SYMPOSIUM

KEYNOTE ADDRESS: STAYING AFLOAT AND ENGAGED IN TODAY'S FLOODED MARKETPLACE OF SPEECH

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Thank you for the kind introduction and invitation to give this address and participate in the Symposium. It is a special privilege for me to come to Notre Dame. I grew up in Indiana, about ninety miles from here in Fort Wayne, have always admired the University, and know several members of the Law School's faculty, including, of course, Judge Amy Coney Barrett, my wonderful colleague on the Seventh Circuit. I don't know whether Rick Garnett or Bill Kelley get the credit or the blame for inviting me. Both are friends, and I appreciate this opportunity very much.

I am honored to give this Address in the Patrick McCartan Courtroom. Mr. McCartan, the former managing partner of Jones Day and chairman of the University's Board of Trustees, is one of the finest, classiest individuals I have ever met and worked for.

I.

We gather on this picturesque campus in the heart of the fall in Indiana. All around us are Hoosier farms, small towns, and diner discussions about the latest happenings—reminders in many ways not just of yesteryears, but also of who we want to remain and be as a people—communities stitched together around shared values, bonded by a love of family and friends, and an embrace of hard, hands-on work. So, too, though do we come together in the age of smartphones, social media, e-commerce, and news cycles that seem to run twenty-five hours a day, eight days a week.

This is America today—a world where many aspects of the way we think, communicate, and interact have one foot still touching yesterday and

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another trying to find balance today. So today's Symposium comes at a most opportune time and covers a most important topic—*Contemporary Free Speech: The Marketplace of Ideas a Century Later.*

The Symposium takes its title from Justice Oliver Wendell Holmes's dissenting opinion in *Abrams v. United States.*[1] The Supreme Court decided *Abrams* in 1919, and the case presented the question whether Russian *émigrés* violated the Espionage Act by distributing leaflets encouraging a workers' revolution and disparaging America's involvement in World War I.[2] The Court upheld the convictions, concluding that the messages conveyed in the leaflets, intended as they were to provoke resistance against the American military campaign in Europe and to urge labor strikes in ammunition factories critical to the war effort, enjoyed no First Amendment protection.[3]

Justice Holmes dissented, arguing against the regulation of dissident speech, reasoning, in the words that gather us today, that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[4] The point, of course, is that we best find truth when speech competes with speech, with government handcuffed from putting its thumb on the side of particular messages.

What a difference a century makes. Leafletting has been replaced by Twitter and Facebook; and the public forum is no longer the town square but rather a vast digital landscape without boundaries. The free trade in ideas, once measured through the quality of finite speech, is now tested by a tsunami of speech.

With Justice Holmes's dissent in *Abrams* as the starting point, the *Law Review* has brought together a distinguished group of professors to offer ideas on how the conception of the marketplace of ideas applies, if at all, to many of today's most pressing and unanswered challenges, including contentious political discourse, hostile counterspeech, and digital privacy. Each professor has drafted an article and provided a valuable contribution.

Dawn Nunziato of George Washington University and Alexander Tsesis of Loyola Chicago tackle the digital issues head-on, proposing new ways to address the complex balance between speech and privacy, truth and untruth, in the social media era. Professor Nunziato describes current regulatory approaches to these challenges at home and abroad, recommending new legislation to limit future foreign intervention in American elections and to increase the transparency of online political advertisements. For his part, Professor Tsesis argues that consumer protection considerations should play a prominent role in the Congress's and judiciary's balancing of speech and digital privacy.

John Inazu of Washington University in St. Louis analyzes today's political contentiousness through the lens of Justice Holmes's discussion of the

1 250 U.S. 616 (1919).

2 *Id.* at 616–17.

3 *See id.* at 624.

4 *Id.* at 630 (Holmes, J., dissenting).

certainty of conviction relative to speech and its impact on the marketplace of ideas. Professor Inazu argues that society benefits when a humble approach to personal beliefs guides individual contributions to national discourse. Likewise, Leslie Kendrick from the University of Virginia assesses the tension between the *Abrams*-style marketplace of ideas and the "clear and present danger" test, introduced by Justice Holmes in *Schenck v. United States*.[5]

Reflecting on the contributions of Professors Inazu and Kendrick, Fred Schauer, also from the University of Virginia, examines the history of counterspeech—from the planned Skokie Nazi march in 1977 to today's clashes on college campuses. Professor Schauer finds today's legal frameworks underdeveloped to address fully instances where speech in its own right is used to drown out a controversial primary speaker. He offers thoughtful observations on what truly constitutes interference with speech, arguing that difficulties in defining that interference have hindered efforts to establish when counterspeech goes too far.

