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**THE ORIGINALIST APPROACH TO
THE FIRST AMENDMENT**

Delivered by

**THE HONORABLE ANTONIN SCALIA,
ASSOCIATE JUSTICE, SUPREME COURT OF THE UNITED STATES**

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Commentary by Leonard S. Halpert '44

WESLEYAN
UNIVERSITY

THE HONORABLE ANTONIN SCALIA, ASSOCIATE JUSTICE, SUPREME COURT OF THE UNITED STATES' FIRST AMENDMENT JURISPRUDENCE¹

The Honorable Antonin Scalia, Associate Justice, Supreme Court of the United States was appointed to the Supreme Court by President Ronald Reagan and continues to serve since the 1986 Term of the Court. He obtained his Bachelor of Laws degree from Harvard Law School. After spending six years in a Cleveland law firm, he became a law school professor. In the early 1970s, he served in the Nixon and Ford administrations, in administration agencies. In 1982, he was appointed a judge of the United States Court of Appeals for the District of Columbia by President Reagan, and elevated to the Supreme Court in 1986. He is currently the longest serving Justice on the Court.

It is this writer's belief that in presenting the views of Justice Scalia, with respect to interpreting and applying the Constitution's First Amendment, it is helpful to know his global view of the Jurisprudence of the Constitution. In the Senate hearings on his confirmation, court opinions, scholarly writings, and interviews, he has expressed himself clearly and with force and conviction. In dealing with matters of the Constitution, he deems himself a "Textualist", meaning that the words as written govern. Where the words are not clear he seeks help from the "original understanding" of their meaning by the people who proposed or ratified the Constitution.

In an interview on *60 Minutes*² he said, "It's what did the words mean to the people who ratified the Bill of Rights or who ratified the Constitution, ***³. As opposed to what people today would like, ***. Because values change, legislatures abolish the death penalty, permit same-sex marriage if they want, abolish laws against homosexual conduct. That's how the change in a society occurs. Society doesn't change through a Constitution."

His approach has been summarized as "the democratic political process, not particular constitutional guarantees, that ensures that the law reflects contemporary values. *** [T]he role of constitutional guarantees is to prevent contemporary majorities from changing the law—short of amending the Constitution—in ways that are incompatible with the values embodied in the original text."⁴

His definition of "originalism" or "original understanding" in Constitutional Jurisprudence is drawn directly from the concept as expounded by Chief Justice Taft in *Myers v. United States*, 47 S. Ct. 21. Justice Scalia said:

The reason I want to discuss it, however, has nothing to do with the substantive issue; I said all I intend to about that in my lonesome dissent. What attracts my attention about the *Myers* opinion is not its substance but its process. It is a prime example of what, in current scholarly discourse, is known as the "originalist" approach to constitutional interpretation. The objective of the Chief Justice's lengthy opinion was to establish the meaning of the Constitution, in 1789, regarding the

¹ This commentary is not, nor is it intended to be, a complete discussion of the Justice's views. It is intended to summarize the

² CBS.Com, February 11, 2009, 3:03 p.m. (originally broadcast April 27, 2008). See also George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 Yale L.J. 1297, 1303 (1990) quoting Antonin Scalia, Remarks at the 24th Australian Legal Convention 12 (Sept. 21, 1987).

³ "***" means that part of the quoted material has been omitted by this writer. Such omissions are to be distinguished from marks in the quoted text "...", which signify omissions by the author of the quoted text.

⁴ *A Tale of Two Textualists*, 74 B.L.Rev. 25, 30.

presidential removal power. He sought to do so by examining various evidence, including not only, of course, the text of the Constitution and its overall structure, but also the contemporaneous understanding of the President's removal power (particularly the understanding of the First Congress and of the leading participants in the Constitutional Convention), the background understanding of what "executive power" consisted of under the English constitution, and the nature of the executive's removal power under the various state constitutions in existence when the federal Constitution was adopted.⁵

He states with certainty that it is the "original meaning" or "understanding" of the text and not the "intent" of the Constitution's drafters and ratifiers that controls in the interpretation thereof.⁶

He says that the "Great Divide with regard to the constitutional interpretation is not that between Framers' intent and objective meaning, but rather that between *original* meaning (whether derived from the Framers' intent or not) and *current* meaning."⁷ From his side of that "Divide", he rejects the concept that the Constitution must be read and applied as a "living" document that reflects current values and meaning of its words in contradistinction to the views of other academic scholars and some of his Court Associates.

