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Free Speech and Democracy Proceedings: Keynote Address

Cass R. Sunstein

KEYNOTE ADDRESS

Cass R. Sunstein: "Free Speech and Democracy"

STANLEY INGBER: Thank you, David.

Traditionally, civil rights leaders and civil libertarians have stood side by side when free speech claims were at stake. In fact, minorities and others lacking political and economic power, in their struggle for equality, often are the most ardent advocates of free speech as they battle to have their messages heard and their complaints confronted. However, in recent years these old allies frequently have found themselves in adversarial positions as they respond to cries for regulations of hate speech, pornography, and hostile work environments.

Essentially, civil libertarians and civil rights advocates have different views concerning the roles and importance of expression. Civil libertarians are skeptical about prevalent understandings of truth and, thus, would prefer reliance on an unregulated competition of ideas in the market to any state-imposed conception of truth. Civil rights advocates see the value of speech as consequential, as it helps the attainment of other societal values such as equality, justice, civility, and so forth. When these views overlap, as they did in the civil rights movement of the 1960s, their distinctive bases may be ignored. In the 1980s and 1990s, however, we have become more sensitive of the interplay between power, both economic and political, and communication. Differentials in power affect access to potent channels of communication which, in turn, aggravate these power differentials. For some civil rights advocates, the laissez-faire assumptions of the libertarian's marketplace seem highly unrealistic when power discrepancies are factored in. Historically subordinated, disempowered, or discriminated-against groups, they insist, need active government intervention if equality and an integrated community are to be attained -- and that intervention may need to take the form of regulating speech that interferes with efforts at obtaining the desired equality and community.

Consequently, the historical alliance between civil libertarians and civil rights advocates seems at risk. The conflict, at times, appears as fundamental as choosing which of two paradigms is the proper basis for analysis. Should one begin by championing the values of free speech and asking when the demands for equality are sufficiently strong to constitute a compelling state interest? Or should our goal be one of fostering a community embracing equal dignity, and then inquiring when speech needs are compelling enough to override that objective? Curiously, the very act of labeling something as a "free speech" problem as opposed to an "equality" problem often appears to channel and predetermine outcomes.

This symposium will both ask and attempt to answer whether there is a true conflict between these paradigms; whether each can accommodate the other; and whether strategies are available to minimize the apparent tension existing between them.

As a starting point for any effort to confront the strains posed by our ambition to simultaneously promote values of community and those of free speech, one must understand the function of free speech in our governmental structure --

both as aspiration and as reality. In this regard, I would like to introduce to you our keynote speaker.

Professor Cass Sunstein, an unsurpassed scholar in jurisprudence, constitutional, administrative and environmental law, is the Karl N. Llewellyn Professor of Jurisprudence at the University of Chicago, a position jointly held in the Law School and the Department of Political Science. He received his A.B. from Harvard College and his J.D. from Harvard Law School where he served as executive editor of the *Harvard Civil Rights-Civil Liberties Law Review*. He served as a law clerk to Judge Benjamin Kaplan of the Supreme Judicial Court of Massachusetts and, thereafter, for United States Supreme Court Justice Thurgood Marshall. Following his clerkships, he briefly worked as an attorney advisor in the Office of Legal Counsel at the United States Department of Justice before joining the University of Chicago Law School, where he has remained except for visiting positions at both Columbia and Harvard. Professor Sunstein has authored numerous books and an incredible number of articles, essays and book reviews, but none more important for our purposes today than his recent book, *Democracy and the Problem of Free Speech* (1993).

Professor Sunstein has titled his remarks this morning simply as "Free Speech and Democracy." After five years of repeated efforts on my part, I'm most pleased to have the opportunity to present to you Professor Cass Sunstein.

CASS SUNSTEIN: I'm grateful to you all. Mostly I'm grateful to Stan for his persistence. It's not a coincidence that my daughter was born slightly over five years ago today, and that accounts partly for the difficulty in getting me here before this time.

My task this morning is to determine whether liberty conflicts with equality. It is widely assumed that it does. The assumption of conflict has large consequences for how we think of the free speech principle. Perhaps our efforts to protect free speech are in tension with our efforts to promote equality. But we should hesitate before accepting that claim. Any conception of liberty, or free speech, has to be specified and defended; the term is not self-defining. The same is true for any conception of equality. It may be that once we identify the appropriate conception of free speech in our constitutional order, and once we do the same for our conception of equality, the tension between the two will be eliminated or at least much diminished.

At the very least, we should recognize that the free speech and equality guarantees are not purposeless abstractions. They have purposes and goals. Once those purposes and goals are identified, we may be able to make progress on current free speech dilemmas.

In this talk, I will spend some time defending a conception of free speech that is associated with democratic self-government. That conception of free speech contains a principle of political (not economic) equality. To this extent, the free speech principle is fully compatible with a large part of our nation's commitment to equality. From the creation of the American republic, political equality has been a defining ideal, and the ideal was sharpened and deepened during the Civil War and the New Deal period.[1] The equal protection clause has itself come to embody a conception of political equality, as in the "one person-one vote" principle.[2] To this important extent, the Constitution's commitment to

equality is quite compatible with its commitment to free speech. At the end of this talk, I will attempt to illustrate this proposition with reference to a number of areas of current dispute.

The equality guarantee has another dimension. The Fourteenth Amendment was designed to eliminate a system of caste -- to ensure that the state would not turn the morally irrelevant characteristic of race into a systematic basis for second-class citizenship.[3] On this view, the Fourteenth Amendment embodies an anticaste principle. So understood, the Fourteenth Amendment bears on current controversies involving pornography and hate speech, and I will discuss these associations later. My basic goal here is to attempt to diffuse the conflict between equality and freedom of expression, by offering understandings of these concepts that are not in severe tension, but that are mutually reinforcing, and that promise to help us escape from some apparently serious theoretical and practical dilemmas.

There are two free speech traditions in the United States,[4] not simply one.[5] There have been two models of the First Amendment, corresponding to the two free speech traditions. The first emphasizes well-functioning speech markets. It can be traced to Justice Holmes' great *Abrams* dissent,[6] in which the notion of a "market in ideas" received its preeminent exposition. The market model emerges as well from the great case of *Miami Herald Co. v. Tornillo,*[7] invalidating a "right to reply" law as applied to candidates for elected office. It finds its most recent defining statement not in judicial decisions, but in an FCC opinion invalidating the fairness doctrine.[8]

The second tradition, and the second model, is focused on public deliberation. It owes its origins to the work of James Madison.[9] The second model can be traced from Madison, with his attack on the idea of seditious libel, to Justice Louis Brandeis, with his suggestion that "the greatest threat to democracy is an inert people,"[10] through the work of Alexander Meiklejohn, who associated the free speech principle with ideals of democratic deliberation.[11] The Madisonian tradition culminated in *New York Times v. Sullivan*[12] and the reaffirmance of the fairness doctrine in the *Red Lion* case,[13] with the Supreme Court's suggestion that governmental efforts to encourage diverse views and attention to public issues are compatible with the free speech principle -- even if they result in regulatory controls on the owners of speech sources.