Finally, the Symposium benefits from broader discussions of the legal frameworks applied to assess the First Amendment in contemporary settings. Heidi Kitrosser from the University of Minnesota addresses the balance between statutorily provided speech mechanisms like whistleblower laws and Supreme Court precedent holding that the First Amendment provides no protections for government officials speaking pursuant to their official duties.[6] Mary-Rose Papandrea examines the Court's shift away from its usual speech rubrics when assessing public school students, public employees, and the government speech doctrine, concluding that the Court's resort to balancing tests in these areas comes with real costs. Finally, my former professor, Martin Redish from Northwestern University, assesses the complexities associated with compelled commercial speech, suggesting a new standard for measuring the legitimacy of government action in that domain.

II.

So the contributions to the Symposium cover substantial ground, address important issues, and offer much to react to. This Symposium, I submit, also occurs at a time of significance for the First Amendment in the Supreme Court. Perhaps the Court's most fervent and consequential defender of free speech, Justice Anthony Kennedy, has retired. His impact on American constitutional law was enormous, including, in my view, in the area of free speech. I had the privilege of clerking for Justice Kennedy, admire him deeply as judge and person, and want to offer some reflections on what I see as a few of Justice Kennedy's more important contributions to the law of free speech and what lessons those contributions may provide as the law marches forward.

Across thirty years on the Supreme Court, Justice Kennedy advanced consistent, coherent, and impassioned defenses of the value of free speech.

5 249 U.S. 47, 52 (1919).

6 *See* Garcetti v. Ceballos, 547 U.S. 410 (2006).

His opinions reflect an unwavering belief that the freedom of speech is essential to our autonomy and identity as individuals and to the preservation and advancement of our republican form of government.

Allow me to illustrate these points by highlighting what I see as some of Justice Kennedy's most significant free speech opinions. At nearly every turn, and with few exceptions, it is easy to see his agreement with Justice Holmes's conception of the First Amendment as protecting the marketplace of ideas.

Justice Kennedy joined the Supreme Court in February 1988, and a year later the Court decided *Texas v. Johnson*,[7] holding unconstitutional the Texas statute that made it a crime for Gregory Lee Johnson to burn an American flag during the 1984 Republican National Convention in Dallas. Justice Kennedy joined the majority and penned a short concurring opinion foretelling his strong commitment to free speech. He saw the case as "exact[ing] its personal toll" and proving that "sometimes [courts] must make decisions we do not like," for he understood that "the flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics."[8] "It is poignant but fundamental," Justice Kennedy continued, "that the flag protects those who hold it in contempt."[9] I have little doubt he felt the same way twenty-two years later when he joined the majority opinion in *Snyder v. Phelps*,[10] where the Court protected outrageously offensive antigay protests by members of the Westboro Baptist Church at the funeral of a fallen American soldier.[11]

One day after issuing its opinion in *Texas v. Johnson*, the Court decided *Ward v. Rock Against Racism*,[12] which presented a First Amendment challenge to guidelines New York City had established to control the volume and sound mix during concerts in Central Park.[13] Justice Kennedy authored the majority opinion and established the framework that remains to this day for evaluating time, place, and manner restrictions on speech in a public forum. He emphasized the necessity of any such restrictions not only being content neutral, but also "narrowly tailored to serve a significant governmental interest."[14] Content neutrality, Justice Kennedy explained, meant that the First Amendment prevented government from regulating speech in ways that reflected disagreement with the message being conveyed[15]—a view he held with unyielding and passionate conviction over his thirty years on the Court.