Justice Scalia quotes with approval John Marshall's statement in *McCulloch v. Maryland* that

"we must never forget it is a constitution we are expounding" ***: Marshall was saying that the Constitution had to be interpreted generously because the powers conferred upon Congress under it had to be broad enough to serve not only the needs of the federal government originally discerned but also the needs that might arise in the future. If constitutional interpretation could be adjusted as changing circumstances required, a broad initial interpretation would have been unnecessary.⁸

He continues:

The principal theoretical defect of nonoriginalism, in my view, is its incompatibility with the very principle that legitimizes judicial review of constitutionality. Nothing in the text of the Constitution confers upon the courts the power to inquire into, rather than passively assume, the constitutionality of federal statutes. That power is, however, reasonably implicit because, as Marshall said in *Marbury v. Madison*, (1) "[i]t is emphatically the province and duty of the judicial department to say what the law is," (2) "[i]f two laws conflict with each other, the courts must decide on the operation of each," and (3) "the constitution is to be considered, in court, as a paramount law." Central to that analysis, it seems to me, is the perception that the Constitution, though it has an effect superior to other laws, is in its nature the sort of "law" that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law. If the Constitution were not that sort of a "law", but a novel invitation to apply current societal values, what reason would there be to believe that the invitation was addressed to the courts rather than to the legislature?⁹

⁵ *Originalism: The Lesser Evil*, 57 U.Cin.L.Rev. pp. 852-53.

⁶ *A Matter of Interpretation*, Princeton University Press (1997) at p. 38.

⁷ *Ibid.*, at p. 38.

⁸ *Originalism*, 57 U.Cin.L.Rev., 849, at pages 852-53.

⁹ *Ibid.*, at page 854.

He reviews the main defects of the “living constitution” concept and “originalism”, and why he chooses originalism as his guiding light:

I also think that the central practical defect of nonoriginalism is fundamental and irreparable: the impossibility of achieving any consensus on what, precisely, is to replace original meaning, once that is abandoned. The practical defects of originalism, on the other hand, while genuine enough, seem to me less severe. While it may indeed be unrealistic to have substantial confidence that judges and lawyers will find the correct historical answer to *** refined questions of original intent as the precise content of “the executive Power,” for the vast majority of questions the answer is clear. *** As for the fact that originalism is strong medicine, and that one cannot realistically expect judges (probably myself included) to apply it without a trace of constitutional perfectionism: I suppose I must respond that this is a world in which nothing is flawless, and fall back upon G.K. Chesterton’s observation that a thing worth doing is worth doing badly. *** It seems to me, moreover, that the practical defects of originalism are defects more appropriate for the task at hand—that is, less likely to aggravate the most significant weakness of the system of judicial review and more likely to produce results acceptable to all.¹⁰

It needs to be emphasized that Justice Scalia’s Constitutional Jurisprudence accepts the universal view that the federal government’s powers are limited to those expressed in the Constitution. Nevertheless, he has also said:

I am not a strict constructionist ***. A text should not be construed strictly, and it should not be construed leniently, it should be construed reasonably, to contain all that it fairly means.¹¹ *** and to give the words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear.¹²

JUSTICE SCALIA’S CONSTITUTIONAL JURISPRUDENCE AS APPLIED TO THE FIRST AMENDMENT

JUSTICE SCALIA’S SUMMARY OF THE COURT’S FIRST AMENDMENT JURISPRUDENCE

In *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542-2547 (1992)¹³ the Justice took on the herculean task of summarizing the then-state of First Amendment Jurisprudence as follows (internal quotation marks and FNs omitted)¹⁴:

¹⁰ *Ibid.*, at page 862-63.

