The George Washington University Law School

Access to the Media—1967 to 2007 and Beyond: A Symposium Honoring Jerome A. Barron's Path-Breaking Article

Introductory Remarks by The Honorable Stephen G. Breyer

Professor Robert Brauneis: Well, I'd like to thank Aaron Wredburg and the other students on *The George Washington Law Review*, Brad Clark, Naomi Cahn, and all of you who come to participate in this and organize it. It's a great event. It's amazing how smoothly it's gone so far, and that bodes well for things to come.

I do have the great privilege today of introducing the Honorable Stephen G. Breyer, Associate Justice of the Supreme Court of the United States, who will open this symposium.

The reason that I have that privilege, as you know, is that I had another great privilege. I served as one of Justice Breyer's law clerks when he was a judge on the First Circuit Court of Appeals. And in those two years I think I learned more about legal writing than I learned in three years of law school. I would prepare drafts of opinions. I would hand them to then-Judge Breyer. He would completely rewrite them from scratch. And again and again I would learn how my mediocre attempts would be turned into elegant, and thoughtful, and convincing opinions.

Justice Breyer has continued to distinguish himself as a great craftsman of judicial opinions in individual cases, but that's not why it's appropriate—or it's not why it's most appropriate—that he open this symposium. Rather it's because he has not been content to sensibly decide particular cases. Instead, he's looked for the deepest themes that underlie our Constitution and considered how those themes can guide us, not only in constitutional interpretation, but in statutory interpretation and in administrative law.

And the central theme that he's articulated, as many of you know, in his Tanner Lectures at Harvard, is that of active liberty. An active liberty is the liberty that arises, not when we're merely free from governmental coercion and restraint, but when we are enabled to actively participate in government. Only when every citizen enjoys

active liberty, argues Justice Breyer, can our polity truly become a democracy.

That general vein of argument may actually sound familiar to you, to those of you who reread Professor Barron's article in preparation for this symposium, because at the core of that article is Professor Barron's perceptive observation, and now I quote, "that a constitutional prohibition on governmental restrictions on expression is effective only if there is an adequate opportunity for discussion." Thus, both Professor Barron and Justice Breyer have insisted on taking, what is at bottom, a very practical view of the relationship between freedom and democracy, and have thereby greatly enriched our understanding of both freedom and democracy, and of their relationship.

And so, ladies and gentlemen, I'm honored to welcome to The George Washington University Law School, Justice Stephen Breyer.

Justice Breyer: Thank you, Bob. I am happy to be here to help open this symposium and to celebrate Professor Barron's fine article. There is, of course, much to admire in Professor Barron's work. One of its many virtues is that it engages with the law in a way that is meaningful and useful to all members of the legal community. It is traditional that our profession is divided into three parts. We have the lawyers who argue cases; the judges who decide them; and the members of the legal academy who write articles that (at their best) will be useful to judges and lawyers alike.

In your introductory remarks, Bob, you mentioned my opinion-writing process. As you say, my law clerk will write a draft, and I'll read it, along with the briefs, and then write my own draft. But the process doesn't stop there. I'll give it back to the law clerk. The law clerk will rewrite it. And then I'll rewrite the law clerk's draft, and we'll keep going until eventually we end up with something we both like, something that (we hope) provides an answer to the specific question before us in a way that makes sense of the larger context in which that question arises. There are law review articles that attempt to do the same things we do—to go through the statutory, constitutional, and case law on a question and put them all together in a way that makes sense, in a way that considers the practical consequences of the different possible answers to legal questions.

I think—and I hope—that the message for law professors is that there is room in legal academia for articles of this type, for articles that take what judges are trying to do and how law is working out in

the world, think about it, put together different ideas and concepts, and then describe for the world what actually is going on in the law so that people can improve it for the future. That, of course, is a traditional pursuit of the legal academy.

There are other pursuits as well, pursuits that are always interesting and often very useful. But the importance of the traditional pursuits—of examining what's going on in a field and trying to make sense of it, of showing how it can be done better and sometimes even producing new and creative insights about the way the law works—should not be forgotten. And that's what, at least in part, this symposium is celebrating: the ability of truly fine scholarship to describe what is, at the same time that it offers insights about what should be. Professor Barron's work exemplifies these great features of legal scholarship. In fact, there are four things about Professor Barron's article that I very much admire.