Three years into his tenure on the Court, Justice Kennedy took the first of his many steps to emphasize that First Amendment doctrine must adapt to changing times to protect speech. He made the point clear in his separate

7 491 U.S. 397 (1989).
8 *Id.* at 420–21 (Kennedy, J., concurring).
9 *Id.* at 421.
10 562 U.S. 443 (2011).
11 *Id.* at 461.
12 491 U.S. 781 (1989).
13 *Id.* at 789.
14 *Id.* at 791.
15 *See id.*

opinion in *International Society for Krishna Consciousness, Inc. v. Lee*,[16] urging that the public congregating areas in the New York City airports should be treated as public fora—much like a street, sidewalk, or public park—and thus broadly open to speech, including protests.[17] It was the judiciary's responsibility, Justice Kennedy reasoned, to determine whether a particular space constituted a public forum, and those determinations needed to account for "fast-changing technology and increasing insularity"—all in the interest of promoting expressive activity.[18]

This same reasoning guided two important opinions Justice Kennedy wrote for the Court in the context of speech in higher education, *Rosenberger v. Rector & Visitors of University of Virginia*,[19] and *Board of Regents of the University of Wisconsin System v. Southworth*.[20] In *Rosenberger*, the Court held that a public university violated the First Amendment by withholding student activity fees from Wide Awake Productions, a Christian student organization that published a Christian newspaper.[21] The Establishment Clause, Justice Kennedy's opinion explained, did not require the University of Virginia to chart this course, and the Free Speech Clause affirmatively prohibited it. Breaking new doctrinal ground, he emphasized that the proper way to view the University's pool of student activity fees was as a "metaphysical" forum designed to create a marketplace for the free and robust exchange of ideas between and among student groups of all viewpoints.[22] To withhold funding on the basis of the Christian students' viewpoint reflected a most impermissible form of speech regulation that risked, as Justice Kennedy put it, the "suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses."[23]

Southworth presented a question unresolved by *Rosenberger*: whether a public university may require a student to pay an activity fee that supports the objectionable speech of particular student groups. Writing for the majority, Justice Kennedy answered yes, emphasizing the substantial interest the University of Wisconsin had in using student fees to establish a nontraditional forum to "facilitat[e] the free and open exchange of ideas by, and among, its students."[24] And returning to the principle of viewpoint neutrality at the heart of *Rosenberger*, Justice Kennedy explained that so long as the student fees are not being used to "prefer some viewpoints to others," the First Amendment permits the University to require the fee.[25]

16 505 U.S. 672 (1992).

17 *Id.* at 693 (Kennedy, J., concurring).

18 *Id.* at 697.

19 515 U.S. 819 (1995).

20 529 U.S. 217 (2000).

21 *Rosenberger*, 515 U.S. at 826–27, 837.

22 *See id.* at 830–31.

23 *Id.* at 836.

24 *Southworth*, 529 U.S. at 229.

25 *Id.* at 233.

Perhaps above all else, *Rosenberger* and *Southworth* underscore Justice Kennedy's view of the importance of free and open speech in the university setting. The opinions root themselves in the belief that exposure to the marketplace of ideas—Justice Holmes's insight in *Abrams*—facilitates learning, fosters critical thinking, and produces informed citizens and future leaders. All of this goes a long way, in my judgment, to explaining Justice Kennedy's votes in the Court's affirmative action cases, *Grutter v. Bollinger*[26] in 2003 and then more recently in his 2013 opinion for the Court in *Fisher v. University of Texas*.[27] Those cases rest in no small part on the view that exposure in the university setting to diversity in all of its forms yields important and lasting educational benefits.

I believe this same institutional interest—a state's promotion of higher education and its many benefits—likely explains Justice Kennedy's vote and separate concurring opinion in *Christian Legal Society v. Martinez*,[28] a case arguably standing as an outlier in his free speech jurisprudence. The Court there rejected a free speech challenge to the so-called all-comers policy of the Hastings College of Law. The policy conditioned the recognition of student groups and their ability to use school funds and facilities on each group's agreement to open their membership to all students, without regard to ideology. The Court held that the all-comers policy was viewpoint neutral, as it applied across the board to all student groups of all ideologies, and reflected a reasonable way for a public institution, as part of creating a limited and special purpose forum, to enhance the learning environment for all students to choose to distribute benefits.[29] Justice Kennedy wrote separately to emphasize not just that viewpoint neutrality saved the all-comers policy but also that Hastings designed the policy to help its students realize the educational benefits of diversity—a point he made by citing and quoting Justice Powell's separate opinion in *Regents of the University of California v. Bakke*.[30]

So, while *Christian Legal Society* may seem like an instance where Justice Kennedy endorsed a form of forced association at odds with *Rosenberger* and, more generally, his belief in the importance of individual autonomy and self-expression, another interpretation is possible. *Christian Legal Society* may have reflected Justice Kennedy's willingness to recognize—at least at the level of a program's facial design—the state's institutional interest in advancing objectives of higher education.