Under the marketplace metaphor, the First Amendment requires -- at least as a presumption -- a system of unrestricted economic markets. Government must respect the forces of supply and demand. At the very least, it may not regulate the content of speech so as to push "the speech market" in its preferred directions. Certainly it must be neutral with respect to viewpoint. For the marketplace model, *Tornillo* [14] is perhaps the central case, and inequality is not a problem or even an issue. The Federal Communications Commission has at times come close to endorsing the market model, above all in its decision abandoning the fairness doctrine.[15] When the FCC did this, it referred to the operation of the forces of supply and demand, and suggested that those forces would produce an optimal mix of entertainment options.[16] Hence Mark Fowler, Chair of the Commission, describes television as "just another appliance. . . . It's a toaster with pictures."[17]

Those who endorse the marketplace model do not claim that government may not do anything at all. Of course government may set up the basic rules of property and contract; it is these rules that that make markets feasible. Without such rules, markets cannot exist at all.[18] Government is also permitted to ensure against market failures, especially by preventing monopolies and monopolistic practices. Structural regulation is acceptable so long as it is a content-neutral attempt to ensure competition. It is therefore important to note that advocates of marketplaces and democracy might work together in seeking to curtail monopoly. Of course the prevention of monopoly is a precondition for well-functioning information markets.

Many people think that there is now nothing distinctive about the electronic media or about modern communications technologies that justifies an additional governmental role.[19] Many people say nothing about the problem of political equality and its relation to freedom of speech. If a governmental role was ever justified, it was because of problems of scarcity. When only three television networks exhausted the available options, a market failure may have called for regulation designed to ensure that significant numbers of people were not left without their preferred programming. But this is no longer a problem. With so dramatic a proliferation of stations, most people can obtain the programming they want, or will be able to soon.[20] With new technologies, perhaps there are no real problems calling for governmental controls, except for those designed to establish the basic framework.

The second model, receiving its most sustained attention in the writings of Alexander Meiklejohn,[21] emphasizes that our constitutional system is one of deliberative democracy. This system prizes both political (again, not economic) equality and a shared civic culture. It seeks to promote, as a central democratic goal, reflective and deliberative debate about possible courses of action. The Madisonian model sees the right of free expression as a key part of the system of public deliberation.

On this view, even a well-functioning information market is not immune from government controls. Government is certainly not permitted to regulate speech however it wants; it may not restrict speech on the basis of viewpoint. But it may regulate the electronic media or even the Internet so as to promote, in a sufficiently neutral way, a well-functioning democratic regime. It may attempt to promote attention to public issues. It may try to ensure diversity of view. It may attempt to promote political equality. It may promote political speech at the expense of other forms of speech. In particular, educational and public affairs programming, on the Madisonian view, has a special place.

In my view, the Madisonian conception is superior to the marketplace alternative, which creates insoluble theoretical and practical problems.[22] For constitutional lawyers, the argument for the Madisonian conception is partly historical; the American free speech tradition owes much of its origin and shape to a conception of democratic self-government. The marketplace conception is a creation of the twentieth century, not of the eighteenth. Insofar as it ignores political equality, it confuses modern notions of consumer sovereignty in the marketplace with democratic understandings of sovereignty, symbolized by the transfer of sovereignty from the King to "We the People." The American free speech tradition finds its origin in that conception of sovereignty, which, in

Madison's view, doomed the Sedition Act on constitutional grounds.[23] If interpretation of the First Amendment is to be based partly on historical considerations, the marketplace model is hard to sustain.

But the argument for Madisonianism does not rest only on history; it is partly evaluative as well. We are unlikely to be able to make sense of our considered judgments about free speech problems without insisting that the free speech principle is centrally (though certainly not exclusively) connected with democratic goals,[24] and without acknowledging that marketplace thinking is inadequately connected with the point and function of a system of free expression. The marketplace model, in its purest form, faces decisive counterexamples. The government regulates attempted bribery, private libel, false or misleading advertising, unlicensed legal or medical advice, threats to assassinate the President, conspiracies, and much more. Few people believe that all of these regulations are constitutionally impermissible. By itself, the marketplace model lacks the resources to explain distinctions that the law does, and should, recognize. Free speech absolutism is a sham; the question is how to distinguish between protected and unprotected speech, and the marketplace model cannot help in that task.

Moreover, a well-functioning democracy requires a degree of citizen participation, which requires a degree of information; and large disparities in political equality are damaging to democratic aspirations.[25] The marketplace model is unhelpful on these points. To the extent that the Madisonian view prizes education, democratic deliberation, and political equality, it is connected, as the marketplace conception is not, with the highest ideals of American constitutionalism.

Some people think that the distinction between marketplace and Madisonian models is now an anachronism.[26] Perhaps the two models conflicted at an earlier stage in history; but in one view, Madison has no place in an era of limitless broadcasting options and cyberspace. Perhaps new technologies now mean that Madisonian goals can best be satisfied in a system of free markets. Now that so many channels are available, cannot everyone read or see what they wish? If people want to spend their time on public issues, are there not countless available opportunities? Is it not hopelessly paternalistic for government to regulate for Madisonian reasons?

I do not believe that these questions are rhetorical. We know enough to know that even in a period of limitless options, our broadcasting system may fail to promote an educated citizenry and political equality, and Madisonian goals may be severely compromised even under technologically extraordinary conditions. There is no logical or a priori connection between a well-functioning system of free expression and limitless broadcasting options. We could well imagine a science fiction story in which a wide range of options coexisted with little or no high-quality fare for children, with political inequality, with widespread political apathy or ignorance, and with social balkanization in which most people's consumption choices simply reinforced their own prejudices and platitudes, or even worse. Quite outside of science fiction, it is foreseeable that free markets in communications will be a mixed blessing. They could create a kind of accelerating "race to the bottom," in which most people see low-quality

programming involving trumped-up scandals or sensationalistic anecdotes calling for little in terms of quality or quantity of attention.

