

The Free Speech Century

LEE C. BOLLINGER AND GEOFFREY R. STONE, 2018

New York, Oxford University Press

xvi + 356 pp, \$99.00 (hb) \$21.95 (pb)

What limits can or should be placed upon speech on college campuses? What steps should social media companies take to limit the spread of fake news? Should the United States adopt hate speech laws like those of many other developed nations? When should we punish those who leak government secrets? Should political spending really be considered a form of expressive conduct?

These pressing social questions, among others, have reinvigorated both academic and popular interest in the meaning, scope, and significance of free speech rights. This resurgent interest in free speech coincides with the one-hundred-year anniversary of the first set of cases in which the United States Supreme Court seriously entertained the more expansive modern understanding of the First Amendment's free speech protections enjoyed in the United States today.

Enter *The Free Speech Century*, a fabulous edited volume that skillfully brings together the historical significance of the past century's monumental legal developments in free speech law with the most important questions about the role of free speech facing democratic societies in the twenty-first century. The volume addresses all the questions asked in the opening paragraph of this review (and many others). It contains sixteen chapters, organized topically into four sections, along with opening and closing dialogues between the volume's editors, preeminent constitutional law scholars, Lee C. Bollinger and Geoffrey R. Stone.

The first section, "The Nature of First Amendment Jurisprudence," is the most historically focused section. Vincent Blasi, Frederick Schauer, Laura Weinrib, and Heather Gerken each offer insightful contributions of significant independent merit. Collectively, they provide newcomers to the field with an excellent introduction to the history and fundamental jurisprudential of U.S. free speech rights, and they provide important new ways of looking at these historical issues for those already acquainted with free speech law.

The second section, "Major Critiques and Controversial Areas of First Amendment Jurisprudence," is the volume's largest section with six chapters comprising roughly a third of the book's pages. Within this section, Floyd Abrams' chapter about the infamous *Citizens United* case and Robert C. Post's chapter about free speech on university campuses both stick out, albeit for different reasons.

In his chapter on the hot button issue of the role of free speech on university campuses, Post artfully defends the view that it is academic freedom, rather than traditional freedom of speech, that applies on university campuses. Post's argument is grounded on the distinctions between the purpose of classic First Amendment principles and the purpose of the university. For Post, the purpose of classic First Amendment principles is 'to protect the process of self-government' (p. 112) while the purpose of universities is education and the 'cultivation' of students' minds (p. 113). Post argues that the First Amendment's 'essential' rules of viewpoint neutrality, equal treatment of all ideas, and no compelled speech are incompatible with the goals of the university and, as a result, 'inapplicable' to universities (p. 112).

Post's chapter is clear and well-reasoned. His approach of stepping back and thinking about the fundamental purposes of both the First Amendment and of higher education is productive. A potential weakness of Post's account is that one could read his view as implying that the full scope of the First Amendment is merely protection of effective self-government. For those who see classic First Amendment protection as grounded in more than just protection of effective self-government (e.g. as grounded in personal autonomy), Post's account may appear incomplete and thus more easily refuted. Overall, Post offers an important contribution to debates concerning freedom of speech at universities.

In *Citizens United v. FEC*, the U.S. Supreme Court held that the First Amendment prohibits the government from restricting the amount of money corporations can spend as political speech. Floyd Abrams, who represented Citizens United in the case, argues that those who predicted that the Court's ruling in *Citizens United* would cause significant damage to our democracy via an influx of corporate money in politics were wrong. His conclusion is delivered with a certain degree of pathos, with Abrams going so far as to suggest that news organizations who made dire predictions about the *Citizens United* ruling ought to apologize (p. 84).

Abram's chapter is data driven. His argument focuses on showing that even the largest corporate donations to political speech were not terribly large when compared to the biggest donations from individuals. To the extent that *Citizens United* was specifically about whether to grant corporations the same highly unregulated conditions on campaign donations already in place for individuals, Abrams makes the valuable point that the specific entrance of looser restrictions on corporate donations to political speech has not been as significant as many predicted. Rather, one might think that the real problem is the much earlier case Supreme Court case *Buckley v. Valeo* (decided in 1976) where the Court began its trend of significantly loosening restrictions on campaign donations and political spending in the name of free speech.

Despite this, I can't help but feel that Abrams has somewhat missed the forest for the trees in asking us to conclude that giving greater political campaign donation power to corporations wasn't so bad after all because the millions given to political campaigns by corporations is still overshadowed by the tens of millions given by wealthy individuals (many of whom themselves exercise significant influence over large corporations). Nonetheless, Abrams' chapter is interesting and provides useful data on political spending.

The volume's third part, "The International Implications of the First Amendment," contains three fascinating chapters that compare, contrast, and study the relationship between U.S. free speech law and free speech law in other developed nations. In addition to offering fascinating comparative studies, these chapters function as a useful primer for global free speech law. They also challenge readers to consider both the pros and cons of the role of the U.S. globally as the country with arguably the world's most robust free speech protections.

The volume saves perhaps the best for last. The final section, "New Technologies and the First Amendment of the Future," includes three insightful chapters on the new challenges created by the internet (especially social media) for free speech. Emily Bell forcefully argues that search engines and social media platforms have become, in many respects, an 'unintentional press' and that they should be treated as such (p. 235). Monika Bickert, Facebook's Head of Policy Management, discusses the

legal and practical challenges of regulating large international social media entities like Facebook. Timothy Wu's chapter insightfully questions the relevance of old First Amendment paradigms given that 'it is no longer speech itself that is scarce, but the attention of listeners' (p. 272). These excellent chapters cover what I expect will be some of the most important issues free speech scholars will be grappling with for the next generation.

This wonderful volume provides an affordable (in the case of the paperback) introduction to the work of many of the most prolific and influential scholars writing about free speech rights. It would pair nicely with philosophical articles on free speech for a philosophy seminar or with First Amendment case law in a law school seminar. I highly recommend this book.

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