This same willingness to credit important institutional interests may explain Justice Kennedy's vote and majority opinion in *Garcetti v. Ceballos*,[31] where the Court held that the First Amendment did not protect a government employee from discipline based on statements made as part of the

26 539 U.S. 306 (2003).

27 570 U.S. 297 (2013).

28 561 U.S. 661, 703–06 (2010) (Kennedy, J., concurring).

29 *Id.* at 694–95 (majority opinion).

30 *Id.* at 705 (Kennedy, J., concurring) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 n.48 (1978) (opinion of Powell, J.)).

31 547 U.S. 410 (2006).

employee's official responsibilities.[32] And I think the same can be said of Justice Kennedy's concurring opinion in *City of Los Angeles v. Alameda Books, Inc.*,[33] where he was willing to afford the City of Los Angeles some latitude with zoning regulations targeting the secondary effects of speech from adult bookstores, massage parlors, and the like.[34] In other words, the government's institutional interests as employer and regulator of community health and welfare carried the day in *Garcetti* and *Alameda Books*, just as the Hastings Law School's institutional interests seemed to save the all-comers policy in *Christian Legal Society*.

Justice Kennedy's insistence that the First Amendment prohibits viewpoint discrimination took center stage in his final writing as a member the Supreme Court. In *National Institute of Family and Life Advocates v. Becerra*,[35] the Court held that a California law requiring licensed health clinics to notify women that the state provides free family planning services, including abortions, violated the First Amendment.[36] While joining the majority opinion, Justice Kennedy wrote separately to express what he called "serious constitutional concern" with a law that required "pro-life pregnancy centers to promote the State's own preferred message advertising abortions"—a "paradigmatic example," as he saw it, of viewpoint discrimination.[37] He especially took the California legislature to task for declaring the law to further the state's legacy of what it called "forward thinking."[38] "It is forward thinking," Justice Kennedy sternly retorted, "to begin by reading the First Amendment as ratified in 1791," to understand the risks of the government acting to stifle speech, and "to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come."[39] The bottom line for Justice Kennedy was that "[g]overnments must not be allowed to force persons to express a message contrary to their deepest convictions."[40]

One of Justice Kennedy's most important opinions underscored this same point and came in his dissent in *Hill v. Colorado*,[41] where the Court upheld a state statute that made it a crime for anyone within one hundred feet of a "health care facility," including an abortion clinic, to approach another person without consent to engage in "oral protest, education, or counseling."[42] Justice Kennedy reacted passionately to the majority's reliance on what it termed the "unwilling listener's interest in avoiding

32 *Id.* at 421.

33 535 U.S. 425, 444 (2002) (Kennedy, J., concurring).

34 *Id.*

35 138 S. Ct. 2361 (2018).

36 *Id.* at 2378.

37 *Id.* at 2378–79 (Kennedy, J., concurring).

38 *Id.* at 2379 (quoting Joint Appendix at 39, *Becerra*, 138 S. Ct. 2361 (No. 16-1140), 2008 WL 388836).

39 *Id.*

40 *Id.*

41 530 U.S. 703 (2000).

