Supreme Court begin to decide what the fourteen words of the First Amendment—"Congress shall make no law . . . abridging the freedom of speech, or of the press"[4]—actually should mean in practice. From our perspective today, one has to say it began rather badly. While the great Justice Oliver Wendell Holmes, Jr., wrote for an unanimous Court in the opening three cases that speech could only be prohibited when the State could establish a "clear and present danger" of some evil within the legitimate powers of the government to do something about,[5] which seemed much more protective than the prevailing "bad tendency" test of the time,[6] the actual application of the new test to the cases before it was shockingly casual, when looked at with modern free speech sensibilities.
As Holmes said, famously, and of course correctly, free speech does not protect the person who yells fire falsely in a crowded theater[7]—that's not a very positive way to approach the task of trying to locate the outer boundaries of political discourse. The most egregious of the three decisions involved the prosecution of the leader of the Socialist Party of the time and its candidate for President of the United States, Eugene Debs. He delivered a speech in Ohio in which he praised individuals who had (illegally) resisted conscription. The government claimed this violated the Espionage Act of 1917, which made it a crime willfully to "obstruct the recruiting or enlistment service of the United States."[8] His conviction upheld by the Court, Debs was sentenced to ten years in prison, during which he received over one million votes in the presidential election of 1920. (It would be as if Hillary Clinton were jailed for her speeches.)

Within a matter of months, however, Holmes began to have second thoughts and to reverse his position. In a case involving five Russian immigrants who circulated a pamphlet in New York City calling on workers in ammunition factories to strike in solidarity with the Communist Revolution in Russia, Holmes dissented from the decision finding a "clear and present danger" and wrote these famous and eloquent 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

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[4] U.S. CONST. amend. I.
[5] *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919).
[6] In a representative case, the Court of Appeals for the Ninth Circuit upheld a conviction under the Espionage Act of an author who mailed a book suggesting that patriotism was an idea created by Satan. Since the work had the "natural and probably tendency" of producing actions that violated the Espionage Act, the First Amendment did not protect this speech. *Shaffer v. United States*, 255 F. 886, 887 (1919).
[7] *Schenck*, 249 U.S. at 52.
[8] *Debs*, 249 U.S. at 212.

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."[9]

Within the decade, Justice Louis Brandeis had joined Holmes as one of the most eloquent free speech advocates, most notably in the 1927 case of *Whitney v. California*.[10] (Anita Whitney attended meetings of the Socialist Party and was part of the group that advocated a moderate, nonviolent platform, while a more radical wing advocated overthrow of the government through revolution.) Addressing the question of how to conceive of freedom of speech, Brandeis wrote in equally famous language about how "it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones."[11] He went on: "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of speech to free men from the bondage of irrational fears."[12] And: "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the powers of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion."[13]

These words and thoughts ultimately won the day, in the United States but also in many nations around the world, over the course of the 20th century. After another low point in repression and censorship in the 1950s, with the McCarthy era and the then-pervasive fear of a Russian threat to undermine American and Western democracies, where the Supreme Court again succumbed to national panic. In *Dennis v. United States*, a majority of the Court upheld the convictions of the leadership of the American Communist Party.[14]

The crowning achievement of the Holmes-Brandeis perspective occurred in the transformative environment of the Civil Rights and Anti-Vietnam War period of the

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[9] *Abrams v. United States*, 250 U.S. 616, 630 (1919 (Holmes, J., dissenting).
[10] 274 U.S. 357 (1927).
[11] *Id.* at 375 (Brandeis, J. dissenting).
[12] *Id.* at 376.
[13] *Id.* at 377.
[14] *Dennis v. United States*, 341 U.S. 494 (1951).

1960s and into the 70s. In this epic crucible of national transformation, the Supreme Court decided a series of cases that together compose the modern idea of freedom of speech and press. The decisions—led by *New York Times v. Sullivan* (protecting *The New York Times* against civil liability for running a civil rights advertisement that made false statements about the actions of the police in Montgomery, Alabama)[15] and supported by *Cohen v. California* (protecting an individual wearing a jacket in a public place with the words "Fuck the Draft" written across the back)[16], *Brandenburg v. Ohio* (protecting a meeting of the KKK)[17], *Pentagon Papers* (protecting the *New York Times* and the *Washington Post* in publishing stolen government classified documents)[18], *Red Lion Broadcasting v. FCC* (upholding regulations of broadcasting designed to expand viewpoints)[19], and *Miami Herald v. Tornillo* (rejecting regulations designed to expand viewpoints in the context of newspapers)[20] and many others —created the most elaborate and speech protective jurisprudence of any nation in history, with, as I have indicated, profound influences around the world.

A centenary always seems like a natural time in which to step back and consider what has happened over that period and what it all means and should mean in the future. That is certainly true with free speech and press. We also live in a moment of enormous social and political change in the United States and across nations, which makes taking stock a necessity more than simply a convenient moment on the historical calendar. That is the genesis of *The Free Speech Century* and the topic of these lectures.

In this first lecture, I want to continue with the summary of the First Amendment experience and, more importantly, offer some observations on how to interpret and understand what has happened. Then, in the second lecture, I want to turn to the present and future and consider three of the most important questions of this present century: (1) Should the legacy of the last century be continued and what are its prospects given current political and global trends towards authoritarian regimes? (2) What should be the general approach to dealing with the rising importance of the Internet and its component elements, which are now widely perceived as increasingly dominant in shaping the public forum? (3) And, lastly, what are we to make of the fact that the modern world is increasingly inter-connected and inter-dependent, yielding problems and issues that can only be resolved effectively through collective international action, with a new truly global communications technology to serve as a global public forum, but with vastly different competing conceptions of free speech and free press in contention? In other words, how should we think about free speech in a globalized world?

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[15] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
[16] *Cohen v. California*, 403 U.S. 15 (1971).
[17] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
[18] *New York Times Co. v. United States*, 403 U.S. 713 (1971); *United States v. Washington Post Co.*, 403 U.S. 713 (1971).
[19] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).
[20] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

II

Understanding the last one hundred years of free speech and press in the United States is very much about understanding how we should deal with people who advocate illegal or bad acts, whether they be major, such as overthrowing the government, or more minor, such as taking over (occupying) public or private property. Context can shape everything, and this is the context that has shaped our thinking about the First Amendment. There have been many proposed tests for drawing that line. Besides "Clear and Present Danger", there is "Bad Tendency,"[21] "Express Incitement,"[22] "Abstract Ideas versus Steeling People to Action,"[23] "the Gravity of the Evil Discounted by its Improbability,"[24] and, finally, "Directed at Producing Imminent Lawless Action and Likely to Produce Such Action,"[25] this last formulation being the one we live under today. As I have indicated, the last one-hundred-year history is one of ebbing and flowing of protection, with the courts following the national mood. Since the 1960s, however, the scope of protection has generally been very strong.

From this, let me fill in the First Amendment map the Court has drawn up for our world of freedom of speech and press.

As the Court expanded the protection for speech advocating illegality, it also recognized a number of exceptions to freedom of speech and steadily narrowed them over time. And, so, we have with laws banning obscenity, fighting words, libel, threats, invasions of privacy, and speech bringing about risks of violence and disruption caused by hostile audiences.[26] The jurisprudence now has many cases permitting and delimiting these exceptions.

Any notion of free speech must also figure out its *horizontal* dimensions, not only what words and language will be protected but also what nonverbal communications. Once you realize that all human behavior is or can be "communicative" or "expressive," you face the dilemma of how far to push the First Amendment interests analyzing government regulation of all conduct. This problem bedeviled the Court and analysts for decades, producing all kinds of analytically problematic solutions (e.g., the government

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[21] *See Shaffer*, 255 F. 886 (1919).
[22] *See Masses Publishing Co. v. Patten*, 244 F. 535 (1917).
[23] *Noto v. United States*, 367 U.S. 290, 297–98 (1961).
[24] *Dennis*, 341 U.S. at 510.
[25] *Brandenburg*, 395 U.S. at 447.
[26] *See, e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (identifying several categories of speech that did not receive full constitutional protection: "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

cannot regulate "pure speech" but it can "action" or "conduct").[27] Eventually, the Court settled on an approach that focused on the government's motive behind the regulation: If the purpose is to stop messages or viewpoints, no matter what the conduct was, then the First Amendment would be fully deployed.[28] If, on the other hand, the government's motive or purpose has nothing to do with the "communicative impact" of the behavior, then the government will be afforded broad (though not unfettered) leeway to regulate.[29] In practical terms, this means that "free speech" encompasses far more than words or language, written or spoken, and, therefore, virtually all human behavior is at least in theory protected against state prohibition to the extent the state's motive is in prohibiting ideas "expressed" through that behavior. The implementation of this approach has required extensive intellectual refinements, adding to the intricacy of First Amendment jurisprudence.