It is easily imaginable that the content of the most widely-viewed programming will be affected by the desires of advertisers, in such a way as to produce shows that represent a bland, watered-down version of conventional morality, and that do not engage serious issues in a serious way for fear of offending some group in the audience. It is easily imaginable that well-functioning markets in communications will bring about a situation in which those interested in politics merely fortify their own unreflective judgments, and are exposed to little or nothing in the way of competing views. It is easily imaginable that well-functioning markets in communications will be accompanied by, and help create, political inequality.

For this reason, the marketplace model offers an unhelpful approach to modern dilemmas. The Madisonian alternative is far superior. Notably, that model has an important positive dimension. It calls for broad public attention to public issues, and for exposure to diverse views. It claims that there is a problem with a system in which many citizens and views are deprived of effective access to communications. On this account, the goals underlying the fairness doctrine are perfectly compatible with the free speech guarantee. It may be doubted whether the doctrine actually promoted those goals and, even more, whether the doctrine is suitable for current conditions. But there is a pressing need to understand the connection between the free speech principle and democratic self-governance.

Despite my remarks to this point, it is undeniable that in many areas of current law, there is at least a potential conflict between freedom of expression and equality. The best way to approach or even to diffuse these problems is to try to understand the purposes of the relevant principles. I have suggested that the equality principle is best understood as referring to political equality and opposition to caste, and that the free speech principle is best understood in Madisonian terms. In the remainder of this talk, I will attempt to show how these ideas might bear on current controversies. The discussion of each issue will be very brief. I attempt to show how apparent conflicts might be approached without suggesting final answers.

1. Turner *and the Problem of Access.*

In *Turner Broadcasting System v. FCC,*[27] the Supreme Court issued an important ruling about the interaction between the free speech principle and principles of equality. The Court held that the government could regulate the speech of cable company operators *if its goal was to promote broad viewer access to sources of speech.* The Court explored the relevant legislative findings, which showed that without the "must carry" rules at issue in the case, free broadcasting might be endangered, and thus Americans without access to cable television might be deprived of their crucial source of information, including information about public affairs.

In particular, the Court recognized a distinctive and legitimate legislative concern in the probability that cable operators have a strong financial interest in favoring their own affiliated programmers, and to do so at the expense of broad-

cast stations. The findings therefore suggested that the cable operators have an economic incentive not to carry local signals. This fact led to the important problem supporting the Act: Without the must-carry provision, Congress concluded, there would be a threat to the continued availability of free local broadcast television.[28] On the Court's account, the elimination of broadcast television would in turn be undesirable not because broadcasters deserve protection as such -- they do not -- but (a) because broadcast television is free and (b) because there is a substantial government interest in ensuring access to free programming, especially for people who cannot afford to pay for television. As Congress had it, the must-carry rules would ensure that the broadcast stations would stay in business. The Court said that this purpose -- the protection of access to free programming through the protection of broadcast stations -- was unrelated to the content of broadcast expression and therefore legitimate.

What is important about *Turner* is the recognition that regulation of speech might be justified if it is an attempt to ensure broad and free access to communication, especially communication about public issues. Insofar as the Supreme Court so held, it accepted an important part of the Madisonian model, and rejected the commitment to unrestricted economic markets. The Court was correct to take this step, and its decision may have broad implications for the future.[29]

2. *The Internet.*

Sometimes it is said that "universal access" is one of the appropriate goals for any information superhighway. The question of access has several dimensions. To some extent it is designed to ensure access to broadcasting options for viewers and listeners -- the central problem in *Turner*. To some extent the problem is to ensure access for certain speakers who want to reach part of the viewing or listening public. In cyberspace, of course, people are both listeners and speakers.

It is possible to regard the goal of universal access with considerable skepticism. The government does not guarantee universal access to cars, or housing, or food, or even health care. It may seem puzzling to suggest that universal access to information technologies is an important social goal. But if we focus on the goal of political equality, the suggestion can be shown to be less puzzling than it appears. Suppose, for example, that a certain network becomes a principal means by which people communicate with their representatives; suppose that such communications become a principal part of public deliberation and in that way ancillary to the right to vote. We know that a poll tax is unconstitutional because of its harmful effects on political equality.[30]

On a broadly similar principle, universal access to the Internet might be thought desirable. To be sure, such access would be most unlikely to be constitutionally mandated, since the right to vote is technically not involved. But universal access could be seen to be part of the goal of political equality. More generally, universal access might be necessary if the network is to serve its intended function.

The point might be generalized. For any particular speaker, part of the advantage of having access to a certain means of communication is that everyone,

or almost everyone, or a wide range of people, can be reached. The United States mail might be justified in part on the ground that a national system of mail is necessary or at least helpful to ensure that any letter can reach everyone. Perhaps a requirement of universal access can be justified not as an inefficient[31] effort to subsidize people who would be without service, but on the quite different ground that universal service is a way of promoting the communicative interests of those who already have service. The interests of the latter group may well be promoted by ensuring that they can reach everyone, or nearly everyone.

Arguments of this kind have been used throughout the history of telecommunications regulation. For most of the twentieth century, there have been cross-subsidies, as local companies with local monopolies have charged high prices to certain customers (usually businesses) with which they subsidized less profitable services. Perhaps a similar model would make sense for modern technologies.

There are, however, significant inefficiencies in this model of cross-subsidization, and a system of open-ended competition may well be better than one based on universal access. It may well be that open-ended competition will provide universal access in any case, or something very close to it. Or it may be that open-ended competition, combined with selective subsidies, would be better than the regulatory approach. This question cannot easily be answered in the abstract. Certainly debate over universal access should not be resolved by constitutional fiat. This is an area for public debate and a large degree of experimentation, especially in light of lurking problems of political inequality.

3. *Educational and Public Affairs Programming, Especially for Children.*

Congress might attempt to regulate speech so as to promote Madisonian goals of attention to public issues and political equality. Suppose, for example, that Congress sets aside a number of channels for public affairs and educational programming, on the theory that the marketplace provides too much commercial programming, and insufficient exposure to diverse views. We could imagine a requirement that telecommunications carriers must provide access at preferential rates to educational and health care institutions, state and local governments, public broadcast stations, libraries and other public entities, community newspapers, and broadcasters in the smallest markets. Or we could foresee a "set-aside" program for educational and public affairs programming.

