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ON FREEDOM OF EXPRESSION**

**“JUSTICE ALITO’S FIRST AMENDMENT”**

Delivered by  
**Professor Geoffrey R. Stone**

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Commentary by  
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## PROFESSOR STONE'S FIRST AMENDMENT VIEWS AND ITS JURISPRUDENCE

Professor Geoffrey R. Stone is the Edward H. Levi Distinguished Service Professor of Law at the University of Chicago Law School. He is one of the leading scholars and commentators on the United States Constitution and its First Amendment.

In order to better understand Professor Stone's views on First Amendment jurisprudence it is helpful to know his view as to the jurisprudence of the Constitution and its interpretation.

These were set out in "Citizens United and Conservative Judicial Activism," 2012 U. Ill. L. Rev. 485.<sup>1</sup> They are framed by his reference to the Constitution's Framers and their backgrounds. They were not afflicted with "narrow-mindedness and short-sightedness that belies their true spirit. In fact, the Framers were visionaries. They were not timid men. As Justice Louis Brandeis observed more than eighty years ago, the Framers believed 'courage to be the secret of liberty.' . . . The conservative version of originalism ignores that those who framed our Constitution were men of the Enlightenment who were steeped in a common-law tradition that presumed that just as reason, observation, and experience permit us to gain greater insight over time into questions of biology, physics, economics, and human nature, so too would they enable us to learn more over time about the content and meaning of the principles they enshrined in our Constitution. Indeed, the notion that any particular moment's understanding of the meaning of the Constitution's broad and open-ended provisions should be locked into place and taken as constitutionally definitive would have seemed completely wrong-headed to the Framers, who held a much bolder and more confident understanding of their own achievements and aspirations [p. 495]. . . To be true to the Framers' Constitution, we must strive faithfully to implement the Framers' often far-sighted goals in an ever-changing society. That is central to any theory of principled constitutionalism. . . [T]hose who enacted the broad foundational provisions of our Constitution often did not have any precise and agreed-upon understanding of the specific meaning of 'freedom of speech,' . . . 'due process of law,' . . . 'regulate Commerce . . . among the several States,' 'privileges or immunities,' . . . 'or equal protection of the laws' . . . it is difficult if not impossible to know with any certainty what they did or did not think about concrete constitutional issues. As a consequence, judges purporting to engage in originalist analysis too often project onto the Framers their own personal and political preferences." [p. 495]

Professor Stone says the current "conservative" Supreme Court majority's constitutional jurisprudence rests on a two-pronged blend of their concept of "judicial restraint" and "originalism":

But what does "conservative" mean in the modern era? In Nixon's time, the term meant a Justice committed to judicial restraint. Judicial restraint is, of course, critical to the legitimacy of constitutional law. In general, the courts must defer to the reasonable judgments of the elected branches of government [p. 494]. But although judicial restraint in appropriate circumstances is essential, its sweeping, reflexive invocation would abdicate a fundamental responsibility that the Framers themselves entrusted to the judiciary and would therefore undermine a critical element of the U.S. constitutional system. [p. 495] Perhaps recognizing that a theory of unbounded judicial restraint is constitutionally irresponsible, political conservatives next came up with the modern theory of "originalism." First popularized in the 1980s, originalism as promoted by Robert Bork, Antonin Scalia, and Clarence Thomas presumes that courts should exercise judicial restraint unless

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<sup>1</sup> Professor Stone's footnote references are not included in materials quoted from an article and other references hereinafter cited. The footnotes that appear are those that this Commentary writer wishes to highlight.

the “original meaning” of the text mandates an activist approach. Under this theory, for example, it is appropriate for courts to invoke the equal protection clause to invalidate laws that deny African Americans the right to serve on juries but not to invalidate laws that deny women that same right because that was not the “original meaning” of the equal protection clause. [p. 495]

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Professor Stone answers the queries: “Where, then, does that leave us? Is there any way for courts to interpret the vague and open-ended provisions of the Constitution in a principled and sensible manner?”

First, there is the issue of precedent. In theory, at least, “conservative” Justices claim to be respectful of stare decisis. Indeed, that is part of what it has traditionally meant to be conservative. Yet, in this instance, there were two definitive decisions of the Supreme Court in the 20 years leading up to *Citizens United*—*Austin* and *McConnell*—in which the Court had held unequivocally that government can constitutionally limit corporate political expenditures, and in which the Court had emphatically and unequivocally rejected the arguments of the dissenting Justices in those cases, arguments that, essentially unchanged, carried the day in *Citizens United*. Although the majority made a half-hearted effort [p. 488] to legitimize its decision to overrule those recent precedents, the plain and simple fact is that nothing had really changed in the intervening years—except the makeup of the Court itself. Conservatives, who have long touted themselves as respectful of precedent, stability, and tradition, were therefore fair game for those critics who gleefully lambasted them for their seeming hypocrisy in overruling a line of important recent decisions, the results of which they simply did not like. [p. 489]

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As I have suggested, the central question should focus on when courts should give deference to the elected branches of government and when they should be more skeptical of the outcomes of the majoritarian political process. It is only by answering that question that we can begin to come to some coherent and principled theory of constitutional law. The best answer to this question, or at least a really good first answer, was offered [in 1938] by the Court in *Carolene Products*. In footnote four<sup>2</sup>, the Court rightly identified the primary circumstances in which judicial activism (by which I mean a muscular interpretation and application of the Constitution) is most appropriate. As the Framers understood, we most need the judiciary to intervene when there is a serious risk of majoritarian dysfunction—when there is a systematic danger that the majoritarian political process has gone awry and when there is therefore a need for some independent tribunal to step in and seriously question the judgments of the political branches. As we have seen, in *Carolene Products*, the Court identified two such circumstances—when there is a risk of political capture and when the majority disadvantages citizens who have traditionally been given the short end of the stick in the political process. And as we have seen, the judicial activism of the Warren Court largely mirrored these two concerns.<sup>3</sup> [p. 498]

Professor Stone states that the current conservative expression of the doctrines of “originalism” and “judicial restraint” has no validity because the second problem with originalism is even more disqualifying. It reveals the theory to be internally incoherent, as applied. Such current “originalism”,

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<sup>2</sup> *Unites States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). The Carolene Products Company was indicted for shipping in interstate commerce a compound of condensed skimmed milk and coconut oil made in imitation or semblance of condensed milk or cream. Judgment sustaining a demurrer to the indictment, and the United States appealed. Supreme Court reversed the lower courts because the statute in question was constitutional.

<sup>3</sup> *Id.* 151.

although it asserts that those who crafted and ratified our Constitution intended the meaning and effect of their handiwork to be limited to the specific understandings of their time, the judicial outcomes of their decisions show no such restraint. [p. 498]

He expands further on the jurisprudence of the Constitution and its interpretation in the discussion of campaign finance. [*infra* at pp. 24-27]

## PROFESSOR STONE'S SUMMARY OF THE SUPREME COURT'S FREEDOM OF EXPRESSION JURISPRUDENCE

In a comprehensive survey he summarizes the Supreme Court's jurisprudence developed in the Twentieth Century in ten lessons.<sup>4</sup> He states:

At the turn of the twentieth century, we knew almost nothing about the First Amendment. Although there had been important disputes about free speech over the Sedition Act of 1798, the suppression of abolitionist literature in the early nineteenth century and during the Civil War, and although both state and federal courts had occasionally wrestled during the nineteenth century with such diverse free speech issues as obscenity and lotteries, for the most part, there was no settled understanding about the meaning of the First Amendment. [p. 273] At the dawn of the twenty-first century, however, we have an astonishingly rich, multi-faceted, and often maddeningly complex free speech jurisprudence. In this Essay, I will try to identify the ten judgments that the Supreme Court made during the course of the twentieth century that most fundamentally shaped the overall framework of contemporary First Amendment doctrine. [p. 274]

He takes the many strands of the history, philosophy, theory, and analysis of the First Amendment and their application to the real life issues that have preserved and enhanced our developing democracy. This Commentary summarizes his conclusions as to what our First Amendment jurisprudence is today. To learn about the details of that jurisprudence and the analysis and reasoning of the decisions of those Justices who crafted it, one will be well served to read in full Professor Stone's essay.

## THE TEN LESSONS TO BE LEARNED

### I. UNDERSTANDING THE TEXT

[W]e decided that "Congress" does not mean Congress. Rather, it means the "national government," including the executive and judicial branches, despite the express and rather puzzling limitation of the text. Moreover, after the enactment of the Fourteenth Amendment and the advent of the incorporation doctrine, we decided that "Congress" effectively means the government, which includes not only the national government, but all state and local governments, as well. [p. 274]

We also decided that the First Amendment does not mean what it appears to mean. The text says that the government may not abridge the freedom of speech. At first blush, this appears to suggest that the government may not restrict an individual's freedom to say what he wants, where he wants, how he wants, and when he wants. But Justice Oliver Wendell Holmes decisively put this apparent meaning to rest in *Schenck v. United States* with his famous example of a false cry of fire in a crowded theatre. From that moment on, we have acknowledged that although the government may

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<sup>4</sup> *Free Speech in the Modern Age: What We Learned in the Twentieth Century*, 36 *Pepperdine L. Rev.* 273 (2009).

not “abridge” the freedom of speech, we must define what we mean by the “freedom of speech” that the government may not abridge. That freedom, in other words, is not self-defining and, indeed, nothing in the text of the First Amendment helps us to decide what it means.