Similarly, and also on the *horizontal* plane, the Court has faced the question whether to extend the reach of the First Amendment into realms of speech activity beyond the traditional political public forum—namely, those involving commerce and finance, labor and management, the workplace, the home and personal areas of life, and so on. In general, the decision has been to permit much greater discretion to regulate, while not withdrawing entirely and keeping a First Amendment foot in the door.[30]

There is also a *vertical* dimension in First Amendment analysis. How should we think about everything that might be "relevant" to "speech"? This can range from having a right of access to information under the control of the government, to a right of access to government controlled spaces (e.g., public streets and parks) for speech purposes, to a right of access to a good education in order to be able to speak and discuss issues more intelligently. Here the Court has been less forceful in pressing free speech interests against other social interests. (Streets and parks must be available (the so-called Public

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[27] *See United States v. O'Brien*, 391 U.S. 367, 376 (1968) (rejecting the idea that a "limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea").

[28] *See Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

[29] *See O'Brien*, 391 U.S. at 381–82 (upholding a statute prohibiting the burning of draft cards because the governmental interest was in running a draft efficiently, not stopping anti-war protests).

[30] *See, e.g,, Central Hudson Gas v. Public Service Commission of New York*, 447 U.S. 557, 563 (1980) ("The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."); *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty., Illinois*, 391 U.S. 563, 568 (1968) (noting a need to strike a balance between public employees' speech rights and government's need to provide public services efficiently).

Forum Doctrine),[31] but not many other venues; there are only limited rights of access (e.g., to judicial proceedings)[32], etc.)

There are three other dimensions of First Amendment jurisprudence worth special note.

The first is especially important. Once you have secured the scope of free speech and press against censorship, you then face the question whether you will leave things at that or whether you will permit (or even require) the government to intervene in the public forum, or the marketplace of ideas, to *improve the quality* of public discussion. There are many things that affect how freedom of speech and press actually function: the allocation and distribution of wealth through the economic system, the nature and distribution of educational opportunities, infamy or fame, discrimination against minorities and certain groups, and effective control over the institutions that disseminate information and opinion. This is a very rich and complex subject, but the key thing I want to note is that the experience of the last century includes a major public effort of this kind involving the public regulation of broadcast media. Beginning in 1927 and then 1934, at the origins of this new technology of communication, the Congress established a federal agency empowered to license and regulate the medium consistent with the most general of mission statements, according to the "public interest, convenience, and necessity."[33] Out of this system came many public regulations, most notably the so-called fairness doctrine, which required broadcasters to cover public issues and to do so fairly with respect to competing viewpoints. In 1969, over three decades from the inception of the regulatory regime, in *Red Lion Broadcasting v. FCC*, the Court unanimously upheld the fairness doctrine and the general system, saying that the public's right to be fully informed outweighed the interests of the privileged few who happened to control the outlets and that the government had a proper (perhaps even a *constitutionally required*) role in helping to secure the public's right to know.[34] In one of the more fascinating developments in the jurisprudence, some five years later, without ever mentioning its decision in *Red Lion*, the Court precluded any such public involvements with newspapers and print media (*Miami Herald v. Tornillo*, 1974).[35] The ostensible distinction between these two outcomes focused primarily on the physical limitations of the electromagnetic spectrum—the so-called scarcity rationale, which claimed that the extremely limited number of broadcasters *physically* possible due to the nature of the spectrum justified government intervention, which ignored, however, the fact that economic realities in the newspaper business produced an even more monopolistic outcome in cities across the nation.[36] (By the 1960s, over 90% of American cities had

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[31] *Hague v. CIO*, 307 U.S. 496 (1939).
[32] *Press-Enter. Co. v. Superior Court of California for Riverside Cty.*, 478 U.S. 1 (1986).
[33] The Radio Act of 1927 created the Federal Radio Commission. In 1934 the law was repealed with the passage of the Communications Act of 1934 which created the Federal Communications Commission (FCC). 47 U.S.C. § 151 et seq.
[34] 395 U.S. 367 (1969).
[35] 418 U.S. 241 (1974).
[36] *Red Lion*, 395 U.S. at 394.

only one daily newspaper.) In my view, the "scarcity rationale" was a fiction that covered the desire to permit public intervention in a limited portion of the new highly monopolized mass media in order to ensure and enhance the quality of public discourse. While this system remains in place to this day, the rising political antipathy to any public regulation of any kind (beginning with the Reagan era) has reduced the significance and scope of broadcast regulation (e.g., the FCC eliminated the Fairness Doctrine in the late 1980s),[37] though has not by any means eliminated it.

A second area I should highlight is that raised by the *Pentagon Papers* case, which is illustrative of the willingness of the Court to check government power and to be highly inventive in doing so.[38] Every nation needs to figure out how to strike the balance between allowing the government to operate with appropriate secrecy and how to ensure that the citizens have the appropriate information they need about their government (which will always be too inclined to act in secret) to exercise their sovereign responsibilities. *Pentagon Papers*, and a few accompanying decisions, established a completely unique and, so far as one can judge such things, entirely successful solution to this problem. Like the dual system of the press/media created by *Red Lion* and *Miami Herald*, this was also one based on systemic and institutional judgments of a highly pragmatic variety, not one wedded to simple notions of logic and an insistence that everything alike must be treated alike, without opportunities for experimentation and for taking account of how people and institutions actually function in the real world. The question asked is, How will this system work in practice? not, What system is logical apart from practice? Without going into this in detail, the solution was this: The government will have full control over its information, with virtually no formal right of access in the press to this information. Leakers, if pursued and apprehended, which in practice rarely happened, may be subject to criminal penalties *without* any First Amendment protections.[39] The press, finally, even when it knows that it is receiving purloined information from leakers, will have virtually full protection to publish what it chooses.[40] (It is all even more interestingly ambiguous than this summary suggests, creating the subtle calculations each player has to make in this serious game of national

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[37] *In Re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York,* 2 F.C.C. Rcd. 5043 (1987).

[38] 403 U.S. 713 (1971).

[39] *See, e.g., United States v. Aguilar*, 515 U.S. 593 ("As to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public.").

[40] *Cf. Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (holding that news media could publish truthful information regarding confidential judicial inquiry proceedings that had been leaked); *Bartnick v. Vopper*, 532 U.S. 514 (2001) (refusing to punish a media outlet that published tapes that were obtained by a third party in violation of wiretapping laws).

secrecy chess.)[41] Up until recently, at least, it is fair to conclude that this method of balancing interests has worked, without unreasonable disclosures of classified information and with reasonable publication of classified information important for the public to know.

The third, and last, general observation I would like to make is really about the range of methods the Court has followed in inserting the First Amendment into areas of government regulation. Sometimes the Court has simply weighed in in a given area of controversy, in essence, to signal the presence of free speech interests. (The hostile audience cases are an example of this.)[42] But sometimes the complexities and doctrinal refinements resulting from the Court having taken extensive cases and issued a number of holdings are remarkable. This is notably true with respect to the areas of libel and campaign finance, which are labyrinthine in their doctrinal complexity. It is, in other words, worth bearing in mind how there are different strategies reflected in the jurisprudence.

III

To close this first lecture, I want to make a few final observations that will be important to the subjects of the next lecture.

It is a vital element of the history of freedom of speech and press in the United States that it has fallen to, or been taken up by, the judicial branch of government. Context is always important, and here the context includes the very special characteristics of the judiciary—lifetime tenure, decisions limited to cases and controversies, the self-restraint and self-education of stare decisis, or precedent, the mandatory norm of principled decision making supported by reason, and the necessity of explanation in detailed opinions, are all critically important. Of course, we know that standing somewhat apart from the political fray permits, at least in theory, a greater awareness of and resistance to the misleading passions of the moment. Given all these qualities and other virtues, it is easy to reach the conclusion that lodging the development of the rights of freedom of speech and press in the judicial branch gives you the greatest chance of having the kind of social and political life you seek, despite the risk that this will make other branches perhaps less attentive than they might otherwise be if they bore the primary responsibility for securing these rights. I share this conclusion, and it is clear to me that, if you seek the most effective law of freedom of speech and press, you should first seek an independent judiciary.