What would be the constitutional status of efforts of this kind? *Turner* is the leading case, and it certainly does not stand for the proposition that such efforts are constitutional. By hypothesis, any such regulation would be content-based. It would therefore meet with a high level of judicial skepticism. On the other hand, *Turner* does not authoritatively suggest that such efforts are unconstitutional. The Court did not itself say whether it would accept content discrimination designed to promote Madisonian goals. Certainly the opinion suggests that the government's burden would be a significant one. But it does not resolve the question.

It is notable that Justice O'Connor's opinion appears quite sensible on this point, and she leaves the issue open.[32] Her principal argument was that the "must-carry" rules are too crude on the point. Certainly crudely-tailored mea-

sures give reason to believe that interest-group pressures, rather than a legitimate effort to improve educational and public-affairs programming, are at work. But if the relevant measures actually promote Madisonian goals, they should be upheld. There is of course reason to fear that any such measures have less legitimate purposes and functions, and hence a degree of judicial skepticism is appropriate. But narrow measures, actually promoting those purposes, are constitutionally legitimate.

4. *Campaign Finance.*

Restrictions on campaign expenditures are frequently justified by reference to political equality. The key Supreme Court case on campaign finance regulation is of course *Buckley v. Valeo,*[33] in which the Court rejected the claim that controls on financial expenditures could legitimately be justified as a means of promoting political equality. In this way, *Buckley* seems highly reminiscent of the pre-New Deal period. Indeed *Buckley* might well be seen as the modern-day analogue of the infamous and discredited case of *Lochner v. New York,*[34] in which the Court invalidated maximum hour laws.

In the key passage, the Court announced that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[35] The *Buckley* Court therefore saw campaign expenditure limits as a kind of "taking," or compulsory exaction, from some for the benefit of others. The limits were unconstitutional for this very reason.

For those concerned about equality, this is a troubling and unjustifiable conclusion. On the view reflected in both *Buckley* and *Lochner,* reliance on free markets *is* government neutrality and government inaction. But in the New Deal period, it became clear that reliance on markets simply entailed another -- if in many ways good -- regulatory system, made possible and constituted through law. We cannot have a system of market ordering without an elaborate body of law. For all their beneficial qualities, markets are legitimately subject to democratic restructuring -- at least within certain limits -- if the restructuring promises to deliver sufficient benefits. What is perhaps not sufficiently appreciated, but what is equally true, is that elections, and speech expenditures, based on existing distributions of wealth and entitlements also embody a regulatory system, made possible and constituted through law. Here as elsewhere, law defines property interests; it specifies who owns what, and who may do what with what is owned. The regulatory system that we now have for elections is not obviously neutral or just. On the contrary, it seems to be neither insofar as it permits high levels of political influence to follow from large accumulations of wealth.

Because it involves speech, *Buckley* is in one sense even more striking than *Lochner.* As I have noted, the goal of political equality is time-honored in the American constitutional tradition, as the goal of economic equality is not. Efforts to redress economic inequalities, or to ensure that they are not turned into political inequalities, should not be seen as impermissible redistribution, or as the introduction of government regulation into a place where it did not exist before. A system of unlimited campaign expenditures should be seen as a regulatory decision to allow disparities in resources to be turned into disparities in political

influence. That may be the best decision, all things considered; but why is it unconstitutional for government to attempt to replace this system with an alternative apparently better from the standpoint of political equality? The Court offered no answer. Its analysis was startlingly cavalier. Campaign finance laws should be evaluated not through axioms, but pragmatically in terms of their consequences for the system of free expression.

5. *Pornography.*

The questions raised by pornography regulation have produced a lengthy and complex debate. From the Madisonian point of view, however, we can announce a simple conclusion: Much pornography is far from the center of constitutional concern. Pornography is not plausibly intended and received as a contribution to public deliberation, at least as a general rule. Hence it may be regulated without the extraordinary showing required for regulation of political speech.[36]

To say this is emphatically not to say that pornography is wholly without constitutional protection. Speech that is not at the First Amendment "core" cannot be regulated without a legitimate showing of harm.

In the context of pornography, a reasonable legislature could make the necessary showing. There is good reason to believe that pornography can be associated with harms that government has a right to prevent, including, first, at least some brutality and coercion in its production and, second, at least some sexual violence and harassment in its use. These harms are closely connected with the anticaste principle that I have outlined. For constitutional purposes, what is relevant is not whether a court is convinced by the relevant evidence, but whether a reasonable person could find it persuasive. There is little doubt that a reasonable person could so find. The issue, then, is not whether pornography can be regulated, but whether any relevant proposals have the necessary clarity and narrowness. It is these more particularized questions that we should be discussing. There is no constitutional barrier to attempts to regulate pornography as such.

6. *Hate Speech.*

What about hate speech? Here Madisonians find the question of regulation much harder. A good deal of imaginable hate speech is fully protected under the Madisonian framework. For loyal Madisonians, hate speech qualifies for constitutional protection if it is intended and received as a contribution to democratic discussion of public issues. Much of what is called "hate speech" certainly so qualifies. Imagine, for example, a claim that women's natural place is in the home, or that African-Americans are genetically inferior to Asian Americans, or that homosexuals are "sick." We may contest or deplore such statements, but they do qualify for constitutional protection, certainly in most circumstances. They are part and parcel of democratic debate and deliberation.

There are two possible exceptions to this claim. First, some hate speech consists of epithets, or of little more than epithets. On an analogy to the obscene telephone call, face-to-face epithets should not receive constitutional protection.

Here the state can legitimately regulate speech in the interest of anticaste goals. Narrow restrictions on hate speech should therefore be upheld. Second, public colleges and universities may have somewhat greater room than do governments generally to regulate hate speech, and this is so by virtue of their educative goals. It should be recalled that educational institutions regulate speech all the time; they grade speech, they require teachers to teach some things but not others, they punish or reward speech during appointments and tenure decisions. It would be far too broad to say that educational institutions may not reward or punish speech.

This simple fact does not give educational institutions carte blanche to censor. It must always be asked whether public institutions are responsibly attempting to promote their legitimate educational mission, or instead punishing viewpoints with which they disagree. But it can be imagined that modest, narrow hate speech restrictions, perhaps going beyond "epithet" regulation, can be legitimate in the eductational setting. Perhaps colleges or universities could conclude that epithets, and hate speech that is little more than epithets, make it impossible for them to accomplish their educational missions. Courts should be reluctant to invoke the First Amendment to prevent institutions from reaching this plausible conclusion.

I emphasize that this is a judgment about constitutional law and not about appropriate policy. Undoubtedly it is best, usually, to proceed without "codes" and to do things in an informal, consultative manner. But this is not a matter for courts to decide.