## II. REJECTING ABSOLUTISM, AD HOC BALANCING AND A UNITARY STANDARD

The second fundamental judgment we made in the twentieth century was to reject three strongly-advocated approaches to interpreting the First Amendment. The first of these approaches, championed by Justice Hugo Black, insisted that the First Amendment is an absolute—that is, “no law” means “no law.”<sup>5</sup> To make this approach credible in the light of Justice Holmes’s false cry of fire, its advocates had to define rather narrowly “the freedom of speech” that could never be abridged. Otherwise, absolute protection would require all sorts of implausible outcomes. Ultimately, we rejected this approach because the broad range of issues posed by the First Amendment proved too varied and too complex to be governed sensibly by a simple absolute protection versus no protection dichotomy. [p. 275]

We also rejected ad hoc balancing as a general approach to First Amendment interpretation. Under this approach, the Court’s task would be to weigh the benefits of restricting speech against the benefits of protecting speech in each case in order to decide whether the challenged restriction is reasonable. In theory, this approach seems sensible, but in practice it proved unworkable. It turns out to be incredibly difficult to identify and assess all of the many factors that should go into this judgment on a case-by-case basis. As a result, its application would produce a highly uncertain, unpredictable, and fact-dependent set of outcomes that would [p. 275] leave speakers, police officers, prosecutors, jurors, and judges in a state of constant uncertainty. Thus, although this approach arguably sought to ask the right question, it attempted to do so in a manner that proved fatally unpredictable. [p. 276]

The third approach we rejected... was the notion that a single standard of review should govern all First Amendment cases. Whether that standard is set at a high level of justification, such as clear and present danger, strict scrutiny, necessary to promote a compelling government interest, or at a low level of justification, such as reasonableness or rational basis review, it became readily apparent that a “one-size-fits-all” standard would not do the trick. Applied in a consistent manner, any single standard would inevitably dictate implausible results, sometimes insufficiently protective of free speech, sometimes insufficiently respectful of competing government interests. The only single approach that could sensibly apply in all cases was ad hoc balancing, but for the reasons already noted, that test was too vague. So, in short, we concluded that there is no unified field theory of the First Amendment—no single test that can apply to all cases. [p. 276]

Now, when I say that these standards would dictate results that would be unacceptably over or under protective of free speech, what I am obviously assuming is that there is some set of results that most reasonable people—including the Supreme Court Justices—would properly regard as clearly “right” or clearly “wrong.” And that, of course, assumes that we have some intuitive sense of what the First Amendment sensibly means. What I am suggesting, in other words, is that we built First Amendment doctrine backwards—not from theory to doctrine to results, but from intuited results to doctrine, with

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<sup>5</sup> In fairness to Justice Black it needs to be pointed out that he accepted the caveat to “no law means no law” that “free speech” can be regulated with appropriated limitations as to its exercise with respect to time, place and manner. He considered these “conduct” and not “speech.” See *A Constitutional Faith*, Alfred A. Knopf (1968) at pp. 61-2. Also see his dissent in *Tinker v. Des Moines School District*, 393 U.S. 517, 521-2 (1969).

only passing attention to theory. This is an important point, for it suggests that First Amendment doctrine as we know it today is largely the product of practical experience rather than philosophical reasoning. [p. 276]

### III. LEARNING THE LESSONS OF EXPERIENCE

In what Professor Thomas Emerson called “the system of free expression”...that played a crucial role in shaping contemporary First Amendment jurisprudence, three are especially worthy of note. [p. 277]

First, we learned about the so-called “chilling effect”—learning that people are easily deterred from exercising their freedom of speech. This is so because the individual speaker usually gains very little personally from signing a petition, marching in a demonstration, handing out leaflets, or posting on a blog. Put simply, except in the most unusual circumstances, whether any particular individual speaks or not is unlikely to have any appreciable impact on the world. Thus, if the individual knows that he might go to jail for speaking out, he will often forego his right to speak...But if many individuals make this same decision...the net effect will often be to mutilate “the thinking process of the community.” Recognition of this chilling effect and of the consequent power of government to use intimidation to silence its critics and to dominate and manipulate public debate, was a critical insight in shaping twentieth-century free speech doctrine. [p. 277]

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[Second,] we learned about what is called the “pretext effect”—that government officials will often defend their restrictions of speech on grounds quite different from their real motivations for the suppression, which will often be to silence their critics and to suppress ideas they do not like. [p. 277]

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Of course, the very idea of the pretext effect turns on what we mean by legitimate and illegitimate reasons for restricting speech. [p. 277]

One thing we decided in the twentieth century is that the First Amendment forbids government officials from suppressing particular ideas because they do not want citizens to accept those ideas in the political process. This principle, which was first clearly stated by the Supreme Court in 1919 in Justice Holmes’s dissenting opinion in *Abrams v. United States*,<sup>6</sup> is central to contemporary First Amendment doctrine and rests at the very core of the pretext effect’s strong suspicion of any government regulation of speech that is consistent with such an impermissible motive. [p.277]

[Third,] we learned about what we might call the “crisis effect.” That is, we learned that in times of crisis, real or imagined, citizens and government officials tend to panic, to grow desperately intolerant, and to rush headlong to suppress speech they can demonize as dangerous, subversive, disloyal, or unpatriotic. Painful experience with this “crisis effect,” especially during World War I and the Cold War, led us to embrace [the term] a “pathological perspective” in crafting First Amendment doctrine. That is, we structure First Amendment doctrine to anticipate and to guard against the worst of times. [p. 278]

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<sup>6</sup> 250 U.S. 616 (1919).

#### IV. THE CONTENT-BASED/CONTENT-NEUTRAL DISTINCTION

This, then, brings me to my fourth observation about what we learned in the twentieth century. Having rejected absolutism, ad hoc balancing, and the quest for a unitary standard of review, we divided First Amendment issues into a series of distinct problems, in the hope of addressing each of them separately with a specific standard that would be relatively predictable and easy to administer, would approximate the results of ad hoc balancing, and would guard against the chilling, pretext, and crisis effects. [p. 278]

The critical step in this development was the Court's recognition of the content-based/content-neutral distinction. Until roughly 1970, the Court did not clearly see that laws regulating the content of expression posed a different First Amendment issue than laws regulating expression without regard to content. The Court first articulated this concept in an otherwise uneventful 1970 decision, *Schacht v. United States*. In *Schacht*, the Court held unconstitutional a law prohibiting soldiers from wearing their uniforms in theatrical productions if those productions held the military in contempt. [p. 279]

Although conceding that the government could constitutionally prohibit soldiers from wearing their uniforms in all theatrical productions—a regulation that would be content-neutral—the Court nonetheless held it unconstitutional for the government to prohibit soldiers from wearing their uniforms only in productions that mocked the military. In effect, the Court held that a content-neutral law that banned more speech was less problematic under the First Amendment than a content-based law that banned less speech. As the Court put the point, the government cannot constitutionally punish soldiers for wearing their uniforms to protest “the role of . . . our country in Vietnam” while at the same time allowing them to wear their uniforms to “praise the war in Vietnam.” Such a distinction, the Court declared, “cannot survive in a country which has the First Amendment.” [p. 279]

[Now] what we must ask about any First Amendment case is whether the challenged regulation is content-based or content-neutral, for the answer to that question dictates the terms of the constitutional inquiry. Some scholars, such as Professors Martin Redish and Barry McDonald, have criticized this distinction as simplistic, wooden, and unduly rigid. Other commentators, including myself, have defended it as a sensible organizing principle that enables us to sort First Amendment problems in a way that responds to a host of concerns, including the chilling, pretext and crisis effects. [p. 280]

In brief, the rationale for analyzing content-based restriction differently from content-neutral restrictions, and for being particularly suspicious of them, is that content-based restrictions are more likely to skew public debate for or against particular ideas and are more likely to be tainted by a constitutionally impermissible motivation. The Court's recognition of this distinction was the fourth critical step in the evolution of twentieth-century free speech jurisprudence. [p. 280]

#### V. A STRONG PRESUMPTION AGAINST CONTENT-BASED RESTRICTIONS

The fifth important twentieth-century development relates to the content-based side of this distinction. Recognizing that content-based and content-neutral regulations pose different First Amendment problems does not tell us how to evaluate the constitutionality of specific laws that fall on one side of the line or the other. [p. 280]

But it was not until *Brandenburg v. Ohio*<sup>7</sup> in 1969 and the Pentagon Papers decision<sup>8</sup> in 1971 that the Supreme Court clearly embraced this view. In 1971 after a series of cases, the Supreme Court clearly stated that content-based restrictions were presumptively unconstitutional. In important respects, this doctrinal development stabilized a central part of First Amendment doctrine. With two significant exceptions—low value speech and what Professor Stone loosely calls “special circumstances”—the Court has adhered to this doctrine, with the result that it has not upheld a single content-based restriction of speech, not involving one of these two exceptions, in half a century. [p. 281]

The key point he makes about this development is that it was the combination of Justices Holmes and Brandeis's early clear and present danger arguments with the strict scrutiny element of the Court's Equal Protection jurisprudence that finally enabled the Court to deal effectively with the chilling, pretext and crisis effects. “By recognizing that these dangers are most likely to arise when the government targets speech of a specific content, and by making it almost impossible for the government to justify such laws, the Court went a long way toward solving those critical First Amendment problems.” [pp. 282-3]