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[41] Professor David Pozen offers a more thorough exploration of this enforcement regime in *The Leaky Leviathan: Why Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013).

[42] *See, e.g.*, *Terminiello v. Chicago*, 337 U.S. 1, 4 ("A function of free speech under our system of government is to invite dispute.").

But I also think that we need periodically to look at what the judges have come up with and ask for more when we think that is needed. I feel that way about how we have defined and articulated the core purposes of the First Amendment. Holmes, as we have seen, began the whole venture by linking free speech to the search for truth. But it was Alexander Meiklejohn in the late 1940s who dismissed that relationship and argued instead for what he portrayed as a much more "practical" relationship between freedom of speech and the responsibilities of self-government.[43] This democracy rationale took solid control of the jurisprudence in the seminal decision in 1964 of *New York Times v. Sullivan* and has remained so ever since. For judges and justices who may always naturally feel a little tentative about introducing broad "values" into constitutional interpretation, saying that enforcing free speech against government regulation is simply fulfilling the more fundamental constitutional commitment to democratic self-government can be appealing. But it is far too limited. The role and meanings of the First Amendment are multi-faceted, and should be recognized as such. There is much more at stake and much more to protect.

In particular, while the political arena is critically important for free speech, so, too, is the system for the generation and preservation of truth and knowledge. This system, composed primarily of colleges and universities, but also of journalistic enterprises (which seek understanding far beyond the political sphere) and other institutions (e.g., museums), has yielded more benefits and contributions to modern life than any other, and its autonomy from the violations of improper government interventions is just as important as that of citizens engaged in the activity of self-government. Seeking truth is not some abstract idea, but rather one with highly practical operations and consequences. Nor is it just some individual interest. We have an elaborate system of institutions, with all the corresponding norms and cultures developed over time, specifically designed to perform this social need and public good. And even though there may not have been as many cases raising threats to this *system*, there have been some and there are likely to be more, and it is time to recognize this system as both fragile and in need of the shelter of the First Amendment. Meiklejohn, ironically because he was a lifelong academic, was too narrow in his conception of freedom of speech, and we should not let those notions delimit the scope of the First Amendment.

And, finally, another area where I believe we have allowed ourselves to be too one dimensional in thinking about the significance of freedom of speech is with the protections afforded extremist speech. These cases have often arisen in the context of spiraling social fear and panic, leading to grave acts of injustice committed against and the scapegoating of people and groups who are often marginal individuals and relatively harmless dissenters. *This* is what both Holmes and Brandeis were trying to address. Holmes saw how "logical" it is for us to "persecute" people we believe wrong, especially in times of war and national stress. Brandeis' comment that "men feared witches and burnt women" graphically captures the breadth of this impulse to unjust intolerance. None of these feelings that lead us to persecute or to be excessively punitive towards

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[43] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1949).

others is limited just to speakers and speech. Women were burned because of irrational fears of what they might *do*—namely, casting spells, something that, if it actually existed, would have nothing to do with "free speech." But "men" feared bad behavior where there was none and committed crimes out of intolerant minds. It is *that mind* we are trying to change, at least when it rears its head in the zone of free speech.

And it is the very generality of our bad impulses that makes insisting that we refrain from giving into them in the realm of speech, perhaps exhibiting extraordinary self-restraint, all the more significant and powerful. The stopping of censorship in these cases, therefore, is more about our concerns about the *reactions* to speech than it is with our wanting to *protect* speech, as such. To say this is to speak about our *character*, our self-understanding, and not about protecting bad speech as some unfortunate by-product of our wish for "good" speech.

I have called this the tolerance theory of the First Amendment, and it is one of many facets of this amazing principle of freedom of speech and press that has taken on such extraordinary significance in the first century of its jurisprudential life.

In so many ways, through this process of creating an elaborate set of doctrines and reactions to the on-the-ground facts of multiple controversies, the value of freedom of speech and press has become more than a legal rule, more than even a constitutional law. It has become part of the very *identity* of what it means to be an American.

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I

In this lecture, I have three general areas I want to cover.

The first is to consider what needs to be done with First Amendment jurisprudence in light of contemporary conditions, to adapt it and make it better for the future. In this context, I also want to talk a bit about what I think is fairly obvious, namely the fact that we appear to have entered another period of grave intolerance and we need to consider the implications for freedom of speech and press.

The second area involves the newest technology of communication—namely, the Internet and its component elements. There is an enormous amount of attention now being devoted to the problems arising out of social media platforms, and I would like to offer some observations on how we might frame those debates.

The third area concerns the phenomenon of globalization and how we should be thinking about freedom of speech and press in this moment where the world as we know it is being transformed. Without question, the peoples of the world are becoming more inter-connected and more inter-dependent, which is the result of many powerful forces (economic, technological (especially with communications), as well as by the incredibly powerful drive of human curiosity and the impulse for improving one's life), all of which is easier to fulfill than ever before. Issues and problems generated by these forces (as well as those that arise out of actions of individual nations with consequences and effects on the global public commons) require some form of global collective action. Yet, as has been widely noted, the institutions, or the public goods, needed to cope with this seemingly irreversible process of integration and its attendant issues (irreversible, I would say, despite new attempts in the United States and, for a time preceding that, in some parts of the world, to impede or reverse its development) lag far behind. Nevertheless, despite the weakness of existing international institutions of governance, there are still ways in which global decisions are being taken, as has now been shown by the Paris agreement on climate change.

All of this means that we now have to conceive of something quite new, namely a *global public forum* in which issues can be addressed and knowledge pursued. Clearly, the most recent and manifest component of the new global public forum is the Internet. This new communications technology both contributes to the globalization phenomenon *and* provides the means of addressing its issues. But there is a lack of agreement in the world about what norms of free speech and press should apply to this medium, and that means that its usefulness as a public forum will be impaired, unless we take action, since now effectively censorship anywhere is censorship everywhere. (This is true both in the sense that, though I may live in a country that recognizes my right to say something, whatever I say there will instantly be published globally, and I may be "censored" or chilled from speaking by laws in other nations that forbid my speech; and in the further sense that censorship in other nations will stop speakers from speaking, speakers whom I

may want to, and need to, hear.) In this century, sorting all this out will be a defining problem and central to the shape of our lives.

But establishing norms of openness is not the only thing to be done. The theme of knowledge production I have spoken about also has a critical role to be in a more inter-dependent world. The system of institutions devoted to the development of knowledge we have built up, mainly with universities, must also be preserved and protected as an international forum for the exchange of ideas.

II

As I look at the jurisprudence and experiences of the First Amendment over the past century, and think about what should be done now, there are several changes I would make. The most important, of course, as I suggested in the preceding talk, is to expand the vision underlying the First Amendment. But here are several more specific revisions:

From my perspective, it is a pity that the Court did not bring the same enthusiasm to the idea of a public and press right of access to information that it did to expanding the protection of expression against various forms of censorship. The key decisions (mostly in the 1970s) were narrowly decided (by a simple majority of justices), and they reflected almost a kind of weariness from the heady expansion of rights that occurred in the preceding decade. To be sure, conceiving of a robust right of access requires living with an incredible array of fact-specific situations, where the government needs for secrecy vary enormously in strength, as does the public interest in knowing what is going on. It is reasonable to fear a flood of cases. It also probably requires some differentiation between the rights of the "press" and of others, which makes many nervous and especially so now, when anyone, it seems, can claim to be a "journalist," which makes drawing that line more elusive than it was before. Still, in this one area, the United States has been far less venturesome than many other nations, where the idea of a right of access to information has flourished. At the very least, it would be good if the Court were to take some cases where the public's interest is strong and the government's interest weak and invoke the First Amendment. This would help to change the calculus more towards openness, which as a general proposition would be all for the good.

Then there is the horizontal dimension. Here the extension of First Amendment protection to extremist speech (e.g., advocacy of illegal acts, hate speech) continues to be very controversial.[1] In my earlier remarks, I made what I believe is a stronger case for this interpretation of the First Amendment than the typical rationales offered, which tend to point to the problems of drawing lines between acceptable and unacceptable ideas and of needing to avoid creating opportunities for governments, judges, and juries simply to use any exception created in order to suppress unpopular speech. (I have never been persuaded by either of Mill's arguments in *On Liberty* that such speech should not be

[1] See, for example, Catharine A. MacKinnon, *The First Amendment: An Equality Reading*, *in* THE FREE SPEECH CENTURY 140 (Lee C. Bollinger & Geoffrey R. Stone, eds., forthcoming).

censored because it might be true or because even if not true we acquire a "livelier" sense of the truth by confronting falsehoods.")[2] In general, I see this as an admirable effort to come to terms with bad impulses revealed in the act of censorship (as I think people like Holmes and Brandeis saw), which is why we feel a sense of pride, not reluctant acquiescence, in extending protection this far.