My principal goal here has been to identify and defend a Madisonian conception of the First Amendment, and to bring that conception into contact with an understanding of equality that emphasizes the political domain and the time-honored American opposition to caste. I have suggested that equipped with these understandings, we might be able to soften the tension between free speech and equality, and perhaps to diffuse it altogether.

I conclude with a passage from Alexander Meiklejohn. What Meiklejohn says is, I think, especially important for a period in which a marketplace model of free speech tends to dominate legal and political culture, and in which the purpose or point of the free speech principle sometimes seems lost. Meiklejohn wrote:

> Congress is not debarred from all action upon freedom of speech. Legislation which abridges that freedom is forbidden, but not legislation to enlarge and enrich it. The freedom of mind which befits the members of a self-governing society is not a given and fixed part of human nature. It can be increased and established by learning, by teaching, by the unhindered flow of accurate information, by giving men health and vigor and security, by bringing them together in activities of communication and mutual understanding. And the federal legislature is not forbidden to engage in that positive enterprise of cultivating the general intelligence upon which the success of self-government so obviously depends. On the contrary, in that positive field the Congress of the United States has a heavy and basic responsibility to promote the freedom of speech.[37]

1. *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION chs. 137-140 (1993).
2. *See* Reynolds v. Sims, 377 U.S. 533 (1964).
3. *See* Cass R. Sunstein, *The Anticaste Principle*, 92 Mich. L. Rev. 2410 (1994).
4. The discussion of these traditions draws on Cass R. Sunstein, *The First Amendment in Cyberspace*, Yale L.J. (forthcoming 1995).
5. The distinction is elided in the best general treatment, HARRY KALVEN, JR., A WORTHY TRADITION (1992).
6. Abrams v. United States, 250 U.S. 616 (1919)(Holmes, J., dissenting).
7. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1978).
8. Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043, 5055 (1987).
9. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH ch.1 (1993).
10. Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).
11. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1948).
12. New York Times v. Sullivan, 376 U.S. 254 (1964).
13. Red Lion Broadcasting Co. v. Federal Communications Comm., 395 U.S. 367 (1969).
14. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1978).
15. *See* Syracuse Peace Council v. Television Peace Council, 2 F.C.C.R. 5043, 5055 (1987).
16. *See id.*
17. *See* Bernard D. Nossiter, *The F.C.C.'s Big Giveaway Show*, 241 THE NATION 402, 402 (1985).
18. Thus wrote the greatest critic of socialism in the twentieth century:

> It is regrettable, though not difficult to explain, that in the past much less attention has been given to the positive requirements of a successful working of the competitive system than to these [previously discussed] negative points. The functioning of a competition not only requires adequate organization of certain institutions like money, markets, and channels of information -- some of which can never be adequately provided by private enterprise -- but it depends, above all, on the existence of an appropriate legal system, a legal system designed both to preserve competition and to make it operate as beneficially as possible. . . . In no system that could be rationally defended would the state just do nothing. An effective competitive system needs an intelligently designed and continuously adjusted legal framework as much as any other.

FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 38-39 (1944).

19. *E.g.*, Syracuse Peace Council v. Television Peace Council, 2 F.C.C.R. at 5055; L.A. POWE & THOMAS KRATTENMACHER, REGULATING ELECTRONIC BROADCASTING (1994).
20. Of course significant numbers of Americans do not have cable television -- now about 38% -- and many citizens are without access to the Internet. *See infra* text accompanying notes 30-32 for a discussion of the access issue.
21. *See* MEIKLEJOHN, *supra* note 11.
22. *See* SUNSTEIN, *supra* note 9, for an effort to do this.
23. *See id.* at xvii.
24. *See* JOSEPH RAZ, FREE EXPRESSION AND PERSONAL IDENTIFICATION, IN ETHICS IN THE PUBLIC DOMAIN 131, 136-38 (1994).
25. For a discussion of the fair value of political liberties, see JOHN RAWLS, POLITICAL LIBERALISM 356-63 (1993).
26. *See* POWE & KRATTENMACHER, *supra* note 19.
27. Turner Broadcasting Sys. v. F.C.C., 114 S. Ct. 2445 (1994).

28. *Id.*

29. For more detailed discussion, *see* Sunstein, *The First Amendment in Cyberspace, supra* note 4.

30. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966)

31. It is likely to be inefficient when compared to subsidies for people who are unable to afford access.

32. Turner Broadcasting Sys. v. F.C.C., 114 S. Ct. 2445 (1994).

33. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

34. Lochner v. New York, 198 U.S. 45 (1905).

35. Buckley v. Valeo, 424 U.S. at 48.

36. *See* SUNSTEIN *supra* note 9 at chs. 6-7 (discussing the issues of pornography and hate speech in detail). An extremely truncated version of that discussion is presented here.

37. MEIKLEJOHN, *supra* note 11, at 16-17.

Audience Discussion

STANLEY INGBER: Following each of our speakers and panels, we have set aside a block of time for you, the audience, to ask questions and make comments. Microphones have been set up on both sides of the aisle. Since we are taping these proceedings for publication as a book, please begin your remarks by identifying yourself and stating your professional affiliations. As we're waiting, I'll break the ice with the first question.

You used Professor Meiklejohn as an important focus of your talk. For many years Meiklejohn argued that the First Amendment was an absolute insofar as it protected communication relevant to democratic self-government. But, according to Meiklejohn, speech that was not related to that self-governing interest was outside of the First Amendment parameters totally -- it might be covered by other constitutional protections, such as those of the Fifth and Fourteenth Amendments, but not First Amendment protections. You bypassed that position of Meiklejohn, and potentially of both Madison and Bork, by saying that although political speech is at the heart of the First Amendment, other speech is protected as well, although perhaps not as strenuously. But you didn't, I think, give us a principle as a basis for that protection. If, in fact, the function of the First Amendment is democratic self government, what is the principle that allows even a more reduced protection in other fields? At some point, Meiklejohn abandoned his position because he had trouble with the exclusion of arts, music, and areas of literature from First Amendment coverage. Also, when he looked around historically and globally, societies that were perceived as restrictive of free speech were seen partially as restrictive in those fields. But I don't think you've given us an articulated principle to explain that perspective, other than to say that it would be uncomfortable to suggest that all these areas were external to the First Amendment.

