INTRODUCTION

I have been teaching classes in the First Amendment for nearly forty years. Students love the First Amendment. Like the overwhelming majority of their fellow citizens, they celebrate not only its protection of a basic human right, but also its role as a part of their identity as Americans.

There was a time when those celebrations were justified, but I believe we have come to a point when it is *thinkable* that the First Amendment does more harm than good. Don't get me wrong. The First Amendment does a lot of good. At its best, freedom of speech promotes many values including liberty, freedom, equality, tolerance, respect, dignity, self-government, truth, justice, and associational values, along with cultural and communitarian values. Perhaps most important, it protects dissent, speech that criticizes existing customs, habits, traditions, institutions, and authorities. Indeed, it protects criticism of public officials and public figures to a greater extent than other countries in the world. It even protects advocacy of illegal action so long as it is not directed to incite and likely to incite and produce imminent lawless action. It could do more to protect dissent than it does and it should. I will argue in Part II of this book that the First Amendment fails to protect dissenting speech as much as it should and that its failure to protect religious minorities is even more pronounced than its failures in protecting dissent.

The main problem with the First Amendment, however, is that it overprotects speech. We take pride in protecting the speech we hate and in tolerating speech that offends. But no one justifies regulating speech on the ground that we should hate it, and regulating speech

merely on the ground that it offends is a nonstarter. But speech that causes significant harm (or unreasonably risks such harm) ordinarily should be regulated to avoid the harm, and that kind of speech should not be exempted from regulation because it is also hateful or offensive.

Free speech doctrine downplays the harm that speech can cause. Indeed, its most problematic assumption is that free speech is considered to be so valuable that it almost always outweighs other values with which it comes into conflict. Of course, free speech is ordinarily valuable, but there is no good reason to assume that it invariably should outweigh other values. Nor is that assumption harmless. Because of it:

- The First Amendment rides roughshod over human dignity protecting privacy-invading speech such as that which provides a voyeuristic public with the names of rape victims and protecting demonstrations intended to inflict emotional distress even at funerals.
- The First Amendment protects pretrial publicity that feeds public curiosity while jeopardizing the rights of the accused to a fair trial.
- The First Amendment protects racist speech despite its undermining of racial equality.
- The First Amendment protects pornography despite its encouragement of violence and discrimination against women.
- The First Amendment protects a market for depictions of animal cruelty that harms animals and promotes sadism or masochism.
- The First Amendment protects the marketing of violent video games to children despite the conclusions of respected medical associations that these games desensitize our children to violence and promote a needlessly violent culture.
- The First Amendment protects commercial advertising that encourages a materialistic and hedonistic culture substituting consumer pleasure for human flourishing. It even protects tobacco advertising that promotes the needless death and suffering of hundreds of thousands of people each year who have become addicted to the tobacco habit.
- And the First Amendment undermines American democracy by permitting corporations and wealthy individuals to dominate American political campaigns at local, state, and federal levels. Simply put, a democracy cannot function when its representatives look to moneyed interests before they look at the will of the people and the common good.

Some might say that all this is the price we pay for free speech. Some argue that the legitimacy of government depends upon respect for the autonomy of the individual and that respect demands that free speech be absolute, at least in the absence of coercion or manipulation of another.[1] We can agree that government must respect each of its citizens; nonetheless, it can disrespect the speech choices that individuals make precisely because the speech causes harm outweighing the speech's value whether or not that harm flows from coercion or manipulation. So, too, some argue that the legitimacy of democratic government depends upon protection for the right of citizens to participate in democratic dialogue or public discourse defined to include the building of the culture or the formation of public opinion.[2] But public dialogue or discourse can trigger substantial harm, and the privileging of free speech over that harm is difficult to defend in terms of democratic legitimacy. For example, if pornography and some forms of racist speech create unjust conditions for women and people of color, it is odd to be told that the legitimacy of government depends on protecting speech that undermines equality.[3]

Examples such as these show the lack of wisdom in supposing that under our Constitution there is no such thing as a false idea. Of course, there are false ideas. State governments could not propagate racist slogans without violating constitutional principles of equality. So the notion is not really the mindless suggestion that there is no such thing as a false idea. The suggestion is that government should be agnostic about the value of an idea or the value of speech (whether it presents an idea or not) in enforcing the First Amendment. To be sure, there is risk in government sanctioning speech and taking its value into account in doing so. History is littered with governmental bad judgments particularly in its censorship of dissent.[4] But First Amendment doctrine is already permeated with judgments about the value of speech.[5] It assumes, for example, that most forms of political speech are more valuable than commercial advertising, credit reports, obscene speech, or nearly obscene speech. There are strong arguments for the view that speech should not be sanctioned in the absence of harm, but when harm is created, there are good reasons to evaluate the extent to which the values of free speech are or are not implicated by the speech

at issue. As the examples detailed plainly show, the assumption that speech is uniformly valuable would lead to unacceptable results.