## VI. LOW VALUE SPEECH

The Professor deals with the sixth important development—“the concept of low value speech. One obvious problem with a doctrine that presumptively holds all content-based restrictions unconstitutional is that there may be some types of content that do not merit such protection. Some speech might not sufficiently further the values and purposes of the First Amendment to warrant such extraordinary immunity from regulation. In part, this was what Justice Holmes was getting at with his false cry of fire.” [p. 283]

The Court first formally recognized this concept in its 1942 decision in *Chaplinsky v. New Hampshire*, which declared that “[t]here are certain well-defined and narrowly limited classes of speech” that “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” Over the years, the Court has characterized several categories of speech as “low value,” including express incitement of unlawful conduct, threats, fighting words, false statements of fact, obscenity, and commercial advertising. Following *Chaplinsky*, the Court has held that because these categories of expression do not further core First Amendment values, they can be restricted without meeting the usual standards of First Amendment review. [p. 283]

Whether this doctrine is justified has been a matter of some controversy, both as to its existence and as to the specific categories of speech that have—and have not—been deemed of “low” value. Professor Cass Sunstein has suggested that the Court consider four factors in determining whether speech qualifies as “low value,” specifically whether (1) the speech is “far afield from the central concerns of the First Amendment” (which he defines as “effective popular control of public affairs”); (2) there are important [p. 283] “noncognitive aspects” of the speech; (3) “the speaker is seeking to communicate a message”; and (4) the speech is in an area in which the “government is unlikely to be acting for constitutionally impermissible reasons.” I have offered a slightly different

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<sup>7</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>8</sup> *N.Y. Times Co. v. United States* (Pentagon Papers), 403 U.S. 713 (1971).



four-factor explanation, noting that (1) low value speech does not primarily advance political discourse, (2) is not defined in terms of “disfavored ideas or political viewpoints,” (3) usually has “a strong noncognitive” aspect, and (4) has “long been regulated without undue harm to the overall system of free expression.” [p. 284]

Although the precise rationale of these categories remains controversial, and although some scholars, such as Professor Thomas Emerson, have attacked the very existence of the doctrine on the ground that it injects the Court “into value judgments...foreclosed to it by the basic theory of the First Amendment,” my own view is that the low value doctrine is a sensible and pragmatic compromise that serves a salutary function by operating as a useful safety valve, enabling the Court to deal reasonably with somewhat harmful, but relatively insignificant, speech—without requiring the Court to dilute the protection it properly accords speech at the very heart of the guarantee. [p. 284]

Moreover, two significant developments in the Court’s application of the low value doctrine have cabined its impact. First, as noted in my fourth factor, the Court has been quite reluctant to recognize new “low value” categories that have not been well established over time. Although this can be criticized as unduly rigid, it constrains what might otherwise be the temptation to manipulate the low value doctrine in ways that would more seriously implicate Emerson’s concerns. That is, confining the concept of low value speech to those categories that have been recognized as “low value” time out of mind lessens the risk that judges will conflate politically unpopular ideas with constitutionally low value speech. (The debate over this question, by the way, has been especially acute in recent decades over the issues of violent expression, hate speech, pornography, and non-newsworthy invasions of privacy.) [p. 284]

The second constructive limitation on the scope of the low value doctrine concerns the degree of protection accorded such speech. Originally, the Court treated “low value” speech as completely unprotected by the First Amendment. Restrictions of such speech therefore received essentially no First Amendment scrutiny. Since *New York Times v. Sullivan* [p. 284] in 1964, however, the Court has increasingly abandoned the idea that regulations of low value speech are immune from First Amendment review. Beginning with *Sullivan*, the Court has recognized that restrictions of even low value speech can pose significant dangers to free expression. [p. 285]

In some instances, illustrated by the false statements of fact at issue in *Sullivan*, low value speech may itself have no First Amendment value, but regulations of such speech may have spillover or chilling effects on speech with important First Amendment value. The threat of liability for false statements of fact, for example, may chill speakers from making even true statements. As the Court recognized in *Sullivan*, regulations of low value speech must take such effects into account in order to pass constitutional muster. In other instances, even low value speech may have some First Amendment value. This is illustrated by the Court’s 1974 decision in *Virginia Pharmacy*, which held that although commercial advertising may be of only low First Amendment value, it nonetheless serves a useful informational purpose and must therefore be accorded significant if not full First Amendment protection. [p. 285]

Using these two considerations, the Court over the past half-century has engaged in what Professor Melville Nimmer has usefully described as a process of categorical balancing with respect to these low value categories, attempting to fine-tune the degree of constitutional protection accorded each category based upon its relative First Amendment value and the risk of chilling valuable expression. [p. 285]

## VII. CONTENT-BASED RESTRICTIONS IN SPECIAL CIRCUMSTANCES

The seventh important twentieth-century development also involves content-based regulation, but relates to what I earlier described as the “special circumstances” exception to the strong constitutional presumption against content-based regulation. The key problem here is that, even apart from low value speech, an almost absolute presumption against content regulation often turns out to be too speech-protective. There are some circumstances, in other words, in which such a presumption would demand too great a sacrifice of competing government interests without sufficiently serving important First Amendment values. [p. 286]

Alas, there is a long list of such “special circumstances,” ranging from regulations of speech by government employees, to regulations of speech on public property, to regulations of speech by students, soldiers, and prisoners, to regulations of the government’s own speech, to regulations that compel individuals to disclose information to the government. In theory, of course, it would be possible to apply the strict presumption against content-based regulation in all of these situations, but this would sometimes produce unwise and even foolish results. Consider a high school mathematics teacher who asserts a First Amendment right to preach Marxist doctrine instead of the Pythagorean Theorem in her mathematics classroom. Or an IRS employee who claims a First Amendment right to post confidential tax returns on the Internet. Or a taxpayer who claims that the government cannot constitutionally create a library or museum dedicated only to science or American history. Or a witness who claims that a congressional committee cannot constitutionally investigate alleged corruption in Iraq without also investigating the use of steroids by athletes. [p. 286]

All of these examples regulate speech on the basis of content, none involves low value speech, and none poses the sort of clear and imminent danger of grave harm that might otherwise be sufficient to justify a content-based restriction of speech. Must we, then, hold all of these regulations unconstitutional? Examples like these caused the Court to rethink the scope of the strong presumption against content-based restrictions. More specifically, they prompted the Court to rethink two facets of that doctrine. [p. 286]

First, they caused the Court to recognize that not all content-based restrictions are equally threatening to core First Amendment values. On closer inspection, the Court came to realize that regulations of viewpoint are much more dangerous to fundamental First Amendment values than other regulations of content, such as regulations of the subject matter of expression, the use of profanity, or the use of certain images. Indeed, for many of the same reasons that content-based restrictions were seen as different from and more threatening than content-neutral restrictions, so too were viewpoint-based restrictions seen as different from and more threatening than other forms of content-based restrictions. That is, they are more likely to distort public debate in a politically-biased manner, and they are more likely to be motivated by hostility to particular points of view. To return [p. 286] to the Equal Protection analogy on which the content-based/content-neutral distinction was initially founded, one might say that it is really viewpoint-based restrictions that are analogous to laws that discriminate against African-Americans, whereas other types of content-based restrictions more sensibly warrant something akin to an intermediate level of concern. [p. 287]

Although this insight has real force, and although viewpoint-based restrictions are indeed the most problematic form of content-based regulation, the question remains, how much should we make of this insight? One possibility would be to revisit the understanding that flowed from *Schacht* and *Mosley*—that content regulation is presumptively unconstitutional—and to limit that presumption only to viewpoint-based restrictions. That might seem sensible in theory, but as the Court quickly

came to recognize the line between viewpoint and other forms of content regulation is often distressingly elusive. In cases like *R.A.V.*,<sup>9</sup> *Rosenberger*,<sup>10</sup> and *Lamb's Chapel*,<sup>11</sup> for example, the Court discovered that in many instances this distinction is far from clear. Does a university policy refusing to subsidize student religious publications regulate content or viewpoint? Does a law prohibiting fighting words only if they are based on race regulate content or viewpoint? Does a law prohibiting sexually explicit images on the Internet regulate content or viewpoint? There is no simple answer to these questions. [p. 287]

Thus, to attach great significance to the line between content and viewpoint could generate precisely the sort of uncertainty, ambiguity, and confusion that the strict presumption against content regulation was designed to prevent. But to ignore the distinction and to treat all viewpoint and content restrictions alike would require either a dilution of the strict presumption against viewpoint-based restrictions or a large sacrifice of competing and legitimate government interests, as illustrated by the mathematics teacher, public library and congressional witness hypotheticals. [p. 287]

To resolve this dilemma, the Court has essentially split the difference in a rather creative way. In dealing with regulations of speech in general public discourse [p. 287], the Court has adhered to the strong presumption against all content regulation. But in dealing with what I have termed “special circumstances,” the Court has recognized a distinction between viewpoint and content. Thus, a public library can constitutionally choose to collect books only about American history, but cannot constitutionally choose to exclude books because they criticize the Vietnam War. A government grants program can constitutionally fund research only about the environment, but cannot constitutionally refuse to fund research because it substantiates global warming. And a public university can constitutionally allow students to post notices on a university bulletin board only if they relate to the curriculum, but cannot constitutionally exclude notices because they criticize the university administration. [p. 288]

Now, I do not want to suggest that this area of First Amendment law is in any way simple, straightforward, or transparent. To the contrary, it is filled with deep ambiguities and complexities. The general proposition, though, is clear. It is that in these special circumstances, when the government is not regulating general public discourse, it can constitutionally regulate content as long as it does so reasonably and in a viewpoint-neutral manner. [p. 288]

For the record, let me identify several facets of continuing complexity in the scope and application of this doctrine. First, as I have already noted, the line between content and viewpoint is often unclear. Although most cases are easy to classify, the marginal cases are genuinely hard. Second, the boundaries of what I have called “special circumstances” are far from clear, the doctrine is in a state of flux, and some of the subcategories that make up the core of the doctrine, such as the distinction between nonpublic forums and limited public forums, are also unclear. Third, and not surprisingly, what constitutes “reasonable” regulation is often a source of confusion. *Morse v. Frederick*,<sup>12</sup> for example, the recent “Bong Hits for Jesus” decision, illustrates the difficulty of defining “reasonable.” Fourth, although the prohibition of viewpoint discrimination remains extremely strong even in the context of these “special circumstances,” it is not absolute. Most notably, as the Court

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<sup>9</sup> *City of St. Paul*, 505 U.S. 377 (1992).