CASS SUNSTEIN: Well, this is true. Meiklejohn's original position was that the First Amendment was only about political speech -- the other stuff was a due process issue. That isn't my view and the text is evidence against it. I don't think it is actually decisive, but the text doesn't say "freedom of political speech," it says "freedom of speech." That's actually a cheap argument if intended to be full because we have to know what "freedom of speech" means. Maybe it meant "freedom of political speech." The text at least is trouble, I

think, for the Meiklejohn-Bork view. The history is not unambiguously supportive of the view that political speech is the only kind of speech protected by the First Amendment; there are broader suggestions. In any case, that position is foreclosed by judicial precedent, just from a lawyer's point of view. Even though some art and entertainment may have no political component, it would be impossible, given existing law, to say that they were unprotected by the First Amendment.

So I think that you are exactly right -- I haven't described the sorts of human interests that are safeguarded by protection of non-political speech. To complicate what I've said a bit, let me just say that I don't think any unitary theory of free speech value would be adequate; that is, the political theory that I've tried to suggested would be the focus or principle concern, but not the exclusive one. There are other human interests having to do with deliberation about whom one should be friends with, or what kind of sexuality is desirable, or whether there really is something called the top quark -- as some physicists now believe. There are deliberative and other interests that are protected by speech that aren't political and that justify guarding these things in at least a second tier.

I don't mean to say that once you're in a second tier of speech, you're at grave risk; the government still has to show something. So sexually explicit speech, for example, that can't be associated with any harms, on my view, that's constitutionally protected. In the pornography debate, we have to build up the case for regulation from harms caused, which is why I think the child pornography area is quite easy to handle, as are cases involving harms in the form of abuse of women in pornography production -- where let's say they're suing for damages -- these seem to be easy First Amendment issues. But then we get harder cases having to do with women suing because of harms they say have resulted from other people reading pornography, that becomes trickier.

So what I want to suggest is that the strict Bork position isn't mandated by text or history, is foreclosed by judicial practice, runs up against very widespread judgments of probably everyone in this room, and that there are other human interests we can identify -- non-political interests -- that supplement the Madisonian case for a First Amendment.

MAURA STRASSBERG (Audience): I'm Maura Strassberg from Drake University. My question comes back to the arts. What I'm particularly interested in are things like gay fiction and gay films. Very often you can look at these things as pornography and say "harm." The problem here, some would say, is that these are spreading "insidious values" through the culture, and so you can have a "harm" regulation. At the same time, gay art is probably the driving force of gay political rights in the sense of bringing gayness to the public forum. How do we try to distinguish the politics underlying something that is not presented explicitly as political speech, and weigh that against the alleged harm it causes? This is particularly problematic when the First Amendment is made to carry the weight for what really ought to be an equal protection concern. Clearly, in most gay rights cases today, the First Amendment is being asked to do what the Equal Protection Clause really ought to be doing.

CASS SUNSTEIN: The only gay material I know is the Robert Mapplethorpe photographs and I think that the Mapplethorpe material probably was political in the relevant sense. There were political statements that Mapplethorpe was making that bore directly and self-consciously, and everyone understood this, on issues of what the state does. So the Mapplethorpe stuff was political in the relevant sense. To put it more clearly, what Mapplethorpe is for is not what pornography is for; Mapplethorpe's work had components of a political statement.

Additionally, the harms of pornography are linked to the Lincoln framework of an anti-caste idea. Mapplethorpe's work can't be seen as creating or supporting a caste system. Since gays and lesbians are pretty close to being "second class citizens" in the United States today, the notion of regulating their speech can't be defended as a means of protecting others from lower caste status. Who would be being protected? So I think the arguments that call for regulation of violent pornography call for protection of homosexual pornography. It is political in the relevant sense and the relevant harms usually aren't there.

GREGORY SISK (Audience): Gregory Sisk, Drake University Law School. The concern I have with what you talked about is that when you use such terms as "less valuable speech" versus "valuable speech," political speech being the most valuable," or other types of speech being less valuable, and when you talk about concrete examples, it sounds as if you're applying your own subjective values and judgments to what you think to be more valuable versus what is less valuable. Yet it is precisely these sorts of judgments we do not wish to delegate to government. Because everything that has an expressive component ultimately is political, even the simple conversation I have over the back fence with my neighbor -- it may not have any political content to it at all, but it helps to develop who we are as a people, what we are as neighbors, which in turn influences the way we interact in our community. In this sense, it has a political effect.

Literature is the same. The most innocuous kinds of expression ultimately have that kind of value. So even if we take the Madisonian approach, everything ultimately is political in that sense. But even more importantly, how could we ever delegate to anyone the ability to make choices as to what is more valuable or less valuable? Particularly how could we delegate it to political entities made up of politicians who likely would determine what is valuable and less valuable by what is popular and less popular in that particular electoral region?

CASS SUNSTEIN: That's an important concern. Let's see how to approach it. One question we might ask is whether the framers had judgments of value which underlay their conception of what speech is protected or not? And there the answer is "absolutely." If you read the writings of Joseph Story or other materials of that early period, they were clear that freedom of speech didn't include all words, that licentious speech or libelous speech was regulable. Now think about that -- "licentious." Furthermore, libelous then meant a lot more than it does now. So certainly the authors of our free speech principle thought that judgments of value had to be made, should be made, would be made.

Now if you don't like that, I think the simplest response to the concern about judgments of value is that they're inescapable. To run a system of free

expression without making judgments of speech value is not possible, and people who think it's possible ought to think a little more. If you think about a case involving attempted bribery which is hopelessly ineffectual, or a threat to assassinate the president that's really pathetic, or an attempt to defraud commercially that's so transparent that no one's going to be defrauded, each of these three cases -- attempted bribery, attempted fraud and an attempt to assassinate the president -- have speech that is protected by the First Amendment? If so, then the view that we ought not to make judgments about value is truly radical. It purports to be simply the stand of convention and common sense. But if it has the effect of protecting speech in these cases, this is a very radical position. Many statutes become unconstitutional. Most conspiracies in the United States, happily, aren't going to harm anybody. Fortunately the government tries to stop them even so. Now does the government have to show that conspiracies, insofar as they're proved by speech, are actually going to produce something before you can criminalize them? So the first part of the answer is that the framers certainly thought judgments about value would be made. The second is that I think it's impossible to run a system of free expression without making those judgments, and the sad thing is we make them covertly without saying so.