42 *Id.* at 707 (quoting COLO. REV. STAT. § 18-9-122(3) (1999)).

unwanted communication," part of the broader "right to be let alone," with the majority borrowing from Justice Brandeis's dissent seventy-two years earlier in *Olmstead v. United States*.[43] To use Justice Kennedy's words, "speech makes a difference, as it must when acts of lasting significance and profound moral consequence are being contemplated."[44] In this way—and indeed in ways that may have surprised many—Justice Kennedy saw the majority opinion in *Hill* as a blow not just to the First Amendment, but also, as he underscored, to the "essential reasoning"[45] of the Court's plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[46] which he coauthored. At the core of *Casey*, he observed, was the Court's reaffirmation of a woman's right to choose whether to terminate a pregnancy—a decision that benefits from more speech, not less. So, as the Justice saw it, there was "[n]o better illustration of the immediacy of speech, of the urgency of persuasion, of the preciousness of time" than presented by the Colorado law, where, for the prohibited speech to be effective, it "must take place at the very time and place" it may matter most.[47] He viewed the majority opinion as "strik[ing] at the heart of the reasoned, careful balance" he saw as "the basis for the opinion in *Casey*."[48]

So we come to *Citizens United v. Federal Election Commission*,[49] the prime candidate for Justice Kennedy's most controversial free speech opinion. The verdict on *Citizens United* is either triumph or tragedy, with few expressing ambivalence about the outcome. The Court held unconstitutional a federal prohibition on corporations spending their own funds to advocate for or against candidates for political office. Emphasizing that "[s]peech is an essential mechanism of democracy," the "First Amendment '"has its fullest and most urgent application" to speech uttered during a campaign for political office,'"[50] and that the right of free speech extends to corporations, Justice Kennedy's opinion reasoned that the government cannot remove a speaker—here a corporation—from the market without interfering with the "'open marketplace' of ideas protected by the First Amendment."[51] Overruled, therefore, was *Austin v. Michigan Chamber of Commerce*,[52] the Court's 1990 decision upholding limits on corporate electioneering speech on the basis of distorting and corrosive effects enabled by allowing the aggregation of corporate wealth for or against a particular candidate. *Citizens United*, in

43 *Id.* at 716 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

44 *Hill*, 530 U.S. at 790 (Kennedy, J., dissenting).

45 *Id.* at 791.

46 505 U.S. 833 (1992).

47 *Hill*, 530 U.S. at 792 (Kennedy, J., dissenting).

48 *Id.* at 791.

49 558 U.S. 310 (2010).

50 *Id.* at 339 (quoting Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989)).

51 *Id.* at 354 (quoting N.Y. State Bd. of Elections v. López Torres, 552 U.S. 196, 208 (2008)).

52 494 U.S. 652 (1990), *overruled by Citizens United*, 558 U.S. 310.

short, rooted itself in Justice Kennedy's consistent and unrelenting view that the government should have little to no role in selecting what speech or speaker to permit or favor. As he put it,

> When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.[53]

Justice Kennedy also made a mark in the area of commercial speech. Writing for the Court in *Sorrell v. IMS Health Inc.*,[54] he condemned content-based restrictions on commercial speech. The Court in *Sorrell* invalidated limitations Vermont had placed on the sale and use for marketing purposes of pharmacy records revealing individual physician's prescribing practices. These limitations, Justice Kennedy emphasized, were the product of the state legislature allowing nearly everyone—insurers, researchers, journalists, and even the state itself—except pharmaceutical manufacturers to acquire and use the so-called prescriber-identifying information.[55] This effected an impermissible distortion of the marketplace for speech on issues of medical safety and drug efficacy: "The commercial marketplace, like other spheres of our social and cultural life," Justice Kennedy wrote, "provides a forum where ideas and information flourish," and the "general rule is that the speaker and the audience, not the government, assess the value of the information presented."[56]

No discussion of Justice Kennedy's free speech jurisprudence would be complete without pausing on *United States v. Alvarez*.[57] The Court in *Alvarez* held unconstitutional—as an impermissible content-based regulation of speech—the Stolen Valor Act.[58] The statute made it a federal crime for Xavier Alvarez to claim at a meeting of his local water board that twenty years earlier he had been awarded a Congressional Medal of Honor for his service as a Marine. The statement was a lie, or, as Justice Kennedy bluntly put it, "a pathetic attempt [by Alvarez] to gain respect that eluded him."[59] The Court's plurality opinion extended sweeping protections to false speech, reasoning that it is up to individuals—not the government—to sort truth from falsity. "Our constitutional tradition," Justice Kennedy wrote for the plurality, "stands against the idea that we need Oceania's Ministry of Truth."[60] "The remedy for speech that is false," he continued, "is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the sim-