<sup>10</sup> *Rosenberger*, 515 U.S. 819.

<sup>11</sup> *Lamb's Chapel v. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

<sup>12</sup> *Morse*, 127 S. Ct. 2618.

held in *Rust v. Sullivan*,<sup>13</sup> when the government itself speaks, it can constitutionally insist that its agents convey a point of view the government is legally entitled to communicate. So, for example, if the government wants to discourage abortion or encourage energy conservation, [p. 288] it can constitutionally retain private individuals and agencies to communicate this message on its behalf. [p. 289]

Even acknowledging these myriad and often vexing complexities, the Court's doctrine in this respect is generally sound. The world is a complicated place, and the realist must recognize that constitutional doctrine can never achieve both perfect results and perfect clarity. The challenge is to reach the right result when the right result is most important, while at the same time having reasonably clear and predictable rules that otherwise reach the "right" result most of the time. [p. 289]

In the realm of content-based regulation, the Court has achieved these conflicting goals reasonably well. In the situation that matters most—the freedom of individuals to express their ideas, beliefs, and convictions in public debate without fear of government censorship—existing doctrine has come a long way toward making that aspiration a reality. At the same time, the Court has not pushed the principle of free speech so far that it has either alienated the American people from their own Constitution by demanding absurd results or paralyzed the government's capacity to fulfill its most basic responsibilities. This is no small achievement. [p. 289]

## VIII. CONTENT-NEUTRAL RESTRICTIONS

The eighth major development "concerns the other side of the content-based/content-neutral divide. Why do we care about laws that do not regulate the content of speech? Consider three laws. The first prohibits anyone from criticizing an ongoing war. The second prohibits anyone from criticizing the war within 150 feet of a military recruiting center. The third prohibits any billboard in a residential area."

The first law is a classic viewpoint-based restriction that forbids anyone to advocate a specific point of view. Such a law profoundly distorts public debate and was very likely enacted at least in part because of the constitutionally impermissible desire to silence dissent and to manipulate political discourse, although the government would no doubt defend it on other grounds. Such a law directly implicates the most fundamental reasons for protecting free speech and under any credible theory of the First Amendment must be at least presumptively unconstitutional. [p. 289]

The second law is what we might call a "modest" viewpoint-based restriction. One might sensibly argue that, as compared with the first law, the second is much less troubling. It leaves open broad opportunities for speakers to convey an anti-war message and is therefore much less likely seriously to distort public debate. Nonetheless, the Court clearly decided in the twentieth century to treat this viewpoint-based law like the first one. That is, the Court is unwilling to engage in fine-tuned inquiries into the extent to which particular viewpoint-based laws actually distort public discourse. In part this is because it is very difficult to assess the actual distorting effects of particular viewpoint-based restrictions, especially when there may be many of them, and in part it is because even modest viewpoint-based laws pose a high risk of constitutionally impermissible motivation. Thus, although one could imagine a regime in which the Court would attempt to assess the distorting effect and the risk of impermissible motivation of every viewpoint-based restriction on a case-by-case basis, the

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<sup>13</sup> *Rust v. Sullivan*, 500 U.S. 173, pp. 192-200 (1991).

Court has wisely opted for a clear, straightforward standard that is difficult to evade and renders all such laws presumptively invalid. [p. 289]

The third law, prohibiting all billboards in residential areas, does not regulate the content of speech at all. One might therefore argue that it has nothing to do with the First Amendment. One might insist, in other words, that the First Amendment is about censorship and that censorship is about regulating content. Although this is a theoretically plausible approach, the Court has rightly rejected it. But that poses further puzzles, for if content-neutral laws can violate the First Amendment, we need to know how and why they threaten First Amendment values. [p. 290]

To begin, it is important to note that content-neutral laws come in many shapes and sizes. They include, for example, laws prohibiting anyone to publish a newspaper, to hand out leaflets in a public park, to scatter leaflets from a helicopter, to spend money to elect political candidates, to discriminate on the basis of sexual orientation, to appear naked in public, or to knowingly destroy a driver's license. Some of these laws have a severe impact on the opportunities for free expression, whereas others have only a trivial impact. Clearly, a content-neutral law that severely impacts the opportunities for free expression [p. 290] should be more likely to be unconstitutional than a content-neutral law that has only a minor impact, and not surprisingly that turns out to be a central concern in assessing the constitutionality of such laws. A robust system of free expression assumes that individuals have ample opportunities to express their views, and content-neutral laws that significantly limit those opportunities should be more closely scrutinized for that reason. [p. 291]

But there are also other reasons why we might be concerned with content-neutral laws, for not only do they limit the opportunities for free speech, but they sometimes do so in a way that has content-differential effects. For example, a law restricting leafleting in public parks will have more of an effect on some types of speakers and on some types of messages than on others. Even though such laws may be content-neutral on their face, they may distort public discourse in a non-neutral manner. Indeed, in some instances the government may enact a content-neutral law in order to achieve a content-differential effect. Consider, for example, laws that have recently been enacted to limit protests near funerals. Although these laws are usually neutral on their face, they were clearly driven in large part by a desire to suppress a particular group of speakers who have engaged in highly offensive protests at the funerals of soldiers. [p. 291]

So, there are several reasons why even content-neutral laws may trouble us. In dealing with such laws, the Court has generally adopted a form of ad hoc balancing, in which it considers many possible factors, including (1) the restrictive impact of the law; (2) the ability of speakers to shift to other means of expression; (3) the substantiality of the state's interest; (4) the ability of the state to achieve its interest in a less speech-restrictive manner; (5) whether the speech involves the use of private property; (6) whether the speech involves the use of government property; (7) whether the means of expression has traditionally been allowed; (8) whether the regulation has a disparate impact on certain points of view; (9) whether there is a serious risk of impermissible motivation; and (10) whether the law is a direct or incidental restriction of speech. The eighth major development, then, is that content-neutral restrictions of speech are presumptively analyzed with a form of ad hoc balancing. [p. 291]

A good example of ad hoc balancing in this context is *Buckley v. Valeo*,<sup>14</sup> in which the Court employed such balancing in the realm of campaign finance regulation to uphold contribution limits

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<sup>14</sup> *Buckley v. Valeo*, 424 U.S. 1, pp. 23-29 (1976).

as relatively [p. 291] modest content-neutral restrictions of free expression but to invalidate expenditure limitations as much more restrictive limitations of free speech. Additional examples would include *City of Ladue v. Gilleo*, which invalidated an ordinance prohibiting homeowners from displaying political signs on their property in order to minimize “visual clutter,” and *Martin v. City of Struthers*, which invalidated a law prohibiting individuals to “ring the door bell” of any homeowner for the purpose of distributing handbills. In both decisions, the Court indicated that some measure of regulation would be permissible (for example, limiting the size of the signs or the hours of the handbill distribution), but that a flat ban on these activities violated the First Amendment. [p. 292]

Now, if the Court were really to take all the factors listed above into account in every case involving a content-neutral restriction, the law in this area would be a complete muddle. That is the nature of ad hoc balancing. To avoid this state of affairs, the Court, as in the content-based context, has therefore attempted to carve out a few specific and recurring categories of content-neutral problems for which it has articulated more clearly defined rules of decision. I will offer two significant examples. [p. 292]

## IX. PUBLIC FORUM DOCTRINE

The first of these examples, which represents the ninth major development, involves the public forum problem. The central question here is whether an individual has a First Amendment right to speak on government property over the objections of the government. To begin with, suppose Mary, who lives on the forty-fourth floor of an apartment building, puts a sign on Joe's front lawn, saying “Mary Supports Obama,” claiming that her speech is protected by the First Amendment. Joe objects to this invasion of his property. Joe will prevail, for two reasons: First, Joe's private property rights trump Mary's desire to commandeer his property; and second, Joe is not the government, so there is no relevant state action to bring Mary's First Amendment rights into play. [p. 292]

Now suppose Mary wants to put her sign not on Joe's front lawn, but on the lawn in front of city hall. The government, like Joe, objects. Here, of course, there is state action, so the First Amendment comes into play. Moreover, Mary maintains that the First Amendment should be understood [p. 292] as guaranteeing her a reasonable opportunity for effective free expression, and putting her sign on the lawn in front of city hall seems reasonable to her. The government responds that it, no less than a private owner of property, has the authority to control the use of its property, and that as long as it acts in a content-neutral manner, and does not discriminate among would-be speakers, it should be free to prohibit Mary's sign. [p. 293]

When this issue first arose in the nineteenth century, Justice Oliver Wendell Holmes, then a justice on the Supreme Judicial Court of Massachusetts, took the view that the government has the same authority as a private individual to exclude those who want to use its property for speech purposes. The Supreme Court, however, has embraced a more nuanced approach. In dealing with this question, the Court has divided public property into essentially two categories. As the Court noted in its 1939 decision in *Hague v. Committee for Industrial Organization*,<sup>15</sup> some public property, most notably parks, streets, and sidewalks, have been dedicated “time out of mind” for the purposes of “assembly, communicating thoughts between citizens, and discussing public questions.” The Court reasoned that, wherever the title to such property might rest, the traditional dedication of such property to speech purposes created what Professor Harry Kalven termed a sort of “First-Amendment easement.