The third thing you talk about is the political nature of all speech. Now, it's very possible that my account of free speech value is just wrong, and another would be better. Great. If we can design another account, political or non-political, and it would be better -- wonderful. If it leads to better and different results, that's even more wonderful. But this is the best I can do. Maybe we can work together in the next few days to come up with something we like more. Of course you're right -- anything can be deemed political. But in order to do the work that a theory of free speech value has to do, we have to give an account of the "political" that's narrower than "anything." Otherwise we're in the domain of no judgments about value again. So my definition of the political is intended and received as a contribution to public deliberation about issues. Now that has a degree of indeterminacy about it, but words cannot escape indeterminacy. So if that standard isn't any good, let's come up with another one.

It's interesting to note that no justice in the Supreme Court's history has denied the need to make judgments of free speech value. And our law reflects judgments of free speech value. And the American Civil Liberties Union, I don't believe, really denies that judgments about free speech value have to be made at some point. So the Court has not given a test, but maybe that's better than giving a test, because any test would be inadequate. But it's good to try to come up with tests and standards and rules.

KINGSLEY BROWNE (Audience): Kingsley Browne, Wayne State University Law School. My question is how do you decide what caste is? You mentioned a minute ago that perhaps gays and lesbians are a caste or fast approaching a caste. What about racists and sexists? They're certainly a reviled minority -- at least we hope they're a minority these days -- yet it's precisely their speech that you provide some support for regulating. Who's to stop us from saying that racists and sexists are now a caste? They are certainly a people that usually have to express their views in private, because of the scorn that would be heaped on them if they didn't.

CASS SUNSTEIN: Yes. Well, two things. I think the simplest way of thinking of who is lower caste is to look at indicators of social well being, like jobs, poverty and wealth, political representation, subjection to crime and so forth. So along those dimensions, African-Americans are very obviously a second class and women slightly less obviously, but also so. What I'd like to do is to look at dimensions of social well being and see who's systematically low. That's what Lincoln was thinking about.

KINGSLEY BROWN (Audience): But you emphasized a couple of times, though, when you were talking about equality that you weren't talking about economic equality. And now I think what I'm hearing you say is you don't mean economic equality, you mean political equality, but we'll use economic well being as a proxy for political equality. So it ends up being pretty much the same thing, doesn't it?

CASS SUNSTEIN: Maybe I've been unclear, but there are two different ideas. One is the notion of political equality, which is not economic equality. The second notion is the anti-caste idea, as to which systematic disparities along economic dimensions are relevant in showing second class citizenship. Note that the anti-caste principle is not egalitarian, because to say that people defined in terms of a morally irrelevant characteristic like skin color should not be systematically below another group, is not to say that everyone should have the same income. So my view is that if we had a society in which people with blue eyes, let's say, were systematically below people with brown eyes, there'd be a problem. Whereas, if there's a society where there's large disparities in economic well being fairly randomly distributed, on my view, from the standpoint of the American constitutional lawyer, that society does not have a problem. It would, of course, have some social, rather than constitutional, problems. So the notion that anti-caste can be measured by seeing whether one group defined in terms of a morally irrelevant characteristic is systematically below another does not constitute an argument for economic equality as a constitutional norm.

On racists and sexists, I have two thoughts. One is it would be quite surprising if racists and sexists were systematically below non-racists and non-sexists in the sense that they had more poverty, they were less frequently employed. If they were, what I think would have to be added to the analysis, which I think is in Lincoln's work, is an evaluative dimension which finds that the disadvantaged group is defined by some morally irrelevant characteristic. So if racists have such problems as they do because people are unhappy with their racism, then we wouldn't have Lincoln's problem of people defined in terms of a morally irrelevant characteristic. I do think if it were true that society took racists and made it so they couldn't have jobs and they were all in poverty, then we'd have a real problem. It wouldn't quite be the problem Lincoln is talking about, and both fortunately and unfortunately we're nothing like near there.

MARIANNE WESSON (Audience): I'm Mimi Wesson from the University of Colorado Law School. Cass, you're very graceful in conceding the difficulty of distinguishing political speech from less political or non-political speech, and you

acknowledge the complexities of examples like the Mapplethorpe example. But I'm wondering if there isn't a more fundamental difficulty with that distinction. In some cases, it may be the harm, that you say is the second prerequisite to the regulation of free speech, flows directly from its political character, as in the case of pornography. I'm not sure I'm happy with the suggestion that pornography's message is not a political one. Many anti-pornography feminists would say that the message of pornography is precisely a political one. It makes the political argument that they are second class, that women are there to be hurt, that they are there to be exploited, that they are there simply for men's pleasure. And this political argument has an effect. In fact, it coincides rather nicely with some empirical evidence that suggest that observers of some kinds of violent pornography will be less likely to believe that a rape occurred when they're shown a depiction of a rape; they're more likely to believe that the woman somehow "asked for" it or "deserved" it. So doesn't it pose a great difficulty for your theory that it may be that the harm created or caused by pornography rests precisely on the politics of the message that it conveys?

CASS SUNSTEIN: That may be a problem. If we had a speaker who said, "Women are second class, they like the sorts of things we see in pornography and those things are great, and nations that allow them are really free," I would say that's at the core of First Amendment protection. So if it's the case that pornography is rightly described as making an argument to that effect, then the Madisonian thinks you have to have a clear and present danger or something of that sort justifying regulation. Then we don't have the commercial speech analogy anymore. But I think there's a difference between pornography, even if it has political effects, and those statements I just made. Pornography may have political effects of the sort you described, but it's not accurately described as intended and received as a contribution to public debate about some issue.

This isn't an adequate response, but I think the issue, when you say feminists perceive pornography as political, is what is meant by that word "political." Probably not the same thing as what the Madisonian means. Attempted bribery, for example, is awfully political in its effects, and yet not for that reason in the First Amendment core. Commercial advertising is for the cultural studies person as political as anything gets, but it would be surprising for the Supreme Court to say that commercial advertising is the same sort of thing that Madison was talking about when protesting the Sedition Act. So I think your use of the word "political" seems just right for the purpose for which you're using it. But my suggestion is that for purposes of figuring out what the First Amendment is about, we have a different conception of the "political."

If, on the other hand, government is trying to regulate pornography because of its political effects -- meaning, let's say, because it's creating a world in which women's role is not the right one, and we could describe it that abstractly -- then I get worried about the legitimacy of the government's reason for regulating pornography. Government should not be allowed to regulate pornography because pornography contains a politically wrong message. This is why it seems to me better from a First Amendment point of view to regulate pornography (if it is to be regulated) on the grounds that it's associated with tangible real world harms, like harms in the production and harms in the use rather than harms

caused by persuading people about certain things. What I wouldn't want is the government regulating literature because the political message was wrong or the political effects were wrong.

