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Constitution Day 2018: Freedom of Speech in the Digital Age

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Good morning and thank you for the warm welcome. This is the second time I've had the opportunity to speak at Henderson County High School during my tenure as Chief Justice of the Commonwealth. Following my last visit, I received an alarmed phone call from my public information officer regarding an article that had been written about me. The headline in *The Gleaner* stated: "State's chief justice speaks to County High."

That was an unfortunate choice of words, and it resulted in some teasing from my fellow justices. But the headline was eventually revised so that it no longer gave the impression that my remarks were made while under the influence.

My visit today happens to coincide with the upcoming celebration of Constitution Day, which falls on September 17 each year. So when I was thinking of a topic for my remarks, my thoughts went to that headline. It reminds me that we are so fortunate to live in a country with constitutional protections for freedom of the press, even if the press states things in a way that we may not like. And we are equally privileged to live in a country that protects speech, even if we don't like or disagree with the contents of that speech.

Both of these protections are found in the First Amendment to the United States Constitution, which also protects the freedom of religion, the right to peaceably assemble, and the right to petition for a governmental redress of grievances.

I'm assuming most of you have had some civics education during your years of schooling. But for purposes of context, it's important to recall the constitutional history leading up to the ratification of the Bill of Rights, which contains the first ten amendments to the Constitution.

When the Constitution was submitted by the Federal Convention to Congress in 1787, few, if any, of the delegates would admit that it was a perfect document. One description I've read indicated that the delegates realized the Constitution was flawed, but "felt that it provided the best government that could be obtained under the circumstances." Not exactly a ringing endorsement.

The document had to be ratified by nine states and the road to ratification was bumpy, to say the least. A special convention chosen by the people met in each state to decide whether to ratify. Several states, including Massachusetts, South Carolina, New Hampshire, and Virginia, to name a few, voted to ratify the Constitution, but with a variety of proposed amendments. The New York convention proposed 33 amendments as a stipulation of their ratification, while the North Carolina convention refused to ratify until a declaration of rights and twenty-six proposed amendments were considered.

So approval of the Constitution was less than unanimous. And there was much discussion about how to address the states' concerns, particularly the notion that the Constitution should include a bill of rights. Eventually, on June 8, 1789, James Madison, himself a strong supporter of the Constitution, took the lead in introducing a bill of rights to Congress. Madison's proposal incorporated many of the amendments suggested by the states.

After some debate and revisions by both the House of Representatives and the Senate, Congress finally agreed on 12 amendments. Of those, only the last ten were ratified by the states. Those ten amendments are what we now refer to as the Bill of Rights.

So the founders of our country – not just the drafters of the Constitution, but the citizens of the original colonies who voted to ratify the Constitution – recognized the importance of the freedoms found in the First Amendment by insisting on their inclusion in the Bill of Rights.

I am going to focus this morning on one of those freedoms – the freedom of speech. I decided on this topic after seeing a recent statistic that 40% of Millennials believe the government should be able to prevent people from publicly making statements that are offensive to minority groups.[1]

Now I recognize that most of you are too young to fall into the Millennial category. But you are certainly much closer to that generation than I am. And I found this statistic interesting, particularly in comparison to the much smaller percentage of older Americans who hold that same belief.

If there is one truth about the freedom of speech it is that it protects almost all speech, even the speech we don't like. There is a famous quote that captures the essence of the freedom of speech: "I disapprove of what you say, but I will defend to the death your right to say it."[2]

The language of the First Amendment prohibits Congress from making any law "abridging the freedom of speech." Initially, the amendment was interpreted very narrowly to apply only to federal laws enacted by Congress. But in 1925, the United States Supreme Court

[1] "40% of Millennials OK with limiting speech offensive to minorities," Jacob Poushter, Pew Research Center, Nov. 20, 2015, available at: http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/

[2] *The Friends of Voltaire*, Evelyn Beatrice Hall. The quote is often mistakenly attributed to Voltaire but was actually Hall's interpretation of Voltaire's beliefs.

held for the first time that the First Amendment applies to state laws as well as federal laws.[3] This means that government at all levels is prohibited from passing laws that limit speech.

There is much debate over what constitutes protected speech under the First Amendment. In fact, the Supreme Court has struggled with this very question for more than a century. The first notable opinions addressing government restrictions on freedom of speech arose following World War I. Congress had passed the Espionage Act of 1917, which imposed a criminal punishment for anyone who caused or attempted to cause "insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States."[4]

One of those opinions, *Schenck v. United States*,[5] involved an official with the Socialist Party of America who was convicted under the Espionage Act for publishing leaflets that urged resistance to the draft. He appealed, arguing the Espionage Act violated the free speech clause of the First Amendment.