¹¹ *A Matter of Interpretation*, Antonin Scalia, at p. 23, Princeton University Press (1997).

¹² *Ibid.*, at p. 37.

¹³ Justice Scalia writing for the majority summarized the case: “In the predawn hours *** petitioner and several other teenagers allegedly assembled a crudely made cross by taping together broken chair legs. They then allegedly burned the cross inside the fenced yard of a black family that lived across the street from the house where petitioner was staying. Although this conduct could have been punished under any of a number of laws, one of the two provisions under which respondent city of St. Paul chose to charge petitioner (then a juvenile) was the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis.Code § 292.02 (1990), which provides: ‘Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses

The First Amendment generally prevents government from proscribing speech, see, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 309-311, 60 S.Ct. 900, 905-906, 84 L.Ed. 1213 (1940), or even expressive conduct, see, e.g., *Texas v. Johnson*, 491 U.S. 397, 406, 109 S.Ct. 2533, 2540, 105 L.Ed.2d 342 (1989), because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 112 S.Ct. 501, 508, 116 L.Ed.2d 476 (1991) *id.*, at 124, 112 S.Ct., at 512-513 (KENNEDY, J., concurring in judgment); *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 536, 100 S.Ct. 2326, 2332-2333, 65 L.Ed. 2d 319 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2289-2290, 33 L.Ed. 2d 212 (1972). From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which 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. *Chaplinsky, supra*, 315 U.S., at 572, 62 S.Ct. at 762. We have recognized that “the freedom of speech” referred to by the First Amendment does not include a freedom to disregard these traditional limitations. See, e.g., *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952) (defamation); *Chaplinsky v. New Hampshire, supra* (fighting words); see generally *Simon & Schuster, supra*, 502 U.S., at 124, 112 S.Ct., at 513-514 (KENNEDY, J., concurring in judgment). Our decisions since the 1960s have narrowed the scope of the traditional categorical exceptions for defamation, see *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); see generally *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13-17, 110 S.Ct. 2695, 2702-2705, 111 L.Ed.2d 1 (1990), and for obscenity, see *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), but a limited categorical approach has remained an important part of our First Amendment jurisprudence.

We have sometimes said that these categories of expression are not within the area of constitutionally protected speech, *Roth, supra*, 354 U.S., at 483, 77 S.Ct., at 1308; *Beauharnais, supra*, 343 U.S., at 266, 72 S.Ct., at 735; *Chaplinsky, supra*, 315 U.S., at 571-572, 62 S.Ct., at 768-769; or that the protection of the First Amendment does not extend to them, *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504, 104 S.Ct. 1949, 1961, 80 L.Ed.2d 502 (1984); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 124, 109 S.Ct. 2829, 2835, 106 L.Ed.2d 93 (1989). Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity as not being speech at all, *Sunstein, Pornography and the First Amendment*, 1986 Duke L.J. 589, 615, n. 146. What they mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.), not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel

anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.”

¹⁴ In using the phrase “Internal quotation marks omitted” the writer is following the rule set out in the *The Bluebook* at legalbluebook.com.

critical of the government. We recently acknowledged this distinction in *Ferber*, 458 U.S., at 763, 102 S.Ct., at 3357-3358, where, in upholding New York's child pornography law, we expressly recognized that there was no question here of censoring a particular literary theme.... See also *id.*, at 775, 102 S.Ct., at 3364 (O'CONNOR, J., concurring) (As drafted, New York's statute does not attempt to suppress the communication of particular ideas).

Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government may regulate [them] freely, *post*, at 2552 (WHITE, J., concurring in judgment). That would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government. Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well. It is not true that fighting words have at most a *de minimis* expressive content, *ibid.*, or that their content is in all respects worthless and undeserving of constitutional protection, *post*, at 2553; sometimes they are quite expressive indeed. We have not said that they constitute no part of the expression of ideas, but only that they constitute no essential part of any exposition of ideas. *Chaplinsky, supra*, 315 U.S., at 572, 62 S.Ct., at 769 (emphasis added).