A commitment to freedom of speech need not commit us to this unwholesome path. Other Western countries, for example, have not taken this course despite their own commitments to the free speech principle. Some might say so much the worse for those countries, but if you were born and raised in Toronto, Berlin, Paris, or London, it is likely you would believe that the Canadians and Europeans are right and the Americans are afflicted with a form of First Amendment idolatry. Moreover, through most of our history, the United States and other Western countries were quite close on free speech issues. Indeed, the historic judicial approach to freedom of speech has been to respect the alternative interests involved. When, however, the First Amendment protects violent video games sold to children, intentional infliction of emotional distress at funerals, depictions of animal cruelty, and tobacco advertising, it seems clear to me that a good thing has been stretched far beyond reasonable bounds.

This leads to the question of how the US judges – whether liberal or conservative – (there are exceptions on some issues) have turned free speech into a fetish. The answer is not simple, but it is fascinating; it is different for conservatives than it is for liberals; and neither conservatives nor liberals are all alike.

Of course, liberals and conservatives are influenced by centuries of thought on freedom of speech, but so are Canadians and Europeans. On the other hand, many have pointed to the American distrust of government, individualism, and antihierarchical views as significant explanations for the different approaches to freedom of speech. The difficulty with these cultural explanations is that the strong free speech tradition was rather late in coming. If the standard cultural factors were so important, the free speech tradition would have emerged much sooner.[6]

In the United States, an important, but, as we shall see, not exclusive influence for liberals was the dispute over free speech for communists in the 1950s. Conservatives argued that communists should not be afforded free speech rights because the interest in national security outweighed the interest in free speech. Instead of emphasizing that this claim wrongly inflated the national security interest, Justice Hugo

Black and prominent commentators associated with the American Civil Liberties Union (ACLU) developed the argument that balancing First Amendment freedoms was inappropriate. The Constitution had done all the balancing that needed to be done. As we will see, this position requires a lot of backing and filling, but it set the stage for liberals to ignore other interests when free speech claims were rightly present. Liberals also were attracted to the view that the First Amendment embraced a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[7] This perspective led to the position that the libel laws should not easily suppress criticism of powerful figures in American government and civil society. But it also led to the conclusion that the right to demonstrate about public issues at a funeral was privileged over respect for the privacy and dignity of a grieving family. Although the liberals work within this tradition, they are hardly homogeneous. As we will see, for example, Justice Breyer has a distinctive approach and Justice Kagan may be moving toward his methodology – at least in part.

On the conservative side, after the fears of communists fell below paranoid levels and after Senator Joseph McCarthy resigned in disgrace when his relentless campaign of guilt by association became no longer politically sustainable, a number of factors led the Republicans toward a stronger commitment to freedom of speech. And, we will see, those factors played out in different ways with the conservative Justices on the Court. What moves Chief Justice Roberts, for example, is different from what has moved Justices Scalia and Thomas, which in turn is different from what moves Justice Kennedy. Looking more generally, however, one factor inclining Republicans toward free speech is that they perceived themselves as the victims of subtle censorship through the imposition of political correctness. If the liberals saw the First Amendment as protecting political (from communists to civil rights demonstrators) and cultural dissent (from sexually oriented novels to the hippies), the conservatives ultimately came to see themselves as being silenced in the liberal universities and denigrated by the liberal media.

More important, the idea of balancing interests against each other was regarded by many conservatives as appropriate for legislatures, but not for judges. Confining the exceptions to free speech to historically

based categories appealed to these conservatives because it imposed judicial constraints by substituting history, albeit a fictional history, for subjective judicial judgment. In the case of these conservatives, the jurisprudential tail wags the First Amendment dog – except, as the Court well knows, virtually all of the reigning categories of unprotected speech are now markedly different from what they had been in the past.