The Supreme Court unanimously affirmed Schenck's conviction, holding that "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." This holding is referred to as the "clear and present danger" test.

Incidentally, one of the most famous – but often misquoted – passages about the First Amendment can be found directly before the holding in the *Schenck* opinion. Justice Oliver Wendell Holmes wrote that "[t]he most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing panic."

Until the 1960s, the "clear and present danger" test established in *Schenck* was applied rather liberally by the Supreme Court in favor of the government, which held in a number of cases that advocating against the government was not protected speech under the First Amendment.

But in 1969, the Court changed its tune, overruling *Schenck* and holding in the landmark case of *Brandenburg v. Ohio* that government cannot punish inflammatory speech unless that speech "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[6]

Under this test, the government can only prohibit speech if it meets both elements of the two-part test: first, the speech must be "directed to inciting or producing imminent lawless action;" and second, the speech must be "likely to incite or produce such action."

[3] *Gitlow v. New York*, 268 U.S. 652 (1925).
[4] Espionage Act of 1917, Sec. 3.
[5] 149 U.S. 47 (1919).
[6] 395 U.S. 444, 447 (1969).

Since *Brandenburg*, the default rule has been that speech is generally presumed to be protected, unless a specific exception applies. Those exceptions are narrow, meaning there are few instances where the government can regulate the content of speech.

Some of those exceptions include "incitement," which is speech that advocates for generating AND is likely to produce imminent lawless action; "fighting words," or speech that is personally abusive to an individual AND likely to produce imminent lawless action; "defamation or libel," which are intentionally false written or spoken statements that cause injury to individual; "harassment," the act of systemic unwanted and annoying actions of one party or group, including threats or demands; and "threats to inflict great bodily harm," but only if the person has the apparent ability to carry out the action.

The key to all of these exceptions is that speech can only be restricted when someone will suffer real – not imagined or hypothetical – violence as a result.

These limited exceptions mean that even speech that we find offensive, hateful, distasteful, or objectionable more than likely will be protected by the First Amendment. In fact, in the 2017 opinion of *Matal v. Tam*, the U.S. Supreme Court unanimously reaffirmed that there is no "hate speech" exception to the first amendment.[7] In that opinion, Justice Alito wrote, "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[8]

This idea that people have the right to express the thought that we hate has gained attention recently in the context of how speech is monitored or policed by social media companies. We all know that social media is a helpful way to update friends about our lives, make important announcements, post mindless videos, and spread positive messages. But it also provides an environment that breeds repugnant views, often by allowing people to hide behind the anonymity of an online persona.

It's important to remember that the Constitution was drafted at a time when telecommunications did not exist. The telegraph was developed in the 1830s and the telephone was invented in 1876. That means when the Constitution was drafted in the late 1700s, no one could conceive of how extensively – and permanently – their words would be broadcast.

Even in the not-too-distant past of the 1990s – which I realize is actually the distant past for most of you in the audience – the idea that a platform would exist that would allow the average person to transmit his or her words and ideas across the world at the touch of a button was unimaginable for most people.

As I mentioned earlier, the First Amendment prohibits the *government* from limiting speech. It does not, however, prohibit private entities, such as corporations, from limiting speech.

[7] 582 U.S. ____ (2017).
[8] *Id.*

The internet is a space that is operated by private entities, outside the scope of the First Amendment. Arguably, social media sites have a duty to address the danger posed by certain types of speech. But these are also spaces founded on freedom of expression. So companies like Facebook, Twitter, and YouTube are left with the hard job of balancing freedom of speech and safety.

In recent years, each of the major social media companies have adopted anti-hate speech policies, all of which discuss in some way this idea of "inciting violence" that the Supreme Court has applied to cases involving the First Amendment.

Facebook's policy states that it does not allow hate speech because "it creates an environment of intimidation and exclusion and in some cases may promote real-world violence."[9] Similarly, Twitter's "hateful conduct policy" states that users "may not promote violence against or directly attack or threaten other people" based on a number of protected characteristics.[10] And YouTube's policy refers to hate speech as "content that promotes violence against or has the primary purpose of inciting hatred against individuals or groups based on certain attributes."[11]

The biggest problem with monitoring hate speech on the internet is that it is a subjective process. Companies can use technology to flag certain words or images. They can provide users with the ability to report offensive speech. But actually reviewing posts to determine if they violate the company's usage policy requires a human being making a decision.