But I also see this idea of extending our societal capacities for tolerance as ultimately dependent on the presence of distinctive social conditions that make that meaning possible. In other words, it has always struck me as important that, in every case where extremist speech is protected, the courts in their opinions have made it perfectly clear that the ideas being protected are bad, which is also always reinforced by similar pronouncements by other leaders in the society. This is one key reason why it was so shocking, and potentially consequential for freedom of speech, when President Trump said of the march in Charlottesville, Virginia, by the White Supremacists and neo-Nazis, that there were "very fine people" in those groups.[3] This remarkable statement sent shock waves through the society, bringing added denunciations of the speakers and of the President's comment. But the President's statement, along with many others like it, have put in doubt how the society is thinking about evil ideas, which then has potential consequences for what tolerance and protections will mean. The larger point here is that we have to see the application of free speech to bad and dangerous ideas as linked to the ways in which the private sphere is thinking and interacting with these ideas. This is why, for example, a neo-Nazi march in Skokie, Illinois, is a very different matter from one in Munich, Germany, where for obvious reasons the *significance* of protection is fundamentally different and why because of that Germany has chosen a different path. The scope of free speech, at least at the extremes, is dependent on how it will interact with what is condoned or condemned in the private sphere.

There are some areas of the jurisprudence that will require substantial revision in light of new conditions. Perhaps the most noteworthy is the *Pentagon Papers*[4] case. I have already described its unique and pragmatic resolution of an eternal and perplexing problem of government secrecy versus public knowledge. But there are now three changes in the world that make this arguably wise resolution problematic (each of which has to do with the developments I will focus on in a moment, namely new communications technologies and globalization). These are: (1) the rise of new players who are likely to gain access to government secrets and who have little or no interest in drawing a responsible balance between the competing interests involved (e.g., Wikileaks and Julian Assange); (2) the ability of leakers to disseminate exponentially greater quantities of government secrets, which they cannot possibly vet in making a decision whether theft and publication will enhance the public good; and (3) the increase in the government's capacity to identify and then prosecute leakers (because of the ability to trace leaks through myriad forms of communications leaders now utilize, from texts and emails to phone calls and in-person conversations). The last change cuts in favor of

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[2] JOHN STUART MILL, ON LIBERTY (Longman, Roberts & Green, 1869).

[3] Donald J. Trump, President, United States of America, Press Conference after Charlottesville Violence, Aug. 15, 2017.

[4] *N.Y. Times Co. v. United States*, 403 US 713 (1971).

expanding the right of access I mentioned a moment ago. The first two indicate that we can no longer count on the professional (and patriotic) judgments of the traditional press (e.g., Ben Bradlee and Katharine Graham of *The Washington Post* at the time of *Pentagon Papers*) to strike the right balance.[5] For myself, I am in favor of preserving the *Pentagon Papers* regime, but on a sliding scale of First Amendment protections that would depend upon the editorial character and journalistic quality of the institutions in possession of the classified information. The obvious objection to this approach is that the courts should not be drawing distinctions between "responsible" and other publishers, but I see no practical alternative given (a) a need to counteract what will always be a problematic reality of excessive government secrecy and (b) no meaningful right of access doctrine at this point to combat that excessive secrecy.

Beyond all of these refinements, there is the big question that looms before us: Will the First Amendment stand up to the next wave of intolerance and oppression and what can and should be done to shore up its fortitude? I pointed out in the first lecture how the modern idea of freedom of speech and press was largely formed in the distinctive societal crucible of the 1960s. Since that time, there has not been a level of national fear that would generate the magnitude of intolerance seen in the eras of World War I and its aftermath and of McCarthyism in the late 1940s and 50s. That is, until now. The sudden rise of demagoguery, authoritarian-style leaders, and so-called populism in the United States and around the world forebodes a return to those earlier periods. The tactics of this strand of politics are well-trod: a call for a particular identity (e.g., religious, ethnic, racial, nationalistic); a claim that this identity is under threat, especially from "foreigners" and immigrants; fanciful ideas about possible policies and hyperbolic claims of achievements; disregard of the truth so that one can believe whatever one wishes; demonization of opponents; legitimization of private violence; and a bundle of other totalitarian strategies. In the United States, President Trump is deploying all of these methods. He has called for the jailing of his opponent (reminiscent of what happened to presidential candidate Eugene Debs); indicated he might not accept the election results if he lost; made false claims about the results of the popular vote in the election; asserted that media regularly and deliberately engage in purveying falsehoods and has repeatedly labeled them the "enemies of the people;" has himself, as counted by *The Washington Post*, engaged in over 5000 falsehoods and lies;[6] exaggerated his own accomplishments; demonized foreigners and immigrants; mocked and ridiculed opponents; approved of and incited violence against journalists; shown disregard for the rule of law; and endorsed, implicitly and even explicitly, violence towards certain groups. In a deep sense, the only thing that currently stands between full authoritarianism in the United States and where we are at the moment is the Rule of Law, which fortunately for now remains strong.

For the time being, at any rate, as Professor Tim Wu points out in his essay in *The Free Speech Century*, "Is the First Amendment Obsolete?," the ways in which censorship

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[5] David Strauss, *Keeping Secrets*, *in* THE FREE SPEECH CENTURY, *supra* note 1, at 123.

[6] Glenn Kessler et al., *President Trump has made more than 5,000 false or misleading claims*, Washington Post (Sept. 13, 2018), https://www.washingtonpost.com/politics/2018/09/13/president-trump-has-made-more-than-false-or-misleading-claims/?utm_term=.fe330fe7ce34

is *now* being manifested are taking nontraditional forms and not official assaults on freedom of speech and press.[7] As any sophisticated observer knows, unofficial and private intolerance can be just (or even more) censorial than the official varieties, so there is little comfort to be taken in where we stand at the present moment in time. If it were to change, however, and become official, how would the jurisprudence fare? I am not optimistic. It seems to me that, if we have learned anything in the last one hundred years, it is that in times of heightened insecurity and fear, which is especially true in times of war, the pervasive unwillingness to tolerate dissent, opposition, and nonconformity is an almost irresistible force for judges. Perhaps the fact that we have now lived long enough with the modern jurisprudence of free speech and press, and have often professed to be ashamed and embarrassed by the fever pitch of intolerance and its devastatingly unjust consequences in the two earlier low points in the evolution of the First Amendment, this will be enough to resist now or in the future. Some, like Professor Fred Schauer whose essay in *The Free Speech Century* entitled "Every Possible Use of Language?" argues that the extension of the First Amendment beyond the "core" of political expression (e.g., for commercial speech) jeopardizes its capacity to resist censorship in periods of crisis.[8] But, besides the possibility that there may actually be strength in greater complexity, I worry that every new era of repression sees itself as unique in its own way and, therefore, unbound by prior teachings and lessons. (One thing that might be done, though, would be finally to overrule several of the Court decisions that defined the collapse of First Amendment resistance and that are widely understood to be implicitly discredited (e.g., *Debs*[9] and *Dennis*[10]). An editing, as it were, of the jurisprudence every one hundred years seems like a good principle).

Of course, speaking out is the thing to do to help reduce the slide into yet another deep pit of censorship. I believe there is an important role for universities to play in this process. The academic mission is compromised by becoming political, but the qualities of mind that characterize that mission cannot survive a world or a nation that loses respect for truth, in a profound sense, and that falls so far below the norms of civil public discourse as to be dysfunctional. This becomes an existential and not a political issue for the university.

Small things might also be done to help. I would just note the recent establishment at Columbia of the Knight First Amendment Institute, which we launched with a $50M endowment and the mission of advancing research, teaching, public education, and—more to the point—litigation on freedom of speech and press. This is the result of a collaboration between Alberto Ibargüen, president of the Knight Foundation, and me to lodge in a relatively secure and independent institution (namely, a university) an organization that will be engaged in helping secure the First Amendment of the last century in as meaningful a role in the society in this next century (and beyond). For the past century, a benefit of what was effectively a monopoly status for much of the press, which combined both wealth and a strong journalistic ethos, was that there would

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[7] Tim Wu, *Is the First Amendment Obsolete?, in* THE FREE SPEECH CENTURY, *supra* note 1, at 272.
[8] Fred Schauer, *Every Possible Use of Language?, in* THE FREE SPEECH CENTURY, *supra* note 1, at 272.
[9] *Debs v. United States*, 249 U.S. 211 (1919).
[10] *Dennis v. United States*, 341 U.S. 494 (1951).

always be an advocate with the desire and the financial endurance to see through to the end any challenge to government abuse of power. In today's world, however, because of the effects of the Internet, the wealth of the traditional media has been depleted, and the new media (e.g., social media platforms), while they have abundant wealth, lack the ethos. Our hope is that the Knight Institute will be there to fill the gap. It is now up and running, with one notable success in obtaining a judicial injunction against President Trump for excluding people from his Twitter account on the basis of the content of their comments.[11] A District Court held that this violates the Public Forum Doctrine. (The government has appealed the decision.)