The first is the practical perspective it brings to considerations of the First Amendment, in particular the traditional view of that amendment. Professor Barron calls the traditional view the "dramatic view." Others have called it "the free market of ideas," and Learned Hand called it the "democratic wager." Under the traditional view, speech should never be regulated in an effort to create better speech. That is a road we should not travel down.

Professor Barron took that traditional view and offered a bit of realism. A.J. Liebling once said that freedom of the press is guaranteed only to those who own one. Now, that's an interesting thought, because there is something more to the First Amendment than pure unregulated speech. This is true even—and particularly—in the context of politics. The First Amendment is designed to promote something, as well as to forbid something. It is designed to help create a marketplace of ideas; it is intended to help create a consumer of ideas who will speak and think and vote. And so we must be careful that we do not throw out the baby with the bathwater by taking too literally and pushing too far the "democratic wager."

Professor Barron was particularly concerned about the absence of newspapers. This fact was, in part, a result of what you might call the "publisher syndrome." What is the "publisher syndrome"? Imagine I am a genius publisher. Because I am a genius publisher, I attract genius writers. Because I attract genius writers, I attract the best advertisers. Because I have the best advertisers and writers, I also have the best programs and the best audience. Eventually I have a monopoly. It's all hard work that got me there; I didn't violate the antitrust

law; and yet it becomes hard for others to break through in a way that will communicate ideas to the public, to the consumers of ideas.

Today, perhaps, this is less of a cause for concern because of the Internet. But which Internet sites do we read? People tend to read those sites with which they agree. So even though there may be many, many web sites, there is still a risk, even today, that we will filter the information we receive, that we will close ourselves off to information that might challenge what we think. And we should worry about what will result if there is no real space for a true exchange of ideas. Professor Barron's article asks us to think about practical consequences like these.

The second thing I like about Professor Barron's article is the way it forces us to think about democracy itself. What is the democracy that this document, the Constitution, foresees? It cannot be that the Constitution merely imagines a United States in which each individual is simply free of government compulsion. That's important, but that's not the whole story. To answer this question I have looked at the writings of Alexis de Tocqueville and Benjamin Constant, both of whom wrote after the French Revolution and both of whom looked back to the ancient Greeks. What Tocqueville and Constant both recognized is that the Greeks had some pretty good ideas about how a community of equals ought to operate. Even though the Greeks did not have a good idea about who exactly should be considered equal—they did not view women as equals, and they had slaves—the Greeks had a good idea about what the people who *were* equals should be doing. The Greeks believed that the people share among themselves the sovereignty that is the nation. And what does that mean? The people participate.

The democratic government that the Greeks established is the kind of government that John Adams and others foresaw: a government of educated people who would talk to each other and debate with each other about what kind of cities, towns, states, and nation they wanted. You can say that Adams was a romantic or ridiculously out-of-date, or that all he envisioned is hopeless. But others would disagree. Think of Tocqueville. In 1840, Tocqueville visited the United States and he said, I don't *see* anything, but I *hear* a clamor. What's the clamor? It is people talking about politics. They may not have been talking about it in a very civilized way, but they were talking about it. And why? Because they were part of it; they were part of politics.

Now fast forward to the present. People are still clamoring. Consider the Patriot Act. While I can't comment on whether it's constitutional, there is one thing on which I can comment: when I hear people fighting about that Act (or any other piece of legislation), I say *good*. Why good? Because it means that the people are still involved, that they still believe politics and government is about them. Take any law that works or doesn't work, and what you discover is that there are people all over the United States debating about it. In classrooms, in newspaper articles, in journal articles, in ACLU meetings, in police chief meetings, at bar associations, all over and in all these different places, there is debate.

That's where the work of democracy is done; that's where the discussion goes on. We're constantly deciding what works and what does not; we're constantly engaged in efforts to revise and improve. What do we do if a law is unclear? Administrative agencies clarify things and fill the gaps. What do we do if a statute doesn't work? Congress passes another one. The whole process is chaotic, but that chaos is the democratic process in action. When you think about democracy that way, you can relate it back to what Tocqueville heard, and you can relate it back to the kind of ideal Adams had in mind.