The proposition that a particular instance of speech can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of another (e.g., opposition to the city government) is commonplace and has found application in many contexts. We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not. See *Johnson*, 491 U.S., at 406-407, 109 S.Ct., at 2540-2541. See also *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569-570, 111 S.Ct. 2456, 2462, 115 L.Ed.2d 504 (1991) (plurality opinion); *id.*, at 573-574, 111 S.Ct., at 2464-2465 (SCALIA, J., concurring in judgment); *id.*, at 581-582, 111 S.Ct., at 2468-2469 (SOUTER, J., concurring in judgment); *United States v. O'Brien*, 391 U.S. 367, 376-377, 88 S.Ct. 1673, 1678-1679, 20 L.Ed.2d 672 (1968). Similarly, we have upheld reasonable time, place, or manner restrictions, but only if they are justified without reference to the content of the regulated speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753-2754, 105 L.Ed.2d 661 (1989) (internal quotation marks omitted); see also *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298, 104 S.Ct. 3065, 3071, 82 L.Ed.2d 221 (1984) (noting that the O'Brien test differs little from the standard applied to time, place, or manner restrictions). And just as the power to proscribe particular speech on the basis of a noncontent element (e.g., noise) does not entail the power to proscribe the same speech on the basis of a content element; so also, the power to proscribe it on the basis of one content element (e.g., obscenity) does not entail the power to proscribe it on the basis of other content elements.

In other words, the exclusion of fighting words from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a nonspeech element of communication. Fighting words are thus analogous to a noisy sound truck: Each is, as Justice Frankfurter recognized, a mode of speech, *Niemotko v. Maryland*, 340 U.S. 268, 282, 71 S.Ct. 325, 333, 95 L.Ed. 267 (1951) (opinion concurring in result); both can be used to convey an idea; but neither has, in and of itself, a claim

upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed. Compare *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (upholding, against facial challenge, a content-neutral ban on targeted residential picketing), with *Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980) (invalidating a ban on residential picketing that exempted labor picketing).

The concurrences describe us as setting forth a new First Amendment principle that prohibition of constitutionally proscribable speech cannot be underinclusiv[e], *post*, at 2553 (WHITE, J., concurring in judgment)—a First Amendment absolutism whereby [w]ithin a particular proscribable category of expression, ... a government must either proscribe all speech or no speech at all, *post*, at 2562 (STEVENS, J., concurring in judgment). That easy target is of the concurrences' own invention. In our view, the First Amendment imposes not an underinclusiveness limitation but a content discrimination limitation upon a State's prohibition of proscribable speech. There is no problem whatever, for example, with a State's prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be underinclusive, it would not discriminate on the basis of content. See, e.g., *Sable Communications*, 492 U.S., at 124-126, 109 S.Ct., at 2835-2836 (upholding 47 U.S.C. § 223(b)(1), which prohibits obscene telephone communications).

Even the prohibition against content discrimination that we assert the First Amendment requires is not absolute. It applies differently in the context of proscribable speech than in the area of fully protected speech. The rationale of the general prohibition, after all, is that content discrimination raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace, *Simon & Schuster*, 502 U.S., at 116, 112 S.Ct., at 508; *Leathers v. Medlock*, 499 U.S. 439, 448, 111 S.Ct. 1438, 1444, 113 L.Ed.2d 494 (1991); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383-384, 104 S.Ct. 3106, 3119-3120, 82 L.Ed.2d 278 (1984); *Consolidated Edison Co.*, 447 U.S., at 536, 100 S.Ct., at 2333; *Police Dept. of Chicago v. Mosley*, 408 U.S., at 95-98, 92 S.Ct., at 2289-2292. But content discrimination among various instances of a class of proscribable speech often does not pose this threat.