Finally, conservatives recognized the importance from their perspective of affording strong free speech rights to business interests. Accordingly, they gradually began to be comfortable with the view that if the free market made sense in the economic sphere, it made sense in the intellectual sphere. Indeed, despite potent criticism of the view that truth emerges in the economic marketplace or the intellectual marketplace,[8] both liberals and conservatives agreed that intervention by government through speech regulation to suppress facts or ideas in the intellectual marketplace was generally inferior to letting the market work. Any such suppression, censorship, or regulation could be justified if, but only if, the government could show that the action was necessary to achieve a compelling state interest.

Requiring a showing that a government regulation of speech is necessary to achieve a compelling state interest relies on a lot of faith in the marketplace. What emerges in the marketplace may be true or just, of course, but it also may be that the cozy arrangements of the status quo have settled on something substantially less than the true or the just, and that the marketplace tolerates quite harmful speech. In fact, it may be that the marketplace reflects the disproportionate communicative resources of the powerful rather than a shiny version of truth and justice, and it may be that the outcome unfairly serves the powerful at the expense of the vulnerable.

As a practical matter, different cultures produce different accounts of the true and the just. This is not surprising. Different cultures involve differing power constituencies and accommodate different clashes of values. Whatever the configurations may be, culture plays a substantial role in the formation of our own views. As Charles Taylor remarks, culture "shapes our private experience and constitutes our public experience, which in turn interacts profoundly with the private. So it is no

extravagant proposition to say that we are who we are"[9] because of our participation or immersion in the larger life of our society.

When we realize that quite different beliefs about freedom of speech have emerged in the European and US market, and when we realize that the citizens who adopted our Constitution had a quite different view of the truth about race, slavery, and male/female relations than we do, it is hard to embrace the sunny view that truth and justice are routinely reflected in what emerges in "the" market or in our markets or in markets different from our own. Even when the truth of what emerges in the market is unassailable, it may be that other interests are more important, as we will see in our discussions of privacy, fair trial, and depictions of animal cruelty.

The answer is definitely not that that government should be free from suspicion when it intervenes. It is that neither the marketplace nor the government can be trusted. So when speech clashes with other substantial interests, there is no reason automatically to privilege the speech interest over the other interests without affording proper respect for each. In the end, it should be clear that speech interacts with too many other values in too many other concrete contexts to hope or expect that a theory privileging it could reliably lead to sensible results.

Human life is all about choices, and we cannot have it all. When important values come into conflict, the sensible approach is not to resolve ahead of time to pick one over the other. Instead, as Isaiah Berlin observed, the sensible approach is to recognize a need for humility,[10] a recognition that it is folly to ignore relevant factors,[11] and to appreciate that "the collisions, even if they cannot be avoided can be softened. Claims can be balanced, compromises can be reached."[12] The conflict of values, he continued, can "be minimized by promoting and preserving an uneasy equilibrium, which is constantly threatened and in constant need of repair – that alone [is] the precondition for decent societies and morally acceptable behavior, otherwise we are bound to lose our way."[13]

In these pages, I propose to examine the bitter and the sweet, but I will concentrate on the damage caused by important forms of protected speech and shine a light on the alternative approaches to free speech employed in Europe and Canada. I will ruminate about why other countries are not infected with free speech idolatry, and I will

critique the theories used to justify that idolatry. But I must introduce a few caveats.

First, as I will argue in Chapter 8, in the hands of the conservative majority, the idolatry stops in contexts where most of the liberals would rightly insist on First Amendment rights. In Part I of the book, comprising the majority of the chapters, I deal with what most would consider the core of the First Amendment: cases in which the government outlaws a category of speech across the board because it believes that the harm done by the speech outweighs its value. But there are other kinds of free speech cases that impinge on the rights of dissenters where the conservative majority has assembled a shoddy record by underprotecting speech. In institutional environments such as schools and workplaces, for example, government acts to smother dissent, and the conservatives support the government. The same is generally true when dissenters seek access to government property in order to conduct demonstrations. The Supreme Court, over liberal objections, gives relatively free reign to government when it imposes unnecessarily restrictive time, place, and manner regulations. In both of these lines of cases, the Court values bureaucratic authority over free speech values. In these and other cases, the Supreme Court is insufficiently sensitive to the values of dissent. I regret to report that Canada and Europe do no better in protecting what should be the rights of dissenters.