III

I now want to turn to the very complex and controversial subject of the Internet, the potential for public interventions or regulations, and the First Amendment.

I would start by observing that there has been an extraordinary change in the general view of the Internet and its consequences for the public forum. At the beginning, it was hailed as the ideal form of what freedom of speech and press were intended to create. It would equalize opportunities to participate in the forum, allow instant communication and universal access to all knowledge, and provide the first ever truly global communications system. That it would undermine the financial model of the traditional press was regarded as a boon for freedom of the press, not a threat. Today, in contrast, it is difficult to find anyone willing to extoll its virtues. Instead, there are regular cries about the destruction of the public mind: citizens can choose to avoid public issues altogether and do as a matter of practice. When citizens do choose to confront public issues, they tend to be highly selective in what they encounter, which means they succumb to the natural human wish to be around only opinions that reaffirm their own, a practice which over time tends to make a person more intolerant towards and angry about opposing views. Meanwhile, we now are keenly aware that the global characteristics of the Internet (about which I will speak more in a moment) make Americans more vulnerable to propaganda, manipulation, and falsehoods propagated by foreign governments and malicious actors. Exhibit one of this risk materializing is the consensus view of the United States intelligence agencies that the Russian government took the extraordinary step of actively trying to influence the 2016 presidential election and to discredit the democracy. Finally, there is (1) a deep concern that the monopolistic status of social media and their remarkable user base gives these for-profit companies undue control over the distribution of information and ideas, however much they profess to be "neutral" in exercising this power; and (2) an equal concern that the business model of these companies relies on their being able to control massive amounts of personal data.

One of the things that is most striking is how few actual, concrete proposals there are right now for dealing with many of these issues. In *The Free Speech Century*, we have three essays that together reveal just how vexing these problems are and how novel.

[11] *Knight First Amendment Institute v. Donald J. Trump*, 302 F.Supp. 3d 541 (SDNY 2018).

(Professor Emily Bell, "The Unintentional Press: How Technology Companies Fail as Publishers." Monika Bickert, the Head of Policy Management at Facebook, "Defining the Boundaries of Free Speech on Social Media." And Professor Tim Wu, noted earlier.)[12] (I am putting aside for the moment the issues around privacy of information, which I think are proving more amenable to a regulatory regime.)

The outline of a policy response to these problems will focus largely, I anticipate, on warnings and notations about information being inaccurate or misleading. Banning foreign government involvement in elections will no doubt continue (although even this can become complicated very quickly), and certainly there will need to be a new framework developed in international law for illegal intrusions, and highly aggressive efforts to influence public opinion, that will draw red lines and indicate appropriate national responses, just like the world has over centuries developed with respect to traditional violations of sovereignty, such as with physical invasions of territory. But providing more information about speakers and their messages when they have been designated as false and propagandistic will be the heart of the first round of remedies for the present concerns about manipulation of public opinion.

Given all this, here is how I would think about where we stand.

In one sense, I am not at all troubled by thinking about creating some kind of public regulatory oversight for the development of these technology companies. The fact that it is too early in our experience with this new communications technology to weigh its potential benefits and harms to our public thought process, and to devise specific public interventions to enhance the first and limit the second, does not seem to me automatically to foreclose government, or public, involvement. We have been through this before. In fact, this is more or less exactly the situation we found ourselves in with broadcasting beginning in the first half of the last century, with similar concerns, as I indicated in the first lecture. The response at the time and carried through to this day was to create a government agency with a very general mandate to figure out regulations that would serve the "public interest, convenience, and necessity." (Censorship, as such, was explicitly prohibited.)[13] And the Federal Communications Commission did so with regulations such as the Fairness Doctrine, requiring broadcasters to cover public issues and to do so fairly in representing different viewpoints on those issues. That system, as I have noted, was upheld by the Supreme Court. I know that the conventional view on this is to see the broadcast model as a unique and inappropriate precedent for this application, but I do not share that view. So, from my interpretation of the First Amendment, there is a model readily available in the existing First Amendment jurisprudence. The government, under continuous oversight by the courts, might be a partner with private industry in the evolution of this new technology of communications.

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[12] Emily Bell, *The Unintentional Press: How Technology Companies Fail as Publishers, in* THE FREE SPEECH CENTURY, *supra* note 1, at 235; Monika Bickert, *Defining the Boundaries of Free Speech on Social Media, in* THE FREE SPEECH CENTURY , *supra* note 1, at 254; Wu, *supra* note 7.

[13] Communications Act of 1934, 47 U.S.C. § 151 et seq. (1996).

Still, with all that said, I would not be inclined to pursue this course at the moment. I think it is still too early, and we would benefit from thinking through other alternative approaches to dealing with the problems we are beginning to perceive. Here it is important to recall the lesson I take from First Amendment experience that we always tend to overrate the risks with new communications technologies. That also happened centuries ago with the printing press, and it happened in the last century with some regulations of broadcasting and films.

I say this only as a preliminary caution, and cognizant that current events are fueling a competing view that the need for government intervention or other regulatory oversight is not premature, but urgent, and perhaps already late. At a minimum, we must entertain the possibility that we could be in the midst of an aberrant advance in communications technology that breaks the historical mold with respect to our ability to count on a benign result. The digital revolution and social media have affected personal introspection, the experience of childhood, availability of solitude, sexual habits, expectations of privacy, public discourse, and democratic governance—not to mention communal recognition of the truth—in the space of little more than a decade. They also have demonstrated a capacity to magnify our worst human tendencies, a view espoused not two weeks ago by Apple CEO Tim Cook in an important speech he delivered in Brussels, where he sounded an alarm about "rogue actors and even governments [who] have taken advantage of user trust to deepen divisions, incite violence and even undermine our shared sense of what is true and what is false."[14] Perhaps the current round of society-shaping technological advances is the one that will finally overmatch our ability to bend the technology to our will because its prevailing impact is corrosive of the very qualities and characteristics that society has fallen back upon to manage previous advances.

The presence of these competing views is, if nothing else, proof of the benefit to be gained from: (1) watching how the tech companies respond to the criticisms about their platform; (2) watching how citizens themselves respond to the proliferation of bad speech; and (3) conducting deeper research and analysis of what we are actually facing. (It can be helpful to step back and take a comprehensive perspective on what we have created. Remember, for example, that, when the Court declared that all streets and parks had to be open to speech without regard to viewpoint, that also enabled the Klan and neo-Nazis to push their messages more effectively than before.)

It seems to me there are also many things we could institute or enhance that would be beneficial in themselves and also respond to problems we perceive now. For example, in my view one of the greatest risks we are encountering today is the financial undermining of the traditional press. We need different ways of getting and receiving ideas and information, and we need—as I have suggested several times already—*institutions*, which are more than the sum of individual actors. The print and broadcast media are among the institutions we need to fortify. While I know in the current state of American politics this is an idea unlikely to succeed, I would greatly increase public

[14] Tim Cook, Chief Executive Officer, Apple Inc., Keynote address at 40th International Conference of Data Privacy and Privacy Commission (Oct. 24, 2018).

support for our public broadcasting system, and even provide such funding for the press generally. With any public funding mechanism, there are always risks of providing leverage for censorship, but there are well-known ways to minimize that risk and bring it to an acceptable level, in my view.