When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class. To illustrate: A State might choose to prohibit only that obscenity which is the most patently offensive in its prurience—i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive political messages. See *Kucharek v. Hanaway*, 902 F.2d 513, 517 (CA7 1990), cert. denied, 498 U.S. 1041, 111 S.Ct. 713, 112 L.Ed.2d 702 (1991). And the Federal Government can criminalize only those threats of violence that are directed against the President, see 18 U.S.C. § 871—since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President. See *Watts v. United States*, 394 U.S. 705, 707, 89 S.Ct. 1399, 1401, 22 L.Ed.2d 664 (1969) (upholding the facial validity of § 871 because of the overwhelmin[g] interest in protecting the safety of [the] Chief

Executive and in allowing him to perform his duties without interference from threats of physical violence). But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities. And to take a final example (one mentioned by Justice STEVENS, *post*, at 2563-2564), a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection, see *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772, 96 S.Ct. 1817, 1830-1831, 48 L.Ed.2d 346 (1976)) is in its view greater there. Cf. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) (state regulation of airline advertising); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) (state regulation of lawyer advertising). But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion. See, e.g., *Los Angeles Times*, Aug. 8, 1989, section 4, p. 6, col. 1.

Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular “secondary effects” of the speech, so that the regulation is justified without reference to the content of the ... speech, *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S.Ct. 925, 929, 89 L.Ed.2d 29 (1986) (quoting, with emphasis, *Virginia State Bd. of Pharmacy*, *supra*, 425 U.S., at 771, 96 S.Ct., at 1830); see also *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71, n. 34, 96 S.Ct. 2440, 2453, n. 34, 49 L.Ed.2d 310 (1976) (plurality opinion); *id.*, at 80-82, 96 S.Ct., at 2457-2458 (Powell, J., concurring); *Barnes*, 501 U.S., at 586, 111 S.Ct., at 2470-2471 (SOUTER, J., concurring in judgment). A State could, for example, permit all obscene live performances except those involving minors. Moreover, since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation’s defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. See *id.*, at 571, 111 S.Ct., at 2463 (plurality opinion); *id.*, at 577, 111 S.Ct., at 2466 (SCALIA, J., concurring in judgment); *id.*, at 582, 111 S.Ct., at 2468-2469 (SOUTER, J., concurring in judgment); *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411, 425-432, 110 S.Ct. 768, 776-780, 107 L.Ed.2d 851 (1990); *O’Brien*, 391 U.S., at 376-377, 88 S.Ct., at 1678-1679. Thus, for example, sexually derogatory fighting words, among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices, 42 U.S.C. § 2000e-2; 29 CFR § 1604.11 (1991). See also 18 U.S.C. § 242; 42 U.S.C. §§ 1981, 1982. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

These bases for distinction refute the proposition that the selectivity of the restriction is even arguably conditioned upon the sovereign’s agreement with what a speaker may intend to say. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 555, 101 S.Ct. 2882, 2917, 69 L.Ed.2d 800 (1981) (STEVENS, J., dissenting in part) (citation omitted). There may be other such bases as well. Indeed, to validate such selectivity (where totally proscribable speech is at issue) it may not even be necessary to identify any particular neutral basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot. (We cannot think of any First Amendment interest that would stand in the way of a State’s prohibiting only those obscene motion pictures with blue-eyed actresses.) Save for that limitation, the regulation of fighting words, like the regulation of noisy speech, may address some offensive instances and leave other,

equally offensive, instances alone. See *Posadas de Puerto Rico*, 478 U.S., at 342-343, 106 S.Ct., at 2977-2978.

Justice Scalia, applying these principles to the St. Paul ordinance, said:

*** we conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional. Although the phrase in the ordinance, “arouses anger, alarm or resentment in others,” has been limited by the Minnesota Supreme Court’s construction to reach only those symbols or displays that amount to “fighting words,” the remaining, unmodified terms make clear that the ordinance applies only to fighting words that insult, or provoke violence, “on the basis of race, color, creed, religion or gender.” Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use “fighting words” in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.¹⁵

Recently Justice Scalia, in his majority opinion in *Brown v. Entertainment Merchants Association*,¹⁶ reiterated his summary of the Court’s First Amendment Jurisprudence, and added the following limitation:

Last Term, in *Stevens*, we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated.