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<sup>15</sup> *Hague*, 307 U.S. at 516.

Following this line of reasoning, the Court over time developed the principle that in such traditional “public forums” the government may reasonably regulate expressive activities “in the interest of all,” but may not “in the guise of regulation” restrict those activities unreasonably. [p. 293]

Under this approach, the Court has generally protected the right of individuals to demonstrate, leaflet, parade, speak, and congregate for expressive purposes in public parks, streets, and sidewalks, subject to reasonable regulation. Thus, a content-neutral prohibition of leafleting on the lawn in front of city hall would be unconstitutional, but a content-neutral law restricting the use of loudspeakers in a public park near a hospital would be upheld as reasonable. [p. 293] For the most part, this approach has worked reasonably well for these traditional public forums, though serious questions have recently arisen about the way in which public authorities have sometimes limited public demonstrations to so-called “Free Speech Zones.” [p. 294]

But even if this approach generally works well for traditional public forums—that is, streets, parks, and sidewalks—it still leaves untouched the vast majority of public property. What about a speaker's desire to hand out leaflets in a welfare office, to post signs on the outside of a public building or on the inside of a public bus, to use the government's loudspeakers or printing presses, or to enter a prison, public school, military base, or public hospital to speak with inmates, teachers, soldiers, patients, and staff? [p. 294]

The justices have put forth three different approaches on this question. One approach, suggested by Justice Black in *Adderley v. Florida* in 1966, insisted that the government, “no less than a private owner of property” has the authority to limit the use of its property to the purposes to which it has been dedicated.<sup>16</sup> In other words, as long as the government acts neutrally, it has absolute authority to exclude expression from non-public forum public property. (p. 294)

The second approach, advanced most forcefully by Justices William Brennan and Thurgood Marshall in the *Grayned* case in 1972, insisted that the “crucial question” in every case should be whether the manner of expression is basically incompatible with the normal activity of a particular [p. 294] place at a particular time.<sup>17</sup> In effect, this approach invites a form of open-ended balancing to determine whether the challenged content-neutral restriction is constitutional. [p. 294]

The third approach, which has carried the day, holds that the government can constitutionally prohibit expressive activity in non-public forum public property as long as the restriction is content-neutral and reasonable. Although “reasonable” might be understood to imply balancing, the Court has consistently applied this standard in such a way that “reasonable” means “not irrational,” and the Court has never invalidated any content-neutral restriction under this standard. [p. 295]

The result, then, is that there is effectively no First Amendment right to use non-public forum public property for speech purposes as long as the government acts in a content-neutral manner. Whether this is good or bad is a matter of some debate. The argument against this position, reflected in the Brennan-Marshall approach, is that the First Amendment should be construed to require the government to bend over backwards to accommodate free speech, and that giving the administrators of government property broad discretion to exclude expressive activity will inevitably result in a weak and ineffective marketplace of ideas. The prevailing approach maintains that we already have a robust marketplace of ideas, that individuals do not need to use non-public forum public property to

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<sup>16</sup> *Adderley v. Florida*, 385 U.S. 39, 47 (1966).

<sup>17</sup> *Grayned v. Rockford*, 408 U.S. 104, 116 (1972).

communicate their views effectively, and that a more open-ended approach would swamp the courts with an endless array of petty constitutional disputes about where and when individuals can commandeer public property over the objections of government administrators. For what it is worth, [p. 295] my own view is that the Brennan-Marshall position has the better argument, although their view has not prevailed. [p. 296]

It may be useful at this point to offer a simple illustration of the intersection of content-neutral balancing with the Court's approach to content-regulation. Consider, for example, laws designed to improve the marketplace of ideas. Here are three decisions that seem inconsistent but are readily explained by the interaction of these doctrines. In *Miami Herald Publishing Co. v. Tornillo*, the Court considered a state law requiring newspapers to give political candidates an opportunity to reply to attacks. In *Red Lion Broadcasting Co. v. FCC*, the Court considered the Fairness Doctrine, which among other things, required broadcasters to give political candidates who had been attacked on-air an opportunity to respond. And in *PruneYard Shopping Center v. Robins*, the Court considered a state law requiring privately-owned shopping centers to allow individuals to distribute leaflets on the grounds of their shopping malls. In each instance, the newspaper, broadcaster and shopping center owner maintained that the law violated the First Amendment by compelling it to associate with speech with which it disagreed. [p. 296]

In *PruneYard*, the Court upheld the shopping center regulation because it was content-neutral and reasonable. In *Tornillo*, the Court invalidated the right-of-reply statute because it was a content-based regulation not involving any “special circumstances.” Unlike the law in *PruneYard*, which was content-neutral, the law in *Tornillo* was content-based because it kicked in only in response to the newspaper’s own speech. In *Red Lion*, the Court upheld the fairness doctrine because it was a reasonable, viewpoint-neutral regulation of content on non-public forum public property—that is, the airwaves *Tornillo* was different from *Red Lion* because it regulated expression by a private speaker on private property, whereas *Red Lion* regulated expression by a private speaker on publicly-owned property. It is analogous to the distinction between *City of Ladue v. Gilleo*, which invalidated a prohibition of political signs on private property, and *Members of the City Council of Los Angeles v. Taxpayers for Vincent* [p. 296], which upheld a prohibition of political signs on publicly-owned public utility poles. [p. 297]

## X. INCIDENTAL IMPACT

This brings me to my tenth and final observation... This observation also concerns a judgment about a sub-problem in the realm of content-neutral restrictions. Here, we are concerned with laws that have an incidental rather than a direct effect on free expression. Illustrations of direct regulation of speech are laws restricting the location of billboards, limiting campaign contributions and expenditures, prohibiting speeches on military bases, and forbidding posting signs on public utility poles. Such laws directly and specifically regulate speech. [p. 297]

Illustrations of laws having only an incidental effect on speech are laws prohibiting open fires in public places, as applied to an individual who burns a flag in public; forbidding urinating in public, as applied to an individual who urinates on a military recruiting center to convey his opposition to the war; requiring witnesses to testify before grand juries, as applied to a reporter who wants to shield her confidential sources; and demanding that we pay taxes, as applied to a citizen who claims that the payment of taxes limits his ability to support his favored political candidates. [p. 297]



As we have seen, content-neutral laws that directly regulate expression are generally subjected to a form of ad hoc balancing. Laws that have only an incidental effect on free speech, however, are treated as presumptively constitutional. The Court first established this principle in *United States v. O'Brien* in 1968, in which the Court upheld a conviction for knowingly destroying a draft card, even though the defendant clearly committed the crime in order to express his opposition to the Vietnam War. Although the Court implied that a form of balancing was appropriate in such cases [p. 297], as in the non-public forum cases the Court in fact gave great deference to the government. [p. 298]

The logic of this position is that, as compared with laws that directly regulate speech, laws that have only an incidental effect on speech are both less likely to be tainted by impermissible motivations and less likely to have a significant limiting or distorting effect on free expression. Moreover, because every law can conceivably have an incidental effect on someone's speech, a doctrine that required courts to evaluate every such claim would open the door to endless litigation and encourage all sorts of fraudulent claims. For example, if Tom is stopped for speeding, he could claim that he was speeding to protest the speed limit laws. [p. 298]

This doctrine has a broad impact, especially on claims of the press to special First Amendment protection. For example, reporters might argue that in order to gather newsworthy information they should be exempt from laws of otherwise general application that prohibit wiretapping, burglary, trespass, and bribery. Invoking the incidental effects doctrine, the Court, in cases like *Branzburg v. Hayes*, has generally rejected such claims. [p. 298]

In at least a few instances, however, the Court has held incidental effects unconstitutional as applied when the incidental effect of the law was seen by the Court as particularly severe. *NAACP v. Alabama*, *Brown v. Socialist Workers '74 Campaign Committee*, and *Boy Scouts of America v. Dale* illustrate such decisions. In general, however, the Court has erected a strong presumption that laws having a mere incidental effect on speech are not unconstitutional. [p. 298]

## APPLICATION OF PROFESSOR STONE'S CONSTITUTIONAL JURISPRUDENCE TO THE SUPREME COURT'S DECISIONS INVOLVING FIRST AMENDMENT ISSUES

Out of the great many issues that involve the First Amendment and because of the necessity of keeping the length of this Commentary to some reasonable length, only two areas will be discussed: (1) national security, and (2) funding of political campaigns.