53 *Citizens United*, 558 U.S. at 356.
54 564 U.S. 552 (2011).
55 *Id.* at 580.
56 *Id.* at 579 (quoting Edenfield v. Fane, 507 U.S. 761, 767 (1993)).
57 567 U.S. 709 (2012) (plurality opinion).
58 *Id.* at 715.
59 *Id.* at 714.
60 *Id.* at 723.

ple truth."[61] Or, directly on point for this Symposium and quoting from Justice Holmes's opinion in *Abrams*, Justice Kennedy reminded that "[t]he theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'"[62]

In Justice Kennedy's final free speech majority opinion on the Court, *Packingham v. North Carolina*,[63] the Court declared unconstitutional a state law that made it a felony for Lester Gerard Packingham, a registered sex offender, to post to his personal page on Facebook a message saying "God is Good" after a traffic court dismissed a ticket.[64] While this looks like pretty innocent speech, the state law said otherwise, and indeed called what Mr. Packingham did a crime because of the simple fact that he knew that minors also used Facebook. Writing for the Court, Justice Kennedy explained that the law lacked narrow tailoring, as it all but foreclosed internet access to registered sex offenders.[65] In doing so, he returned to the observations he made twenty-five years earlier in the *Krishna Consciousness* case about the necessity to adapt free speech doctrine to changing times.[66] Justice Kennedy described social media sites as the modern public forum used by millions of people to "engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'"[67] He then projected broad protection for speech in cyberspace, observing that, "[w]hile we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be."[68]

Only time will tell Justice Kennedy's impact on American constitutional law. If I had to offer an early nomination, I believe his contributions to the law of free speech will prove lasting and consequential. His opinions reflect an abiding commitment to the belief that the First Amendment's promise of free speech is essential to individual freedom—to grow in knowledge and wisdom, to define our autonomy and identity, to chart our course forward in life, and to participate fully in our democracy.

Justice Kennedy's opinions expressed reverence for this freedom, seeing it as the Constitution's North Star. His opinions, by design I would submit, describe the value and virtue of speech in lofty, idealistic, aspirational, and optimistic terms to push each of us to reach our full potential as individuals and citizens. Time and again the opinions see the First Amendment as both inviting active and high-minded individual engagement and promising that

61 *Id.* at 727.

62 *Id.* at 728 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

63 137 S. Ct. 1730 (2017).

64 *Id.* at 1734–35 (quoting Joint Appendix at 136, *Packingham*, 137 S. Ct. 1730 (No. 15-1194), 2016 WL 7321395).

65 *Id.* at 1737.

66 *See supra* notes 16–18 and accompanying text.

67 *Packingham*, 137 S. Ct. at 1735–36 (quoting Reno v. ACLU, 521 U.S. 844, 870 (1997)).

68 *Id.* at 1736.

the government must stand back and not pick sides. That indeed is the essence of free speech: these choices belong to us to make as individuals, not the government, and our hardest challenges as individuals and a nation benefit from more thought and more speech, even if the price is that we encounter some deplorable messages along the way.

I trust that many of Justice Kennedy's opinions will remain mainstays in First Amendment casebooks, and for these contributions we owe him a debt of gratitude.

III.

Allow me in closing to offer a few of my own reflections on where we find ourselves today.

Foremost, the marketplace seems overcrowded, with too many voices, too much news, and too many messages competing for our attention. Our shopping carts, in other words, feel overloaded and the market too big, flooded, and open too many hours each day, leaving us not sure how to participate, and overwhelmed by the modern challenge of finding quiet and time to think, much less becoming informed about issues that matter.

Feeling overwhelmed often paralyzes and instills cynicism, if not fear. Not sure what to do, many stand still, choosing the sidelines over the playing field, finding it much easier, if frustrating, to sit out than to participate, not knowing what play to call or how to engage. The size, speed, and saturation of today's marketplace—the overwhelming ubiquity of speech—chills participation, leaving us unsure of how our own voice can make a difference.

I worry equally so, if not more so, about today's marketplace lacking civility. Our discourse too often has sharp edges, a bluntness and crassness unbecoming our tradition, more committed to slinging arrows than to listening, learning, empathizing, and searching for common ground. All of this is abetted at some level by our twenty-four seven news cycles and the information overload and anonymity of the cyber age. We feel pressed to communicate nonstop but without much substance, too often finding it too easy to react instantly, to spray criticism and insult, to say something in an email, text, post, or tweet that we would never say in person. We are losing our ability to step back.