THE STANDARD OF GOVERNMENTAL INTEREST THAT OVERCOMES FIRST AMENDMENT PROTECTION OF SPEECH

The First Amendment proscribes any abridgment of speech by the government. As we have seen, *supra*, pp. 5-9, the Jurisprudence that has developed as the Constitution’s words have been interpreted and applied is not absolute. In addition, the Court has made clear that the government has interests that overcome and supplant the Amendment’s command that free speech shall not be abridged.

What is the standard or test which the Court has applied, and does Justice Scalia differ therefrom in any manner, to uphold the government’s interest? A majority of the Court, including Justice Scalia, applies “strict scrutiny” to the interest that would result in an abridgment of speech. As he said in his majority opinion in *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729, 2738 (2011)¹⁷:

Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. *R.A.V.*, 505 U.S., at 395, 112 S.Ct. 2538. The State must specifically identify an “actual problem” in need of solving, *Playboy*, 529 U.S., at 822–823, 120 S.Ct. 1878, and the curtailment of free speech must be actually

¹⁵ *R.A.V.*, 112 S. Ct. 2538, at p. 2547.

¹⁶ 131 S. Ct. 2729 (2011).

¹⁷ *Ibid.*, at pp. 2733-34. In *Brown* the Court held that video games amount to “speech” within the meaning of the First Amendment and that the First Amendment did not allow California’s ban on the sale of violent video games to minors.

necessary to the solution, see *R.A.V.*, *supra*, at 395, 112 S.Ct. 2538. That is a demanding standard. “It is rare that a regulation restricting speech because of its content will ever be permissible.” *Playboy*, *supra*, at 818, 120 S.Ct. 1878.

It is useful to examine how he applies the foregoing factors to conclude whether or not there is a “compelling governmental interest” shown which will permit an abridgment of speech. His dissent in *Austin v. Michigan*, 110 S. Ct. 1391 (1990), at page 1408 is most instructive because it presages the Court’s overruling *Austin* in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).¹⁸

In *Austin*, Justice Scalia’s dissenting view is that assuring the “fairness” of elections vis-à-vis political speech is not a “compelling interest.” He rejects the majority opinion’s holding that the statute

ensures that expenditures reflect actual public support for the political ideas espoused by corporations. We emphasize that the mere fact that corporations may accumulate large amounts of wealth is not the justification for § 54; rather, the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures. Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions. We therefore hold that the State has articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations.¹⁹

His reply is (internal quotation marks omitted):

The Court's opinion says that political speech of corporations can be regulated because [s]tate law grants [them] special advantages, *ante*, at 1397, and because this unique state-conferred corporate structure ... facilitates the amassing of large treasuries, *ante*, at 1397-1398. ***. Those individuals who form that type of voluntary association known as a corporation are, to be sure, given special advantages—notably, the immunization of their personal fortunes from liability for the actions of the association—that the State is under no obligation to confer. ***. It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights. See *Pickering v. Board of Education of Township High School Dist. No. 205, Will County*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). The categorical suspension of the right of any person, or of any association of persons, to speak out on political matters must be justified by a compelling state need. See *Buckley v. Valeo*, 424 U.S. 1, 44-45, 96 S.Ct. 612, 646-647, 46 L.Ed.2d 659 (1976) (*per curiam*). That is why the Court puts forward its second bad argument, the fact that corporations amas[s] large treasuries. But that alone is also not sufficient justification for the suppression of political speech, ***. Neither of these two flawed arguments is improved by combining them and saying, as the Court in effect does,

¹⁸ The Court in 1990 was Chief Justice Rehnquist, Associate Justices, White, Marshall, Blackmun, Stevens, O’Connor, Scalia, Kennedy, and Souter, and in 2010 it was Chief Justice Roberts, Associate Justices Stevens, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, and Sotomayor. It should be noted that Chief Justice Rehnquist, as part of the majority in *Austin* reversed his position that corporations were not speakers entitled to First Amendment protection in joining three others in *McConnell v. Federal Elections Commission*, 124 S. Ct. 619 urging that *Austin*, be overruled. See *Citizens United*, 130 S. Ct. at page 894.