It depends on how we understand the word "political." What the feminist anti-pornography arguments, including yours, I take to be, least controversially, are that pornography is associated very clearly with harms that the government has a right to protect against.

MARIANNE WESSON (Audience): And what are those harms, in your view?

CASS SUNSTEIN: Well, most simply, violence in the production and use.

MARIANNE WESSON (Audience): Anything beyond that, in your view? Let's assume that there was valid consent by all of those who participated in the production of pornography, and that they were all adults. But let's assume further that someone who consumed pornography was encouraged thereby to go out and harm someone who had not consented in any way. Do you think providing that victim with some sort of compensation is compatible with your theory of the First Amendment?

CASS SUNSTEIN: Sure, if you can prove causation. So if I see a civil damage remedy, maybe with a damage cap . . .

MARIANNE WESSON (Audience): Those are popular these days!

CASS SUNSTEIN: Yeah, I know. I think I said that by reflex. That's like a libel case.

MARIANNE WESSON (Audience): Cass, what would you say to someone who would respond by saying, "Well, the reason that person was encouraged to go out and harm his victim is that he responded to a political message encoded in the pornography, and the political message was 'it's okay to treat women this way because they really like it, and if they don't like it, they deserve it.'"

CASS SUNSTEIN: I think "political message encoded" doesn't make something political speech within the meaning of the First Amendment.

MARIANNE WESSON (Audience): Isn't that what you said about Mapplethorpe, that there was a political message encoded?

CASS SUNSTEIN: I don't think it's encoded. I might just be wrong on both Mapplethorpe and pornography. What I understand pornography of the regulable sort to be basically is a masturbatory aid. And that can be great, but that's not what the First Amendment is centrally all about. Mapplethorpe is not that. And even if you have a masturbatory aid that encodes political messages, the notion that that's at all close to what Madison is talking about seems odd. These are very good questions. I know I haven't adequately answered them.

CATHY CROSSON (Audience): Cathy Crosson, Indiana University. Cass, I disagree with many, many of your stated and unstated assumptions which I think you need to unpackage. I think the over-arching question to me is what is our agenda here? I seem to read your remarks' global impact as basically a position that a niggardly approach to free speech is justified by a project of equality.

CASS SUNSTEIN: A niggardly approach to free speech? That's not what I'm for.

CATHY CROSSON (Audience): I think an approach to free speech which cuts out personal autonomy issues, which cuts out the ability to receive ideas and information and to express ideas that are not inherently political, is a very narrow one.

CASS SUNSTEIN: I hope I said to Stan that that was not my view, that truthful commercial advertising and non-harmful sexually explicit stuff are right in the First Amendment -- they're just not in the core.

CATHY CROSSON (Audience): I think to treat these autonomy issues as not being at the core First Amendment is consistent with the bulk of Supreme Court decisions, not *Stanley v. Georgia* (1969), not *Cohen v. California* (1971), which I consider to be the high water marks, but certainly that's consistent with most existing doctrine. I'm not sure we want to be bound by that or stop there or end our project of constitutional development there. And in that regard, if equality is part of this project, if we are going to justify a lot of regulation of speech by their impact on lower caste people, by their adverse effects on equality, then it raises several questions about your approach. First of all, I'm uncomfortable with using as a polestar for our discussion the views and conceptions of the white male elite who happened to be in power two centuries ago as opposed to the strivings of living, breathing people today for their freedom and equality. I think that's where we should start. We should be looking empirically at what proposed regulations of free speech actually mean for strivings for equality and freedom. I also am deeply troubled by the idea that we can separate political from non-political speech, and I believe that in the current power structure that the aspects of free speech which are most important for most people, are the more emotive self-development, personal autonomy aspects of having as wide as possible access to ideas and information and artistic expression.

I'm also troubled by this kind of "less is more" argument, to put a crude label on it, whereby you seem to say that because universities engage in all kinds of non-free speech decisions, because there are all kinds of invidious censorship going on in the university in terms of who gets tenure, etc., that justifies more limitations on free speech; that because workers in the work place currently have such limited autonomy in terms of speech rights, that that justifies more restrictions on their personal autonomy. In fact, I think if our project is human freedom and development and equality, that for all those reasons we should be arguing for much less censorial approaches to speech on college campuses and in the work place.

The final assumption I find very troubling is that government is, in any substantial sense, really about the task of promoting equality. When I look around in the context of the onslaught on the welfare system and other attacks on the lower caste, I find very troubling the idea that we should entrust greater power to censor speech on a government that I do not think in any way is about promoting the dissolution of castes in our society.

CASS SUNSTEIN: I think those are good points, but they are mostly political rather than legal points. You say rightly that what we ought to be principally concerned about is living people today, rather than white male elites which produced the Constitution. And I think insofar as we are citizens, absolutely, and the framers, I think, would be with you on that. So far as we're talking about constitutional law, I think there's an obligation to think at least somewhat historically, and for us not to feel free to mold the Constitution anyway we wish. The notion that we can't trust our government to promote equality -- I don't know. The idea that any pornography regulation will misfire -- maybe.

CATHY CROSSON (Audience): But that's certainly our empirical experience. It gets used against gay literature overwhelmingly.

CASS SUNSTEIN: Well, that's a fine political point. But you know, the FDA, -- I'm completely with the Republicans on the FDA -- it's doing terrible things, and they ought to reform it so it doesn't stop good drugs from getting on the market. But the FDA isn't unconstitutional; we have a political process to deal with it. Under your conception -- maybe I misunderstand you -- it seems that the First Amendment is doing so much work which I think ought to be done through democratic debate. Now, if you don't like the political/non-political line, and I confess I don't love it, mostly because of the indeterminacy, then the question is what sort of line would be better? I guess I want to suggest also that, although as lawyers we can think very well of hard cases, with the Madisonian approach as I've described it almost all cases are very easy. I mean, the Stanford University hate speech restriction -- that's fine; the University of Michigan one -- not fine. One goes into the democratic domain, one doesn't.

You raise a bunch of interesting topics. I do think you're right that for most people non-political speech is, in a sense, more important than political speech. I think for most people, food is much more important than any speech, but food isn't protected by the Constitution. So I think to put the arguments you're making into the Constitution is what's troubling to me. I guess I have a bit of the reaction that some people had to the Warren Court: that there are a lot of things here that might be good, but the notion that the judges should impose them because they're good is unclear.

STANLEY INGBER: We're going to have a number of panels which clearly will be dealing with similar types of topics. Before we begin our first panel, we'll take a short break.