### FREE SPEECH AND NATIONAL SECURITY

Professor Stone states in *Free Speech and National Security*, 84 *Indiana L. J.* 939 (2009):

The first issue involves speech that criticizes the government. No one likes to be criticized, and it is quite natural for government officials to want to suppress such speech. It is therefore rather striking that throughout American history there has been a broad consensus in support of the proposition that the government cannot constitutionally punish individuals for criticizing government officials or policies—except when their speech is thought to threaten national security. In the national security setting, however, the United States has a long and checkered history of allowing fear to trump constitutional values. [p. 939]

The second issue involves secrecy. The government has a legitimate need to keep certain matters secret. But in a self-governing society, secrecy prevents citizens from evaluating their government's actions and holding their representatives accountable. Once again, it has proved most difficult to strike the proper balance between free speech and national security. [p. 939]

## 1. Speech that Criticizes the Government

The paradigm violation of the First Amendment is a law forbidding citizens to criticize public officials and policies. In the entire history of the United States, the national government has never attempted to punish criticism of government officials or policies, except in times of war. This makes clear that, in order to understand free speech, one must understand free speech in wartime. War excites great passions. Thousands, perhaps millions, of lives may be at risk. The nation itself may be at peril. If ever there is a time to pull out all the stops, it is surely in wartime. In war, the government may conscript soldiers, commandeer property, control prices, ration food, raise taxes, and freeze wages. May it also limit the freedom of speech? [p. 939]

It is often said that dissent in wartime is disloyal. This claim puzzles civil libertarians, who see a clear distinction. In their view, dissent in wartime can be the highest form of patriotism. Whether, when, for how long, and on what terms to fight a war are among the most profound decisions a nation encounters. A democratic society [p. 939] must debate those issues. Dissent that questions the conduct and morality of a war is, in this view, the very essence of responsible and courageous citizenship. [p. 940]

At the same time, though, dissent can readily be cast as disloyalty. A critic who argues that troops are poorly trained or that the war is unjust may make a significant contribution to public discourse. But he also gives “aid and comfort” to the enemy. The enemy is more likely to fight fiercely if it is confident and believes its adversary is divided and uncertain. Public disagreement during a war can both strengthen the enemy's resolve and undermine the nation's commitment to the struggle. [p. 940]

Moreover, war generates a powerful mass psychology. Emotions run high. Spies, saboteurs, and terrorists are seen around every corner. War imperils our way of life. We fear and despise anything that increases the danger to our sons and daughters in uniform. We cannot tolerate the thought that a loved one or friend has put life and limb at risk for an unworthy cause. We are just; our enemy is cruel, immoral, and inhuman. Loyalty is the order of the day. [p. 940]

In such an atmosphere, the line between dissent and disloyalty is elusive, and often ignored. Indeed, the United States has a long and unfortunate history of overreacting to the perceived dangers of wartime. Time and again, Americans have allowed fear and fury to get the better of them. Time and again, Americans have suppressed dissent, imprisoned and deported dissenters, and then—later—regretted their actions. [p. 940]

From the Sedition Act of 1798 until after World War I, the Supreme Court was uniform in finding that the First Amendment gave no protection to those persons who dissented from the Government policies on national security and war.<sup>18</sup>

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<sup>18</sup> See 84 *Indiana L. J.* at pp. 939-46 for Professor Stone's recitation of the country's state of mind and the Court's suppression of dissent during this extended period of time.

Justices Oliver Wendell Holmes and Louis Brandeis would eventually depart from their brethren and launch what became a critical underground tradition within the Court's First Amendment jurisprudence.<sup>19</sup> However, the Court as a whole showed no interest in the rights of dissenters. As the First Amendment scholar Harry Kalven later observed, these decisions left no doubt of the Court's position: "While the nation is at war, serious, abrasive criticism...is beyond constitutional protection." These decisions, he added, "are dismal evidence of the degree to which the mood of society penetrates judicial chambers."

In the tense period of World War II the Government's position was different as pronounced by the successive Attorneys General Frank Murphy, Robert Jackson, and Francis Biddle. Professor Stone reports their views as follows:

Frank Murphy promised that there would be no witch hunt for subversives and announced that it was the duty of the Department of Justice to "refrain from any action" that might violate "the fundamental rights and privileges of free assembly, free opinion, and free speech."...Murphy as Attorney General, addressed the nation's federal prosecutors. He warned that, "[i]n times of fear or hysteria," groups and individuals often "cry for the scalps" of other groups or individuals "because they do not like their views." Jackson exhorted his United States Attorneys to steel themselves to be "dispassionate and courageous in those cases which deal with so-called subversive activities." Such cases, he cautioned, posed a special threat to civil liberty because the prosecutor has no definite standards to determine what constitutes a subversive activity."...After Roosevelt appointed Jackson to the Supreme Court, he appointed Francis Biddle Attorney General. Like Murphy and Jackson, Biddle warned repeatedly against the dangers of public hysteria and excess. [p. 947]

All these men were charged with violating the Espionage Act of 1917, but Biddle dismissed the charges, stating that "free speech...ought not to be restricted" unless "public safety was directly imperiled." The United States had come a long way since World War I. [p. 947]

Public pressure mounted on Biddle to punish these dissenters, but he refrained, believing that the First Amendment protected critics of the war. This led to severe criticism, including a direct rebuke from Franklin Roosevelt. Indeed, according to Biddle, it was the President who exerted the most pressure on him to prosecute dissent...William Dudley Pelley [leader of the Silver Shirts], an admirer of Adolph Hitler whose writing, Roosevelt observed, "comes pretty close to being seditious. Now that we are in the war," Roosevelt noted, "it looks like a good chance to clean up a number of these vile publications." In April 1942, Roosevelt directly [p. 947] confronted Biddle, "demanding to know what was being done about" Pelley. Biddle complied. Pelley was indicted, convicted, and affirmed by the Circuit Court, but the Supreme Court refused to take the case. [p. 948]

## 2. The Cold War

As World War II drew to a close, the nation moved almost seamlessly into what came to be known as the Cold War. During this era, the nation demonized members of the Communist Party, "endowing them with extraordinary powers and malignity." J. Edgar Hoover, the Catholic Church,

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<sup>19</sup> See, e.g., *Gilbert*, 254 U.S. at 335 (Brandeis, J., dissenting); *Pierce*, 252 U.S. at 253 (Brandeis, J., dissenting); *Schaefer*, 251 U.S. at 482 (Brandeis, J. dissenting); *Abrams*, 250 U.S. at 624 (Holmes, J., dissenting).

the American Legion, and a host of political opportunists all fed—and fed upon—the image of the domestic Communist as less than a full citizen of the United States. [p. 949]

When Harry Truman became president in 1945, the federal and state statute books already bristled with anti-Communist legislation. As the glow of our wartime alliance with the Soviet Union evaporated, Truman came under increasing attack from a coalition of Southern Democrats and anti-New Deal Republicans who sought to exploit fears of Communist aggression. The Democrats lost fifty-four seats in the House. [p. 949]

The long shadow of the House Committee on Un-American Activities (HUAC) fell across our campuses and our culture. In hearings before HUAC, such prominent actors as George Murphy and Ronald Reagan testified that the media had been infected with sly, un-American propaganda and insisted on loyalty oaths for members of the Screen Actors Guild. Red-hunters demanded, and got, the blacklisting of such writers as Dorothy Parker, Dalton Trumbo, Lillian Hellman, James Thurber, and Arthur Miller. Fear of ideological contamination swept the nation like a pestilence of the national soul. [p. 949]

In 1954, Congress enacted the Communist Control Act, which stripped the Communist Party of all rights, privileges, and immunities. Hysteria over the Red Menace produced a wide range of federal and state restrictions on free expression and association. These included extensive loyalty programs for federal, state, and local employees; emergency detention plans for alleged subversives; pervasive webs of federal, state, and local undercover informers to infiltrate dissident organizations; abusive legislative investigations designed to harass dissenters and to expose to the public their private political beliefs and association [p. 949]; and direct prosecution of the leaders and members of the Communist Party of the United States. [p. 950]

The Supreme Court's response was mixed, and evolved over time. The key decision was *Dennis v. United States*, which involved the prosecution under the Smith Act of the leaders of the American Communist Party. The indictment charged the defendants with conspiring to advocate the violent overthrow of the government. In a six-to-two decision, the Court held that this conviction did not violate the First Amendment. [p. 950]

Although the Court in *Dennis* overruled its World War I decisions upholding the convictions of socialists and anarchists under the Espionage Act of 1917, it could not bring itself to invalidate the convictions of these communists under the Smith Act of 1940. Rather, the Court concluded that, because the violent overthrow of government is such a grave harm, the danger need neither be clear nor present to justify suppression. Chief Justice Vinson explained that the “formation by petitioners” of a “highly organized conspiracy, with rigidly disciplined members,” combined with the “inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, persuade us that their convictions were justified.”<sup>20</sup> [p. 950]

Over the next several years, in a series of decisions premised on *Dennis*, the Court upheld the Subversive Activities Control Act, sustained far-reaching legislative investigations of “subversive” organizations and individuals, and affirmed the exclusion of members of the Communist Party from

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<sup>20</sup> *Dennis*, 341 U.S. 494, at 510-11. Justices Black and Douglas, in separate dissents, would reverse the convictions on First Amendment grounds.