Now I come back to the First Amendment. Doesn't the First Amendment have something to do with the democracy of equals the Framers hoped to create? Isn't there some connection between that Amendment and how the democratic process is supposed to work? What I like about Professor Barron's work is that it forces us to think backward and connect to first principles. He forces us to think about what kind of country we are and how democracy actually works.

The third thing I like about Professor Barron's work is related: it helps with deciding cases, especially the difficult ones. One comes to mind—*Turner Broadcasting*. *Turner Broadcasting* beautifully illustrates the merits of Professor Barron's approach. In that case, Congress told the cable company that it *had* to carry over-the-air broadcasters on its system to ensure that they weren't shut out. Otherwise, everyone would buy cable, and they would never see over-the-air broadcasts. This legislation thus was intended to ensure that the over-the-air broadcasts had a chance of survival.

The cable companies didn't want to do it, and they challenged the statute's constitutionality. Four justices wrote that it was constitutional because there are good economic reasons for imposing this sort of requirement, and they then discussed reasons having to do with antitrust law. Four justices wrote that it was not constitutional be-

cause the antitrust justifications are wrong. Now I used to *teach* antitrust, and I agreed with those who believed that the antitrust justifications are wrong. But I believed that Congress could enact the law anyway. Professor Barron's article helps explain why. The Act will bring a few more voices into our homes. The Act shuts out no one or very few, and it does not disfavor any ideas. In other words, it allows in more and different ideas without anything of significance being shut out, or disfavored, or censored. Thus considered the law was constitutional. But that approach differs from the democratic wager and its view that Congress can never limit some speech to permit others to speak more.

Campaign finance raises the same problem. Many people feel that any limitation on the amount of money that a person can give to a campaign violates the First Amendment. The Constitution says, "Congress shall make no law . . . abridging the freedom of speech . . . ." How can laws then limit what a person can contribute? Doesn't that abridge the freedom of speech? And then people on the other side say that money is not speech. But, of course, it's difficult to get your ideas across in a campaign without any money. Campaign contributions are speech, or they're like speech, or they enable speech.

This argument is a strong one, but now come back to Professor Barron's article. It suggests we think about democracy, about the notion of informed discourse. It suggests the importance of having ideas out there, of enabling people to get their ideas through. It suggests that we shouldn't allow the twenty-five million or thirty million dollars of one person to drown out the dollars and voices of others. Instead, we should seek to promote discourse, to treat these candidates equally in the sense that they all have some opportunity to get their ideas through.

There are thus First Amendment interests on both sides of the question, and once you see the First Amendment interests on both sides, it is necessary to ask additional questions. Whom does the campaign finance law hurt? Whom does it benefit? Justice Brandeis said the First Amendment is not just an end; it is a means. A means to what, you might ask. It is a means to the maintenance of a system that promotes the kind of democracy that the Founders envisioned.

Finally, the fourth thing that I like about Professor Barron's article is that it doesn't simply tell you what to do. Instead, it makes suggestions. It gives you a sense of what questions to ask without supplying the answers to those questions. It prompts you to ask whether certain actions are constitutional or not, and informs the considera-

tions that might guide your analysis. For example, imagine that television gave free time to candidates. They do that in Europe. I just saw a debate for the French presidency. The two candidates asked each other questions and debated for over two hours. There was a moderator to keep time, and that was all. This is one idea, one possible way to break through into a world of 300 million people who must be informed and who must be willing to participate if the kind of Constitution that the Founders wrote in 1789 is to work in practice. There are many other possible ways, as well. Professor Barron's article is useful because it helps raise the questions that we must ask about these ideas, as well as identify the various considerations that might inform our answers.

There is thus much to admire in Professor Barron's article. It has much to teach us not only about the First Amendment, but also about how we think about the law and our Constitution more generally. And that is why I am very glad that you're having this conference to discuss this article and to engage in the sorts of debates about good policy and good politics that the Framers hoped we would have.