¹⁹ *Austin* 110 S. Ct. 1391 at 1397-98.

that since the State gives special advantages to these voluntary associations, and since they thereby amass vast wealth, they may be required to abandon their right of political speech.²⁰

As for the second part of the Court's argumentation, the fact that corporations (or at least some of them) possess massive wealth: Certain uses of massive wealth in the electoral process—whether or not the wealth is the result of special advantages conferred by the State—pose a substantial risk of corruption which constitutes a compelling need for the regulation of speech. Such a risk plainly exists when the wealth is given directly to the political candidate, to be used under his direction and control. ***²¹

The Court does not try to defend the proposition that independent advocacy poses a substantial risk of political corruption,” as English speakers understand that term. Rather, it asserts that that concept (which it defines as financial quid pro quo corruption, *ante*, at 1397) is really just a narrow subspecies of a hitherto unrecognized genus of political corruption. Michigan’s regulation, we are told, aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas. *Ibid*. Under this mode of analysis, virtually anything the Court deems politically undesirable can be turned into political corruption—by simply describing its effects as politically “corrosive”, which is close enough to corruptive to qualify. It is sad to think that the First Amendment will ultimately be brought down not by brute force but by poetic metaphor.²²

The Court’s opinion ultimately rests upon that proposition whose violation constitutes the “New Corruption”: Expenditures must “reflect actual public support for the political ideas espoused.” *Ibid*. This illiberal free-speech principle of “one man, one minute” was proposed and soundly rejected in *Buckley*:

It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by § 608(e)(1)'s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. 424 U.S., at 48-49, 96 S.Ct., at 648-649 (citations omitted)[internal quotation marks omitted]²³.

ENTITIES’ SPEECH PROTECTED BY THE FIRST AMENDMENT

It is well established that the freedom of speech liberty of the First Amendment protects “speakers” and the Court decisions establish that it will not discriminate between “speakers”. Justice Scalia in his concurring

²⁰ *Austin*, at pp. 1408-09.

²¹ *Ibid.*, at pp. 1409.

²² *Ibid.*, at pp.1410-11.

²³ *Ibid.*, at page 1412.

opinion, taking issue with the dissenting opinion in *Citizens United v. FEC*, 130 S. Ct. 876 (2010)²⁴ that corporations are not afforded free speech protection by the First Amendment, states that they are. His stand:

Though faced with a constitutional text that makes no distinction between types of speakers, the dissent feels no necessity to provide even an isolated statement from the founding era to the effect that corporations are not covered, but places the burden on petitioners to bring forward statements showing that they are (“there is not a scintilla of evidence to support the notion that anyone believed the First Amendment] would preclude regulatory distinctions based on the corporate form,” *post*, at 948).²⁵ *** The dissent offers no evidence—none whatever—that the First Amendment’s unqualified text was originally understood to exclude such associational speech from its protection.²⁶

To this writer the foregoing seems to be the pivotal point of Justice Scalia’s concurrence and the reason he deemed it important to emphasize it to buttress the majority opinion in which he joined. This is a procedural argument—Who has “the burden of proof”²⁷ to establish that the “original understanding” was that (1) corporations were included, or (2) corporations were not included?. His answer: Those arguing that the Amendment protects individual humans and does not include corporations.

Does that answer raises additional questions: Should the application of the “burden of proof” rule be a determining factor in cases where the interpreting of the Constitution is at stake? Or, rather than rely on the resources and abilities of opposing counsel to bring the facts before the Court, should it, in discharging its duties, make independent inquiries, take “judicial notice” and use independent judgment to gather facts upon which to make the determination as to “original meaning” (or “understanding”)?

Justice Scalia’s approach is to state the conclusion that the “burden” falls on those urging exclusion of corporations. He stated:

The dissent says that when the Framers “constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.” *Post*, at 950.