the bar, the ballot, and public employment. In so doing, the Court clearly put its stamp of approval on an array of actions we today look back on as models of McCarthyism. [p. 950]

Toward the end of the decade, however, with changes in its composition and perspective, the Court began to take a more critical look. Over the next decade, the Court constrained the power of legislative committees to investigate political beliefs, invalidated restrictions on the mailing of communist political propaganda, limited the circumstances in which an individual could constitutionally be denied public employment because of her political beliefs or associations, and restricted the authority of a state to deny membership in the bar to individuals because of their past communist affiliations. Although the Court proceeded in fits and starts during this decade, in the end it played an important role in helping bring this sorrowful era to a close. [p. 951]

### 3. Vietnam War

In the Vietnam War, as in the Civil War and World War I, there was substantial, often bitter, opposition both to the war and the draft. Over the course of the war, the United States suffered through a period of intense and often violent struggle. After President Nixon announced the American “incursion” into Cambodia, student strikes closed a hundred campuses. Governor Ronald Reagan, when asked about campus militants, replied: “If it takes a bloodbath, let’s get it over with.” On May 4, 1970, National Guardsmen at Kent State University responded to taunts and rocks by firing their M-1 rifles into a crowd of students, killing four and wounding nine others. Protests and strikes exploded at more than 1200 of the nation’s colleges and universities. Thirty ROTC buildings were burned or bombed in the first week of May. The National Guard mobilized in sixteen states. [p. 951]

Despite all this, there was no systematic effort during the Vietnam War to prosecute individuals for their opposition to the war... There are many reasons for this. For one, most of the dissenters in this era were the sons and daughters of the middle class. But the courts, and especially the Supreme Court, played a key role in this period. In 1969, the Court, in *Brandenburg v. Ohio*<sup>21</sup>, effectively overruled Dennis and held that states cannot punish even advocacy of unlawful conduct, unless it is intended to incite and is likely to incite “imminent lawless action.” The Court had come a long way in the fifty years since World War I. [p. 951]

Professor Stone details [p. 952] that beginning in the 1950s, the government found other ways to impede dissent. “The most significant of these was the FBI’s extensive effort to infiltrate and to “expose, disrupt and otherwise neutralize” allegedly “subversive” organizations, ranging from civil rights groups to the various factions of the anti-war movement... When these activities finally came to light they were sharply condemned by congressional committees. In 1976, the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities made the following findings: The Government has often undertaken the secret surveillance of citizens on the basis of their political beliefs, even when those beliefs posed no threat of violence or illegal acts... The Government, operating primarily through secret informants... has swept in vast amounts of information about the personal lives, views, and associations of American citizens. Investigations of groups... have continued for decades, despite the fact that those groups did not engage in unlawful activity.” [p. 952]

### 4. The War on Terrorism

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<sup>21</sup> 395 U.S. 444 (1969).

Professor Stone states that the more “fundamental observation about the past eight years is that the government has made no effort to prosecute individuals for their criticism of the war in Iraq or of any other steps the government has taken in the war on terrorism. When compared to the Sedition Act of 1798, the prosecution of Clement Vallandigham, and the World War I era prosecutions under the Espionage and Sedition Acts, the change is profound.” [p. 955] But he details the reinstatement of earlier, activities similar to the FBI’s COINTELPRO which came to light in the 1970s, and which had caused “Attorney General Edward Levi to promulgate a series of guidelines restricting the FBI’s authority to investigate political and religious activities.” [p. 954]

On May 30, 2002, Attorney General John Ashcroft effectively dismantled the Levi guidelines and once again authorized FBI agents to monitor political and religious activities without any showing that unlawful conduct might be afoot. The most immediate implication of this change was to authorize the Bureau for the first time in twenty-five years to spy on public political and religious activities. [p. 954]

After the Professor details the measures taken by the Bush II Administration with respect to “secrecy in National Security affairs”, he concludes, “Some measure of secrecy is, of course, essential to the effective functioning of government, especially in wartime. But the Bush Administration’s obsessive secrecy effectively and intentionally constrained meaningful oversight by Congress, the press, and the public, directly undermining the vitality of democratic governance. As the legal scholar Stephen Schulhofer has noted, one cannot escape the inference that the cloak of secrecy imposed by the Bush administration had ‘less to do with the war on terrorism’ beginning in the 1950s than with its desire ‘to insulate executive action from public scrutiny.’ Such an approach to self-governance weakens our democratic institutions and renders the country ‘less secure in the long run.’ This is an area in which serious reconsideration of First Amendment doctrine is necessary. The Obama Administration has already moved in this direction.” [p. 962]

## CAMPAIGN FINANCE

*Citizens United v. Federal Election Comm.*, 558 U.S. 310 (2010)<sup>22</sup> is the explosive case in which the Supreme Court opened the floodgates of unbridled spending in political campaigns by corporations and unions from their the general funds.

In Professor Stone’s critique<sup>23</sup> of this decision he states: “[T]he opinion of the Court in *Citizens United* reiterated the arguments of the dissenters in the earlier cases, declaring, for example, that ‘[i]f the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of

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<sup>22</sup> Nonprofit corporation brought action against Federal Election Commission (FEC) for declaratory and injunctive relief, asserting that it feared it could be subject to civil and criminal penalties if it made through video-on-demand, within 30 days of primary elections, a film regarding a candidate seeking nomination as a political party’s candidate in the next Presidential election. After the case was argued before the Supreme Court, at Chief Justice Robert’s urging, the Court ordered re-argument and the Court asked the parties to file supplemental briefs addressing whether it should overrule either or both the *Austin* case and part of *McConnell* which addresses the facial validity. Also see the Jeffrey Toobin’s detailed description of how an obscure and not too important case turned the American campaign finance world upside-down and opened the floodgates of unlimited corporate financing of election campaigns. *THE OATH The Obama White House and the Supreme Court*, Doubleday, New York (2012).

<sup>23</sup> “Citizens United and Conservative Judicial Activism,” 2012 U. Ill. L. Rev 485.

citizens, for simply engaging in political speech,’ that even though corporations are granted special powers and prerogatives to enable them to function efficiently as economic entities, ‘[i]t is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights,’ that corporations should not ‘be treated differently under the First Amendment simply because [they] are not natural persons,’ and that when the government seeks ‘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.’ Such ‘thought control,’ Justice Kennedy concluded, is ‘unlawful,’ because the ‘First Amendment confirms the freedom to think for ourselves.’” [p. 488]

He continues:

*Citizens United* has been criticized on a variety of grounds. For purposes of this Article, the most interesting criticisms suggest, not that the majority was necessarily wrong on the merits of the First Amendment issue (although the decision surely has been criticized on those grounds), but that the conservative Justices who made up the majority behaved disingenuously in their handling of the case. At least three reasons exist for this accusation. First, there is the issue of precedent. In theory, at least, “conservative” Justices claim to be respectful of stare decisis. Indeed, that is part of what it has traditionally meant to be conservative. Yet, in this instance, there were two definitive decisions of the Supreme Court in the twenty years leading up to *Citizens United*—*Austin* and *McConnell*—in which the Court had held unequivocally that government can constitutionally limit corporate political expenditures, and in which the Court had emphatically and unequivocally rejected the arguments of the dissenting Justices in those cases, arguments that, essentially unchanged, carried the day in *Citizens United*. Although the majority made a half-hearted effort to legitimize its decision to overrule those recent precedents, the plain and simple fact is that nothing had really changed in the intervening years—except the makeup of the Court itself. Conservatives, who have long touted themselves as respectful of precedent, stability, and tradition, were therefore fair game for those critics who gleefully lambasted them for their seeming hypocrisy in overruling a line of important recent decisions, the results of which they simply did not like. [p. 489]

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Traditionally, conservatives have insisted that courts should resolve constitutional controversies on narrow rather than broad grounds and should avoid holding laws unconstitutional unless there is no other way to dispose of the case. In *Citizens United*, however, the conservative Justices eschewed the narrow grounds of decision that were available to them, even those suggested by *Citizens United* itself, and actually ordered the parties to file briefs on the much broader and more controversial question of whether *Austin* and *McConnell* should be overruled. Because this sort of aggressive overreaching has traditionally been disdained by conservatives, the Court's performance in *Citizens United* was fair and easy game for those who condemned the majority's evident eagerness to reach out unnecessarily to pronounce the limit on corporate spending unconstitutional. [p. 489]

[Further,] there is the question of judicial activism versus judicial restraint. This is, for me, the most intriguing facet of the decision in *Citizens United*. How should courts decide how much deference or how much scrutiny is appropriate in considering the constitutionality of government action? That is the central question of U.S. constitutional law, at least insofar as courts are concerned. In the last half-century, conservatives have derided judicial activism as illegitimate and called for a more restrained exercise of the power of judicial review. In *Citizens United*, however, the conservative majority embraced an aggressively activist approach, disregarding an effort by our nation's elected officials to bring order to what they regarded as a dangerously out-of-control electoral process. The stakes were clearly high, and members of Congress and the President (Bush II, by the way)

obviously have a high degree of expertise in such matters. Why, then, did the conservative Justices not exercise restraint and defer to the judgment of our elected leaders? [p. 490] This is the question to which I now turn.