Second, I recognize my thesis is controversial and provocative. I aim to provoke second thoughts about First Amendment worship. But I have deliberately refrained from the sober and lawyerly on-the-one-hand and on-the-other-hand rhetoric of the standard academic monograph. The latter is well worn and obvious and the rejoinders well plotted. To go down the avenue of give and take would double or triple the size of the book with little gain. So consider this an opening argument for the view that the Court is valuing speech more heavily than it should. In making that argument, I attempt to take representative cases and give them flesh and blood to make them interesting. I also try to do the same with cases from Europe or Canada to show that alternative approaches are available.

Third, in using examples from Canada and Europe, I do not mean to suggest that their jurisprudence is more interesting than that of

Israel, South Africa, or many other countries around the world. I use the examples I use because they are the ones I know. Moreover, I do not mean to suggest that Europe is homogeneous unless I otherwise specify, but I would contend without fear of contradiction that the free speech sensibilities in Europe and Canada are vastly different from those in the United States. The point of the examples is to suggest that other democratic countries can and do arrive at different conclusions regarding how to adjudicate clashes between speech and other values.

Finally, some might wonder why I am complaining about the First Amendment and not simply the Court's interpretation of the First Amendment. After all, Charles Evans Hughes once said, "We are under the Constitution, but the Constitution is what the Court says it is."[14] Of course, I am complaining about how the Court interprets the First Amendment. And, in Part III of the book, I will explore how various justices have come to their conclusions and the different paths they have taken to get there. I will also explore what decisions could be changed with small modifications in the Court. But I will argue that the broad sweep of the conclusions discussed in Part I are here to stay. They were brought about by Court decisions, but they are now firmly embedded in the culture, or, at least, the legal culture. They are now the First Amendment – not merely what the Court says the First Amendment is.

In pursuing my argument, Part I, maintains in seven chapters that the First Amendment overvalues privacy-invading speech, pretrial publicity, racist speech, pornography, depictions of violence, commercial advertising, and political speech by the wealthy, including corporations. In all but one of these chapters (commercial advertising burdens many values), I first discuss the value burdened by speech to show that it is counterintuitive to suppose that the value should always be subordinate to free speech. I then turn to the most important US case or cases that argue free speech should be privileged over such values. I argue that the justifications they advance on behalf of the First Amendment regime are strikingly inadequate. In doing so, I try to put as much flesh and blood as I can on those cases to give life to my thesis. After criticizing those cases, I look at cases from Europe or Canada to show that reasonable alternatives are possible.

Part II explores the extent of the First Amendment insensitivity to those who swim against the current. Chapter 8 argues that the First Amendment undervalues dissent. Chapter 9 argues that the First Amendment insufficiently protects the religious freedom of religious minorities. Although this book is predominantly about freedom of speech, I think that the Court's handling of religion under the First Amendment offers a basis for interesting comparisons and contrasts. Just as the Court is not sufficiently sensitive to the importance of protecting those who use speech to dissent, the Court is insensitive to those whose religions mark them out as different from others. Moreover, it is often overlooked that government speech about religion is itself a part of the system of freedom of expression and a controversial part at that. In addition, the handling of religion when combined with the cases in Section I serves to support the view that the First Amendment is generally interpreted to serve the needs of the powerful. Finally, it also shows that a majority of the Court is willing to promote sectarian religious values without regard for the views of others. This willingness to promote values is in tension with some of the rhetoric employed in the free speech cases.

Part III of the book discusses how we got to this unsatisfactory place and where we might go from here. Chapter 10 rejects many of the standard cultural explanations of American free speech exceptionalism. It argues that liberals and conservatives separately arrived at this unsatisfactory state for quite different ideological reasons down different historical paths. Chapter 11 discusses what a First Amendment that was responsive to our social needs and responsibilities would look like. It would be a First Amendment that afforded stronger, but not absolute, protection for dissent and religious minorities. It would recognize that nondissenting speech typically has significant value, but it would abandon free speech idolatry and reach results closer to those of other Western countries. That chapter also explores the extent to which this ideal is within the realm of the possible. It concludes that much of this ideal can be achieved, but much of it is not within the realm of the possible for the foreseeable future. Free speech idolatry is so deeply entrenched in the American culture that it is hard to see how it might be shaken. And that lies at the core of what's wrong with the First Amendment.