Finally, I would also hope that universities and colleges would be prepared to become greater participants in the public forum. About two-thirds of high school graduates go onto some form of higher education. That number could be much higher with more public funding. How we educate and train each new generation, in light of the changing nature of the public forum, will be important. In many ways, it is by far our most important "social" and "political" "platform." Meanwhile, we need more and better journalism schools and, in public education, a curriculum that, from an early age, develops in every rising generation a new form of digital literacy, which prepares our citizens to be more intelligent and wise consumers of news in an increasingly complex online environment. And we would all benefit—universities as well as the public—if universities became more engaged with practical issues facing the society and the world. (To this end, we have launched at Columbia an important initiative called Columbia World Projects, which commits the university to work with outside partners in solving significant societal problems, in limited time periods.) And, finally, I would say all this provides yet another reason why it would be good for the Court to articulate how the system of knowledge preservation and development, which I set forth in the first lecture, also is part of the "central meaning of the First Amendment." We should be focused on the broad ways in which we advance knowledge and art, which have value independent of our political culture yet are also intimately connected to it—undergird it, in fact. Looking at all this as a whole also makes us more aware of the potential for a positive role of the state, since the system of knowledge is significantly suffused with and sustained by public funding (e.g., the National Institutes of Health, the National Science Foundation, and the National Endowments for the Arts and Humanities).

We are early in the development of these new media and still very much finding our way. The technology companies themselves have evolved out of a vision of simply providing a means, a platform, for people to communicate, along the lines of a public utility. The legal upshot of this vision is reflected in the early law absolving them of any liability for harmful and illegal speech distributed on their platforms. (i.e., Section 230 of the Communications Decency Act of 1996).[15] The more they have been transformed into a major, perhaps even dominant, public forum in the society (and the world), the more they have come under enormous pressure to limit speech. From a free speech perspective, this is both good and bad. The more dominant and monopolistic their control of public thought and discussion becomes, the more their restrictions on speech effectively become the equivalent of government censorship. On the other hand, the First Amendment is often absolutely dependent on the private sphere being more restrictive than the constitution permits. (This is one of the lessons of extremist speech.) All this produces a kind of paradox. The government is increasingly wary of the power of these companies and we now see it using soft power (e.g., congressional hearings at which tech executives are brought in to testify) as a kind of tacit regulation. The tech companies are

[15] Communications Decency Act of 1996 § 230, 477 U.S.C. § 230 (1996).

clearly very worried about an onset of regulation and negative public reactions and are increasing efforts to control speech content on their platforms. But the more they do that the more they are putting in jeopardy their initial vision of neutrality and the legal benefits of protection against liability. Fundamentally, we are on a course where these technology companies are moving inexorably to becoming curators, editors, of information, knowledge, and opinion, however much they resist going there. The fact is that algorithms are a form of human editing, but they are very limited as editors; and, in the end, algorithms will not be able to do all we will expect of these institutions.

IV

I would now like to turn to the enormously complex and important issues surrounding the development of a system of freedom of speech and press in a new globalized world. Of course, this is a hugely difficult matter, not least because the views about this vary so greatly around the world and because we have no simple way of resolving those differences of perspective. But the fact of increasing inter-dependency driven largely by markets and economic activity (e.g., trade, foreign direct investment), the new global communications technologies, and the movements of peoples (whether caused by human curiosity, ambition for a better life, or physical and political need), is very, very real. And so is the fact there are major problems that have to be dealt with because of these phenomena, problems that require collective action of some form because they cannot be solved otherwise (the consequences of global warming being the primary example here). That we are in a period of rising hostility towards "globalization," which not coincidentally is often being expressed and manifest in social and political movements that are also threatening to freedom of speech and press, does not, I think, mean these forces of globalization will be reversed completely. On the contrary, it seems to me, this is more proof about the overwhelming power and strength of the process of integration. As with the Internet, the swing in attitudes about globalization—from Panglossian idealism a little more than a decade ago to outright denunciation and pessimism now—from Davos to Detroit, as one might describe it—has been dramatic. Meanwhile, as the foundations of the world continue to shift towards inter-dependency, the need for attending to the system of freedom of expression to support it will continue to grow in importance.

I see the general problem as having two dimensions. One is that every individual nation will have to decide for itself how it will arrange for its citizens to relate to the rest of the world, both in speaking to the world and in hearing from it. My immediate interest is with how to shape our thinking about the First Amendment in the United States in this regard.

The other dimension is how we will evolve a "global" set of norms about freedom of expression. In an important sense, there will be a dialogue among nations, explicitly or implicitly, as each one separately grapples with its own solutions and approaches. In a deeper sense, there will be a serious question over how much individual nations will be

prepared to give up, or adjust, their own sovereignty over the realm of "speech" to a more international or multinational system. We are building on an existing foundation, created in that seminal period following the Second World War, when most of the current international system was created. Article 19 of the 1947 Universal Declaration of Human Rights[16] provides a vigorous international version of the First Amendment to the U.S. Constitution, declaring: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." This is now widely accepted as constituting international law, and it has been embedded further in the International Covenant on Civil and Political Rights (1966)[17] and in various regional charters around the world (e.g., American Convention on Human Rights (1969)).[18]

So much always depends upon our basic understanding about what we are trying to do, and here again we see the need for a shift in our basic mentality. When the Universal Declaration of Human Rights was drafted and signed onto, the world was trying to recover from two devastating world wars and to reduce the ways this might be repeated. The idea of "human rights" was thought about in that context. Governments that denied basic human rights to its citizens were believed to be more inclined to be aggressive towards other nations and thus to ignite yet another conflagration. Respect for human rights, and free speech and press most especially, was thought to be important to preserving peace through halting the tendencies of totalitarian regimes.

This logic still has relevance today, but there is a new reality that brings into focus a new rationale. That new reality is made up of the forces of globalization and its resulting issues, and the new rationale for freedom of speech and press is the need for the capacity to solve these issues and to advance knowledge so that the world can be a good place to live. It is critically important that we envision the international norm of freedom of expression with this new purpose in mind.

A.

Let me turn to an examination of how the United States should think about the First Amendment in light of the modern world of globalization. Here, too, we need to begin to develop a new mind-set, built on an awareness of how the United States cannot continue to think of itself, in this area of free speech and press, as existing in isolation, in a bubble separated from the necessity of developing global knowledge and public opinion. That does not necessarily mean that Justices should somehow become "liberal internationalists," or think of themselves as acting on behalf of world citizens. One can accept and embrace the realities of a global system of expression for addressing global problems and still think about it solely from the standpoint of what the First Amendment

[16] G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).
[17] Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.
[18] American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143.

must guarantee in order for American citizens to be able to participate effectively in that system.

What is actually involved here is really just an extension of what we went through in the last century, represented most significantly by what the Court did in *New York Times v. Sullivan*,[19] which imposed strong limits on what individual states could do—and had been doing since the birth of the country—in the way of protecting individual reputations at the expense of open and free discussion of public officials and public figures. As the nation became more inter-connected—with a national as opposed to a local economy, with an expanding national consciousness about issues like segregation and discrimination, the environment, and war, and with a new inherently national communications technology (again) both contributing to this new national reality and enabling national decision making about these issues—it had to develop national standards for free speech and press. The spirit of that necessity pervades *New York Times v. Sullivan*. Now this same process is happening on a worldwide scale, and we will need in this century to devise ways of coming to terms with this change, which, of course, will be far more difficult since there is not a "Supreme Court" to appeal to for enforceable international law.

With this in mind, you can quickly see that there are a host of very specific and concrete areas and problems that will have to be addressed over time. Here are some of them:

1. With the reality now that virtually anything said on the Internet will be instantaneously transmitted around the world, we will have to decide to what degree will we weigh in limiting free speech within the United States the effects the speech will have outside of the country. This could be either in inciting violence or in causing violent reactions because of its perceived offensiveness. A prime illustration of this problem was, in 2012, the publication on YouTube of a purported trailer for a privately produced "film" about the Prophet Muhammad, which led to riots in the Middle East.[20] How should the classic "hostile audience" doctrine developed in the domestic context be applied here?

2. United States citizens might wish to participate in helping foreign actors in their political activities. To what extent should the principles developed for protection of domestic political activities apply abroad? In *Humanitarian Law Project v. Holder*,[21] a U.S. activist group sought to provide legal assistance to the Turkish PPK, which in federal law is designated a foreign terrorist organization and thus is prohibited from receiving any "material support."

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[19] 376 U.S. 254 (1964).

[20] *See* Claire Cain Miller, *Google Has No Plans to Rethink Video Status*, N.Y. Times, Sept. 14, 2012, https://www.nytimes.com/2012/09/15/world/middleeast/google-wont-rethink-anti-islam-videos-status.html. *See also Garcia v. Google, Inc*., 786 F.3d 733 (9th Cir. 2015) (rejecting claim of unwitting actress featured in the trailer seeking preliminary injunction requiring Google to remove the fim from its platforms).

[21] 561 U.S. 1 (2010).