In July, Facebook got into hot water over the application of its policy after it labeled part of the Declaration of Independence as "hate speech."[12] That decision was ultimately reversed, but it was just one of the approximately 66,000 hate speech posts that Facebook deletes worldwide each month.[13] Until about a week ago, Twitter had been the subject of criticism after it declined to suspend the account of controversial radio host Alex Jones under its hate speech policy, despite the fact that Facebook and YouTube had suspended his accounts for violations of their policies. But that changed last Thursday, when Twitter "permanently suspended" Jones and his InfoWars account, citing violations of its abusive behavior policy.[14]

This inconsistency in application is why the Supreme Court has interpreted the First Amendment to allow hate speech: it is hard to define. As noted in a recent article from Wired magazine, policing hate speech "inevitably involves disapproving one version of speech while

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[9] Facebook Community Standards, Sec. 12, Hate Speech, available at: https://m.facebook.com/communitystandards/hate_speech

[10] Twitter Hateful conduct policy, available at: help.twitter.com/en/rules-and-policies/hateful-conduct-policy

[11] You Tube Hate Speech Policy, available at: support.google.com/youtube/answer/2801939?hl=n

[12] "Facebook apologizes after labeling part of Declaration of Independence 'hate speech,'" Annie Grayer, *CNN*, July 5, 2018, available at: www.cnn.com/2018/07/05/politics/facebook-post-hate-speech-delete-declaration-of-independence-mistake/index.html

[13] "Facebook Deletes 66,000 Hateful Posts Each Week," Jonathan Vanian, *Fortune*, June 27, 2017, available at: fortune.com/2017/06/27/facebook-deletes-hate-speech

[14] "Twitter Bars Alex Jones and Infowars, Citing Harassing Messages," Kate Conger and Jack Nicas, *New York Times*, Sept. 6, 2018, available at: https://nytimes.com/2018/09/06/technology/twitter-alex-jones-infowars.html

letting another pass. And that violates the free speech axiom that, in public discourse, all speech is equal."[15]

The number of American adults who get their news primarily online continues to grow, which means public debate about policing speech on the internet will also grow. Some scholars now argue that social media platforms should be treated as "publishers" and be held responsible for the content they distribute.[16] Others contend that government regulation of social media is necessary to stop it from eroding our democracy.[17]

For nearly 50 years, the Supreme Court has consistently held that there are very limited exceptions to the freedom of speech. How those exceptions are applied to online speech in the future will be up to your generation to decide. And given the Millennial perspective that I cited earlier, the world will be watching to see how you choose.

I would like to end today with a word of caution by again paraphrasing Justice Oliver Wendell Holmes, who said that "an employee may have a constitutional right to talk politics, but he has no constitutional right to be employed."[18]

Freedom of speech is a constitutionally protected right. But that does not mean your speech cannot be used against you by an employer, or perhaps more relevant to some of you, a college or university. Recent studies show that approximately 70% of employers use social media to screen candidates.[19] And upwards of 40% of college admissions officers look at a student's social media accounts when reviewing applications.[20]

This isn't necessarily a bad thing and, in fact, can be helpful if there is content on your social media accounts that make an employer or an admissions officer more interested in your application. But you should also evaluate how that information could negatively impact you – from inappropriate or discriminatory photos and comments to unprofessional screen names.

Thank you to everyone for your attention today.

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[15] "Should Facebook and Twitter be Regulated Under the First Amendment," Lincoln Caplan, WIRED, Oct. 11, 2017, available at www.wired.com/story/should-facebook-and-twitter-be-regulated-under-the-first-amendment
[16] *Id.*
[17] *Id.*
[18] "A Chill Around the Water Cooler: First Amendment in the Workplace," Jeanette Cox, *Insights*, available at: www.americanbar.org/publications/insights_on_law_andsociety/15/winter-2015/chill-around-the-water-cooler,html
[19] "Keep It Clean: Social media Screening Gain in Popularity," Saige Driver, *Business News Daily*, April 3, 2018, available at: www.businessnewsdaily.com/2377-social-media-hiring.html
[20] "Social Media as 'Fair Game' in Admissions," Scott Jaschik, *Inside Higher Ed*, April 23, 2018, available at: www.insidehighered.com/admissions/article/2018/04/23/new-data-how-college-admissions-officers-view-social-media-applicants