So where do we go from here? The wrong reaction is to hang our heads, live for yesterday, and somehow convince ourselves that 1791 was forever ago and that the First Amendment America once knew is itself drowning in today's flooded marketplace. Or, worse yet, it would be dead wrong and indeed dangerous to blame the flood and poor quality of our discourse on the First Amendment. And, more than anything, nobody should look to trade today's cyber age—the promise and extraordinary opportunity it offers—for a quill pen.

The right reaction, I believe, is to double down on our commitment to free speech. The First Amendment is alive and well, fully capable of applying in today's marketplace, and we best prove that by embracing its promise at an individual level and through our individual example. Don't make the mis-

take of trying to calm the whole sea or, as my grandfather used to say, to boil the ocean.

Before introducing the marketplace of ideas, Justice Holmes in *Abrams* offered an observation worth underscoring: "If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition."[69] "I think that we should be eternally vigilant," he continued, "against attempts to check the expression of opinions that we loathe and believe to be fraught with death . . . ."[70]

Justice Holmes's message rings as clear and pertinent today and as it did in 1919: neither we as individuals nor the government should foreclose speech based on our opposition to or disagreement with particular messages. The right response is to embrace the freedom the First Amendment provides to chart our own individual courses and to persuade others that our path, our idea, and our perspective is both right and worth following.

The answer and path forward, then, lies in our individual responses to the First Amendment's invitation to engage. We do that best when we choose the playing field over the sidelines and communicate and interact in ways that reveal our very best—by speaking up on matters of consequence, celebrating what is right and calling a wrong a wrong, listening carefully and respectfully to others, and always keeping an open mind. Example matters.

In a speech in his hometown of Sacramento not long before he retired, Justice Kennedy sounded a worry that the idea and promise of free speech may be slipping from today's generation. He worried that the cyber age, despite all of its promise, was inhibiting quality dialogue; producing generations less educated in matters of history, literature, and philosophy; and rushing our interactions to such a degree that we are losing part of our ability to reflect, learn, and grow.[71]

Allow me to conclude with an invitation. Let's prove Justice Kennedy both right and wrong. All around us—in our world, nation, and local communities—are enormous challenges craving creative, empathetic, and collaborative responses. Let each of us embrace the First Amendment's promise and become and remain fully engaged as individuals, friends and neighbors, professors, parents, and citizens.

The questions are easy and obvious. It is the answers that require individual resolve and an embrace of our First Amendment freedom: Are we going to use our voices to offer solutions; to press for change in rooms replete with complacency; to clarify confusion and correct lies; to celebrate right and to condemn wrong; to help your family, friends, and communities

69 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

70 *Id.*

71 *See* Justice Anthony Kennedy, Opening Remarks at a Conference on Civil Discourse at the Sacramento Federal Courthouse (Sept. 15, 2017). For a video recording of the speech, see *Free Speech and How to Be Civil About It: Advice from SCOTUS Judge*, KCRA3, https://www.kcra.com/article/free-speech-and-how-to-be-civil-about-it-advice-from-scotus-judge-1/12258212 (last updated Sept. 16, 2017).

move forward when faced with the hurt and losses life puts on our doorsteps; to offer an optimistic perspective in a world where negativity often reigns supreme; to offer essential nuance to viewpoints that prefer oversimplification; to bring understanding to circumstances blinded by intolerance; to respect the dignity of individuals nobody else will defend; to add compassion to a chorus line of condemnation; to sand off the sharp edge of a text message or Facebook post—in short, to make a positive difference in our own life and the lives of others?

The First Amendment allows us to engage in our own ways and on our own terms, but engage we must and urgently so, for too much is at stake for us as individuals, our families and communities, and our nation and world. As Justice Kennedy so simply, so rightly, and so eloquently stated in *Hill v. Colorado*: "In a fleeting existence we have but little time to find truth through discourse."[72]

Thank you again for the opportunity to participate in the Symposium.

72 530 U.S. 703, 792 (2000) (Kennedy, J., dissenting).