The Supreme Court, expressing deference to Congress and the executive branches over matters involving foreign policy, held that a different, and minimal, standard of protection should be applied in such cases.[22] Whatever one thinks about the particular circumstances in this case, the lowered First Amendment protections for speech activity outside the United States seem badly out-of-step with the need for a global public forum. This will have to be reviewed and the gap closed.

3. The corollary problem is this: To what extent can foreign actors—governments, organizations, and individuals—be prohibited and prevented from participating in the U.S. public forum? In the United States now, of course, there is heightened concern about Russian government "meddling" in the 2016 U.S. election. This involved hacking into the Democratic National Committee computers, stealing emails, and publishing those emails (through Wikileaks); using fake accounts to distribute false information and inflammatory opinions; and hacking into the voting systems in several states. The U.S. intelligence community has warned that these actions have taken the general spying regime to a completely new level, perhaps even threatening American democracy. Currently, foreign states are forbidden from using money to influence our elections,[23] and anyone who represents a foreign government in the U.S. political system must register with the federal government.[24] Of course, hacking computers is illegal.[25] But what "speech" by foreign governments and actors should be prohibited as well?

4. A related problem is when cable operators, which are generally regulated because of their natural monopoly status, refuse to allow foreign state broadcasters (such as Al Jazeera or RT) to distribute their content to cable customers. Should this be allowed and the public deprived of access to foreign media, because those media are regarded as offensive, or propagandistic, or mouthpieces of bad state actors?

5. A major point of contention for this new global system is the border. Traditionally, as with foreign policy, the courts have been extremely deferential to the government in deciding how to go about admitting and denying entrance to foreigners and treatment of U.S. citizens. The recent so-called travel ban of the Trump Administration is an example. The purported rationale was national security, but it was challenged on the ground that it represented invidious religious discrimination (against Muslims).[26] Academic institutions filed amicus briefs providing the courts with information about the importance of free movement of students and scholars to research and education, but they stopped short of claiming the ban violated the First

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22 Id. at 33-37.
23 52 U.S.C. § 30121.
24 22 U.S.C. § 611 et seq.
25 *See, e.g.*, 18 U.S.C. § 1030 .
26 *Trump v. Hawaii*, 585 U.S. ___ (2018).

Amendment.[27] (Another example would be a policy, reportedly under consideration by the Administration, to deny visas to Chinese nationals to study and work at universities in the United States, as a way of protecting U.S. intellectual and research property from being stolen or taken.)[28] If we envision the First Amendment as protecting the system of knowledge production I recommended earlier, a key component of which is the exchange of ideas through interactions with scholars and students internationally, should a strong First Amendment interest be weighed in the balance here?

There are many more examples of border decisions that evoke these large questions: visas denied to foreign citizens on the basis of viewpoints, special visas required of foreign media to operate within the United States, and restrictions on U.S. citizens leaving and coming back to the country based on their beliefs and expressive activities. Recently, the government is reportedly considering giving customs officials the power to require any prospective entrant to disclose all of their Internet identities, addresses, and handles.[29] In this heretofore largely First Amendment-free zone, what should be the role of the First Amendment?

6. Still another illustration is whether U.S. courts will or should enforce judgments against U.S. citizens obtained in foreign courts involving restrictions on speech that would not be permitted under First Amendment law. This is especially problematic in the area of defamation actions secured in foreign courts. This will test and require amendment of the custom of reciprocity in the recognition of foreign judgments.

I do not have the time here to resolve each of these problems. But I would suggest several recommendations for how we (the Court) should approach solving them. Here, as always, everything should start with an open recognition of what we are trying to do and why.

1. The key is to acknowledge that we now have an interest under the First Amendment in building a framework of general principles and specific doctrines that will enable U.S. citizens to participate in the global public forum, and to receive and hear voices from around the world. This also applies to the system of preserving and growing knowledge.

2. This means, of necessity, that we must at the very least reduce the deference paid to government actions in the foreign policy and foreign affairs arena and in immigration and customs.

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[27] Brief of Colleges and Universities et al. as Amici Curiae Supporting Respondents, *Trump v. Hawaii*, (March 30, 2018) (No. 17-965).

[28] *See* Ana Swanson and Keith Bradsher, *White House Considers Restricting Chinese Researchers Over Espionage Fears*, N.Y. Times, Apr. 30, 2018, https://www.nytimes.com/2018/04/30/us/politics/trump-china-researchers-espionage.html.

[29] *See* Sewell Chan, *14 Million Visitors to U.S. Face Social Media Screening*, N.Y. Times, Mar. 30, 2018, https://www.nytimes.com/2018/03/30/world/americas/travelers-visa-social-media.html.

3. While there is a long tradition in comparative law of taking note of legal doctrines and decisions in other countries, today's world requires that our courts at the very least be conscious of how their decisions will be received abroad and realize that we have an interest in other nations becoming more protective of speech and press and, therefore, in understanding what we are trying to do and why. We need to think about how we speak to them, as well as ourselves. (See, e.g., Professor Sarah Cleveland's essay "Hate Speech at Home and Abroad" in *The Free Speech Century*.)[30]

4. In that process of persuasion, we should recognize and openly address the facts of our own history and how it is marred by bad decisions, too. We did not come to where we are either quickly or in a straight line. We have a century of experience and it is important to draw on it in all its parts, good and bad.

5. In this realm, enlarging the vision of the First Amendment from serving democracy to the development of knowledge and the myriad benefits of that will be better received in a world in which other forms of government prevail. The idea of freedom of speech serving the Madisonian conception of citizen sovereignty is necessarily limited on the global stage. The advancement of knowledge is far more compatible with a reality of multiple systems of government.

B.

Lastly, let me turn to the massive problem of developing global norms on freedom of speech and press around the world. This can occur at two levels: Just as with changes within the United States, it can be within each nation. But it can also be at the regional or global level, where national sovereignty is sacrificed in return for a system deemed to advance the public good, and where in fact we already have a foundation of articulated principles and a variety of international and UN institutions that engage in reporting on, investigating violations of, and issuing reports on freedom of speech and press in countries. There are many matters we could inquire into. I could speak about strengthening these international institutions and their capacities to issue and enforce judgments (much of the movement in the last century has been at the regional level, in Europe, Latin America, and now Africa); or about using other areas of international agreements and institutional mechanisms to enforce free speech and press standards (of particular interest to me has been the potential of international trade law, and the WTO and of Foreign Direct Investment treaties, to press for greater free speech and press rights; or about preserving the complex governance structure of the Internet so that this critical communications system is not balkanized; or about how to expand the use of laws in nations with strong free speech and press cultures to do things like restrict visas or

[30] Sarah Cleveland, *Hate Speech at Home and Abroad, in* THE FREE SPEECH CENTURY, *supra* note 1, at 210.

freeze financial assets of leaders of countries that violate freedom of speech and press norms (as happens in the United States); or about how these nations could put more pressure on other violating countries (e.g., the recent Khashoggi case); or about exploring the periods in every civilization when there was respect for tolerance and openness of expression and the development of knowledge, so that every nation can find for itself a model to build on for today, rather than creating the false sense that these freedoms and values are really just American or Western notions. These are all interesting and crucial subjects, but I would like to focus for just a moment on what seem to me to be two very important factors in the development of free speech norms in the coming century. One is an overarching observation; the other is more tactical about building out a legal system.

The first has to do with China. We all know that China is well on its way to becoming a global superpower and, because of that, what it becomes will have a profound influence on our world in this century. But China's evolution into a world superpower is more than an economic and political reality. China is also creating a bundle of values that will affect the rest of the world, or at least contend for influence. It is important that we understand, in this regard, that among those values, is a view of freedom of expression and knowledge that is strikingly at odds with that of the First Amendment and with Western Enlightenment and liberal values. This has to be taken very seriously. In fact, it may be said there are now two conflicting philosophies about free speech and press emergent in the world today, each contending for influence and ultimate dominance. Any serious discussion about the future of freedom of expression in the world in this century must start with this contest of perspectives. (In *The Free Speech Century*, Professor Tom Ginsburg discusses this in "Freedom of Expression from Abroad: The State of Play.")[31]

Until recently, the general view among sophisticated observers of China has been that either of two possibilities would unfold. One view was that once a threshold of modern development of the economy and social system had been reached (e.g., when the vast migration from rural to urban areas had taken place, the economy had shifted from an export-driven system to an internal, consumer-driven system, and the average standard of life had improved significantly), the country would of necessity and choice become more open in terms of free expression—a fact the government would have to accept. This would follow the course of history of other developed nations and would be consistent with the rising expectations of its increasingly educated, affluent, and travelled population, as well meeting the needs of an economy more and more dependent on knowledge and creativity. The other view was darker, though equally favorable toward an evolution of greater openness: namely, that modern China had been created out of an inherent contradiction (an open market economy and a closed authoritarian political regime) that would at some point inevitably implode, or come into conflict. And, when that happened, this latter view held, the forces of openness would likely emerge victorious.