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But what does “conservative” mean in the modern era? In Nixon's time, the term meant a Justice committed to judicial restraint. Judicial restraint is, of course, critical to the legitimacy of constitutional law. In general, the courts must defer to the reasonable judgments of the elected branches of government. But although judicial restraint in appropriate [p. 494] circumstances is essential, its sweeping, reflexive invocation would abdicate a fundamental responsibility that the Framers themselves entrusted to the judiciary and would therefore undermine a critical element of the U.S. constitutional system. [p. 495]

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Perhaps recognizing that a theory of unbounded judicial restraint is constitutionally irresponsible, political conservatives next came up with the modern theory of “originalism.” First popularized in the 1980s, originalism as promoted by Robert Bork, Antonin Scalia, and Clarence Thomas presumes that courts should exercise judicial restraint unless the “original meaning” of the text mandates an activist approach. [p. 495]

Originalism, however, is fundamentally flawed. First, because those who enacted the broad foundational provisions of our Constitution often did not have any precise and agreed-upon understanding of the specific meaning of “freedom of speech,” “due process of law,” “regulate Commerce...among the several States,” “privileges or immunities,” or “equal protection of the laws,” it is difficult if not impossible to know with any certainty what they did or did not think about concrete constitutional issues. As a consequence, judges purporting to engage in originalist analysis too often project onto the Framers their own personal and political preferences. The result is an unprincipled and often patently disingenuous jurisprudence. There is no evidence, for example, for the claims advanced by originalists that the original meaning of the equal protection clause prohibited affirmative action or that the original meaning of the First Amendment guaranteed corporations a constitutional right to spend unlimited amounts of money to dominate the election of [p. 495] public officials. Both of these claims, however, are central to today's conservative constitutional agenda. [p. 496]

If conservative Justices adhered to either their judicial restraint or originalist conceptions of judicial review, they would surely have upheld the law at issue in *Citizens United*. Certainly, under an approach embracing judicial restraint [p. 496] deference to the elected branches of government, the Court would have had to uphold the challenged provisions of BCRA. Only by invoking a high degree of judicial scrutiny and aggressively second-guessing the judgments of Congress and the President could the conservative Justices justify their position in *Citizens United*. Similarly, any Justice attempting seriously to employ an originalist analysis in *Citizens United* would also have had to uphold the legislation. There is no credible reason to believe that the Framers of the First Amendment understood the Amendment as guaranteeing a right of for-profit corporations to spend unlimited amounts of money in order to shape the outcomes of the U.S. political process. [p. 497]

How, then, could the five conservative Justices have invalidated the challenged law in *Citizens United*? The answer, of course, is simple. John Roberts, Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito are committed neither to judicial restraint nor to originalism. Rather, like the liberal Justices of the Warren Court, they employ a form of selective judicial activism. It seems clear, though, that these Justices would have joined few, if any, of the Warren Court decisions I



listed earlier. But despite the conservative rhetoric about “strict constructionism,” “originalism,” “judicial restraint,” and “call[ing] balls and strikes,” the current conservative Justices are just as activist as their liberal predecessors—but in a wholly different set of cases. [p. 497]

In a series of aggressively activist decisions, the current conservative Justices have held unconstitutional affirmative action programs, gun control regulations, limitations on the authority of corporations to spend at will in the political process, restrictions on commercial advertising, laws prohibiting groups like the Boy Scouts discriminating on the basis of sexual orientation, the environment, violence against women, age discrimination, federal legislation regulating guns, and policies of the state of Florida relating to the outcome of the 2000 presidential election. [p. 497]

The challenge is to figure out what theory of judicial review or constitutional interpretation drives this particular form of activism. Although one can readily discern the specific conception of judicial review that undergirds the Warren Court's judicial activism, which was clearly rooted in the concerns of Jefferson, Madison, and Hamilton about majoritarian dysfunction, no similar principle or constitutional methodology explains the jurisprudence of contemporary conservative judicial activists. To understand the Warren Court's use of judicial activism, all one needs to do is to look at the results and then ask, “Why these cases and not others?” The answer, as we have seen, is quickly apparent. But if one attempts the same inquiry about the decisions of the current conservative Justices, no principled explanation emerges for their version of selective activism. Rather, to paraphrase Justice Frankfurter's critique of an earlier generation's judicial activism, the selective activism of the current conservative majority seems to be born out of “their prejudices and their respective pasts and self-conscious desires.” The point, in other words, is that judicial activism itself is neither inherently good nor inherently bad. It is a legitimate and essential method of constitutional interpretation—when used in appropriate circumstances. [p. 498]

*Citizens United* again brought to the fore the hotly contested “buzz words”—“money is speech” vs. “money is not speech”. Many critics of the *Citizens* decision say it isn't. Professor Stone says “it isn't, but.” Professor Stone is quoted<sup>24</sup> as follows:

There are many reasons to be concerned about both the impact of money on our political process and the Supreme Court's decision in *Citizens United*. But critics of *Citizens United*, including those calling for a constitutional amendment to overrule it, have too often made the mistake of grounding their argument on the claim that “money is not speech.”

Of course, money is not “speech.” Money is money, a car is a car, and a ribbon is a ribbon. These are objects, not speech. But all of these objects, and many more besides, can be used to facilitate free speech. Consider a car. The government can lawfully impose all sorts of restrictions on how, when and where we can drive a car, and no one would argue that those restrictions implicate the First Amendment.

But suppose a city enacts a law prohibiting any person to drive a car in order to get to a political demonstration. Such a law would clearly implicate the First Amendment, not because a car is speech, but because the law restricts the use of a car for speech purposes.

Like a car ... money is not speech. But when government regulates the use of money for speech purposes, it implicates the First Amendment. Suppose, for example, an individual at an Occupy

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<sup>24</sup> [Huffingtonpost.com/HUFFPOST POLITICS/posted 02/05/2012](http://Huffingtonpost.com/HUFFPOST POLITICS/posted 02/05/2012).

protest burns a dollar bill to convey her disdain for corporate America. A dollar bill is not speech, fire is not speech, but a government law prohibiting any person to burn money as a symbolic expression of opposition to corporate America would surely implicate the First Amendment.

The point is simple. Even though an object may not itself be speech, if the government regulates it because it is being used to enable free speech it necessarily raises a First Amendment issue. Thus, a law that prohibits political candidates to spend money to pay for the cost of printing leaflets, or that forbids individuals to contribute to their favorite political candidates to enable them to buy airtime to communicate their messages, directly implicates the First Amendment. Such laws raise First Amendment questions, not because money is speech, but because the purpose of the expenditure or contribution is to facilitate expression.

Indeed, not a single justice of the United States Supreme Court who has voted in any of the more than a dozen cases involving the constitutionality of campaign finance regulations, regardless of which way he or she came out in the case, has ever embraced the position that money is not speech. It is simply not a persuasive or even coherent way to frame the issue. If it were, then the government could make it a crime for any person to use money to buy a book.

More to the point, if the Constitution were amended to say that “money is not speech,” then the government could constitutionally prohibit anyone to spend or contribute even a single dollar in the political process. In a world in which speech costs money, this would give a huge advantage to incumbents and effectively destroy our democracy. It simply will not do to insist that “money is not speech.”

This is not to say, however, that the government cannot constitutionally regulate the use of money in politics. The fact that an object is used to facilitate speech does not mean that it is immune from regulation. The use of a loudspeaker is speech, but the government can regulate the decibel level. Burning a dollar bill for expressive purposes is speech, but the government can prohibit anyone from doing so near an open gas line. And the same is true for campaign contributions and expenditures. When the government attempts to regulate the use of money for expressive purposes it implicates the First Amendment, but it does not necessarily violate it.

If the critics of *Citizens United* and the advocates of a constitutional amendment to overrule it want to be taken seriously, they must move beyond superficial slogans and focus on the real issue at stake: When should the government be allowed to regulate political contributions and expenditures—even if they are speech?

He suggests the following amendment:

**“In order to ensure a fair and well-functioning electoral process, Congress and the States shall have the authority reasonably to regulate political expenditures and contributions.”**

He cautions that “even if a substantial majority of the people support a particular position, getting it enacted in a constitutional amendment is a monumental task, especially if there is significant opposition. On the other hand, public opinion polls suggest that 80 percent of the American people oppose *Citizens United*, including 65 percent who “strongly” oppose it. If that holds true, and if citizens are prepared to make this a “make or break” issue for politicians of both political parties, then adoption of a constitutional amendment seems at least plausible.

## CONCLUSION

With the ten judgments he has set out, *supra*, Professor Stone says, “The Supreme Court has shaped most of our contemporary First Amendment jurisprudence. Given that these principles were adopted by many different justices, with widely varying perspectives, over many decades, it is not surprising that there are inconsistencies, ambiguities, conundrums, and perplexities in the doctrine. On the other hand, by the end of the twentieth century the Court, in my view, had for the most part built a sensible and reasonably effective set of principles for sorting First Amendment issues and for reaching reasonably sound and predictable outcomes.”

Although I have my differences with some of these doctrines, on the whole I applaud the Court for exercising common sense, staying focused on the most fundamental values of the First Amendment, learning from its own mistakes and experience, seeking to articulate a set of relatively simple rules—even if they are sometimes both over and under protective of speech—and refusing to let the perfect be the enemy of the good.<sup>25</sup>

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<sup>25</sup> *Free Speech in the Modern Age*, 36 *Pepperdine L. Rev.* 298-9.