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[31] Tom Ginsburg, *Freedom of Expression from Abroad: The State of Play*, *in* THE FREE SPEECH CENTURY, *supra* note 1, at 193.

Today neither of these theories seems any longer descriptive of reality, nor of the path China is likely to take. As China has become more and more successful economically, it has also become more and more confident in its overall system, which includes rising levels of repression of dissent and general censorship. In fact, in China today there is now a much more direct and open challenge to the view about free speech and press that has defined the United States. That challenge argues that the U.S. political and social system will itself implode because of the extreme positions we have taken under the First Amendment. By the new Chinese view, protecting extremist speech, allowing radical dissent to flourish, denying protections to the government against attacks and falsehoods, and so on, all have contributed to a steady decline in social and political cohesion and the necessary trust in the government and the state. For this view, the election of Donald Trump is proof of theory.

How should we think about this challenge? One can start by understanding whether what we are facing today in the United States, and in other democracies that are turning illiberal, is a sign of the failure of the free speech experiment or a downward cycle that is inevitable, given our understanding of human nature, and one we know we must continually work against and offer alternatives to, by creating strong and enduring institutions built on the idea of open and free inquiry. Not surprisingly, I believe the latter. But we cannot prove these ideas, except through the quality of life we witness over the long term. We can, however, make our case more effectively than we have.

Looked at with the perspective of one hundred years of First Amendment jurisprudence, what we see today in the U.S. is, in a profound sense, not surprising at all, nor proof of a failure of the interpretations we have given to the First Amendment. Every society will face these political and intellectual recessions periodically. The success of the nation over time will be in its acquired capacity to recognize the sources and to minimize the effects of these regressions.

For us to do that and to play a more effective role on the world stage and advocate for a robust principle of freedom of speech and press, however, we have to change ourselves, beginning with how we organize our knowledge and expertise. I know this from my own work in the First Amendment. As I have indicated, I came of age, as a scholar, in the period of this last century in which the tectonic plates of free speech came together to form a single national system of principles and doctrines defining freedom of speech and press. My scholarly expertise encompassed that range. But in the new globalized and inter-connected world, I know too little about the developments across the world, outside the United States. In my field of law, I took the United States and the rest of the world was assigned to those who did international law and international human rights. Given current realities, of the world we are heading into, that separation of knowledge will not work. We all need to know more than our fields have led us to know.

In the last decade, I have tried to change this, for myself and for my field. At Columbia, I established a project on Global Freedom of Expression. One of its functions is to do something quite simple, namely, collect in one place, on a website, all of the

decisions about freedom of speech and press in nations around the world.[32] We also give special prominence to those decisions that refer to international norms. The idea is that over time (a long time, to be sure) we will create more of a sense of community—of common law—around these issues than exists today, since courts and commentators can easily look in one place and see what is happening there, comparisons can be made, and materials can be assembled for courses to educate the next generations of students. As a result, their knowledge will not be so limited as mine, and they will be much better prepared to apply that knowledge, both in their professional lives and in the way they exercise their rights and duties as citizens.

This is basically what many law professors did in the United States in the last century in various areas of common law (contracts, torts, etc.), when for the first time they collected decisions in individual states and then wrote treatises about the emerging "common law" they were helping to create from scratch. By bringing together these formerly separate and discrete cases, they created something new—a "common" and shared effort and a zeitgeist for seeing everything as a whole rather than as discrete parts.

In this next century, seeing the development of freedom of speech and press around the world as a whole is the vision we must seek. Then in such a world—using as an example what is happening across the world at this very moment—we would all know about recent cases such as *Okuta v. Kenya* (2017)[33], in which the High Court of Kenya held that criminal defamation laws were unconstitutional; or *Primedia Broadcasting v. Speaker of the National Assembly* (2016)[34], in which the Supreme Court of Appeal of South Africa struck down Parliament's rules prohibiting live broadcasting of incidents of disorder in Parliamentary sessions; or *Alestra v. Mexican Industry of Musical Property*,[35] in which the Mexican Supreme Court struck down a government agency's suspension of public access to a particular website; or the *NorthKoreaTech.org* case in which a South Korean Court of Appeals held that a website could be blocked only in exceptional circumstances, that blocking of the named website by the South Korean intelligence services unduly limited the Korean public's right to know, and that foreign website operators (NorthKoreaTech.org was operated from the UK) have standing in South Korea by extension of the right to freedom of expression of Koreans;[36] or the decision of the Kerala High Court in India to dismiss a petition claiming that a magazine cover depicting a woman breastfeeding her child was obscene and a violation of laws that protect women

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[32] GLOBAL FREEDOM OF EXPRESSION, https://globalfreedomofexpression.columbia.edu/cases/ (last visited Dec. 14, 2018).

[33] "Okuta v. Attorney General," GLOBAL FREEDOM OF EXPRESSION, https://globalfreedomofexpression.columbia.edu/cases/okuta-v-attorney-general/ (last visited Dec. 14, 2018)

[34] "Primedia Broadcasting v. Speaker of the National Assembly," GLOBAL FREEDOM OF EXPRESSION, https://globalfreedomofexpression.columbia.edu/cases/primedia-broadcasting-v-speaker-national-assembly-2/ (last visited Dec. 14, 2018)

[35] "Alestra v. Mexican Institute of Industrial Property," GLOBAL FREEDOM OF EXPRESSION, https://globalfreedomofexpression.columbia.edu/cases/alestra-v-mexican-institute-industrial-property/ (last visited Dec. 14, 2018)

[36] "Korea Communications Standards Commission v. Martyn Williams," GLOBAL FREEDOM OF EXPRESSION, https://globalfreedomofexpression.columbia.edu/cases/korea-communications-standards-commission-v-martyn-williams/ (last visited Dec. 14, 2018)

and children;[37] or the case of Tufik Softi, in which the Constitutional Court of Montenegro, for the first time in Montenegro, recognized that states have positive obligations to protect journalists from attacks and threats on their life;[38] or the very recent decision of the Supreme Court of Brazil to protect the rights of university students and faculty to express political views (saying, memorably, that "The only force that must enter universities is the force of ideas");[39] and many, many other judicial decisions that extend and apply the globally emerging principles of freedom of speech and freedom of the press.

The first one hundred years of free speech in the United States is instructive as an experiment in the evolution of "human values," the broad subject of the Tanner Lectures project. At this point, it is a jurisprudential beehive of cases, opinions, and doctrines that bring a kind of order to a realm of human activity and its relationship with the State. Given its starting premises about human nature and government, what it has aimed for is nothing short of wondrous. It asks of us something deeply counter-intuitive, against the grain of our inclinations, all in the name of sheltering our quest for knowledge and of realizing our democratic choice for self-government. It has itself not always succeeded by its own terms, and now it is being tested again by new threats arising from the natural "logic," as Holmes described it, of "persecution," by a transformative new technology of communications, by global power struggles, and a shrinking world that needs all the discussion and understanding it can muster. There is nothing simple about any of this, and it has been one of my purposes in these lectures to highlight some of the key complexities. At the same time, our ignorance about critical elements of what needs to be done now will make things harder than they should be to sort out. The hope is that, after a century of free speech, we will be able to learn from our experiences and do even better in this next century.

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[37] "Felix v. Gangadharan," GLOBAL FREEDOM OF EXPRESSION, https://globalfreedomofexpression.columbia.edu/cases/felix-v-gangadharan/ (last visited Dec. 14, 2018)

[38] "Softić v. Montenegro (Constitutional Court)," GLOBAL FREEDOM OF EXPRESSION, https://globalfreedomofexpression.columbia.edu/cases/softic-v-montenegro/

[39] "'O ensino não se reveste apenas do caráter informativo, mas de formação de ideias', defende Raquel Dodge no STF," PROCURADORIA-GERAL DA REPÚBLICA, http://www.mpf.mp.br/pgr/noticias-pgr/201co-ensino-nao-se-reveste-apenas-do-carater-informativo-mas-de-formacao-de-ideia201d-defende-raquel-dodge-no-stf / (last visited Dec. 14, 2018)