²⁴ The case was a landmark decision by the Court (5-4) holding that the First Amendment prohibits government from placing limits on independent spending for political purposes by corporations and unions. The factual issue was whether the non-profit corporation Citizens United could have broadcast and advertised a film critical of Hillary Clinton, in apparent violation of the 2002 Bipartisan Campaign Reform Act (McCain-Feingold Act). The Court reversed the lower court, striking down those provisions of the Statute that prohibited all corporations, both for-profit and not-for-profit, and unions from broadcasting “electioneering communications.” that mentioned a candidate within 60 days of a general election or thirty days of a primary. The decision overruled *Austin v. Michigan Chamber of Commerce* (1990) and partially overruled *McConnell v. Federal Election Commission* (2003). The Court upheld requirements for disclaimer and disclosure by sponsors of advertisements. The case did not involve the federal ban on direct contributions from corporations or unions to candidate campaigns or political parties, which remain illegal in races for federal office.

This article concentrates on Justice Scalia’s concurring opinion concerning who has the burden of proof to establish whether or not corporations are “speakers” whose speech receives First Amendment protection and presents for the reader’s consideration whether his conclusion comports with his jurisprudential doctrine of “textualism” and “original meaning”.

²⁵ *Citizens United v. FEC*, 130 S. Ct. at page 925.

²⁶ *Ibid.*, at page 927.

²⁷ Burden of Proof is defined in *Black’s Law Dictionary* as: “Burden of proof in the sense of carrying the risk of nonpersuasion. The one who has this burden stands to lose if his evidence fails to convince the jury — or the judge in a nonjury trial. The present trend is to use the term burden of proof only with this second meaning.... Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 78 (3d ed. 1982).” (internal quotation marks omitted).

That is no doubt true. All the provisions of the Bill of Rights set forth the rights of individual men and women [emphasis supplied] not for example, of trees or polar bears. But the individual person's right to speak includes the right to speak in association with other individual persons. Surely the dissent does not believe that speech by the Republican Party or the Democratic Party can be censored because it is not the speech of "an individual American." It is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf. The association of individuals in a business corporation is no different—or at least it cannot be denied the right to speak on the simplistic ground that it is not "an individual American."²⁸

“But to return to, and summarize, my principal point, which is the conformity of today’s opinion with the original meaning of the First Amendment. The Amendment is written in terms of “speech,” not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals—and the dissent offers no evidence about the original meaning of the text to support any such exclusion. We are therefore simply left with the question whether the speech at issue in this case is “speech” covered by the First Amendment. No one says otherwise.”²⁹

In the light of his agreement with the dissenting view quoted *supra*, page 14, that in the Constitution’s Bill of Rights, including the First Amendment, the Framers and Ratifiers had in mind the speech of individual Americans, why does not the history of the adoption of the Bill of Rights clearly establish who are the speakers protected?³⁰ He agrees that the history of the proposed First Amendment within the Bill of rights and its ratification was definitively understood to protect the speech liberty of human beings. His “originalist” doctrine proclaims that one looks to history and should govern to determine the meaning of the text, when it is silent or unclear. His agreement that the Amendment’s protection of the speech liberty was at the time of its proposal and ratification only discussed in terms of “meaning” to apply to humans, it seems proper to conclude that it is the proponents of the contention that corporations are included have the “burden of proof.”

He declares that by today’s standard of the Amendment’s underlying values it is unthinkable that anyone would challenge the speech liberty of a spokesperson of a corporation or other associations of individuals—allowing for example the head of the present day Republican or Democratic Party speak for its members. Under his judicial philosophy of “textualism” and “original meaning”, is not the proper remedy to have the legislative body grant to entities excluded from the Amendment’s protection the right of free speech?

²⁸ *Citizens Union*, at page 928. And as expanded in FN7. “The dissent says that ‘speech’ refers to oral communications of human beings, and since corporations are not human beings they cannot speak. *Post*, at 950, n. 55. This is sophistry. The authorized spokesman of a corporation is a human being, who speaks on behalf of the human beings who have formed that association—just as the spokesman of an unincorporated association speaks on behalf of its members. The power to publish thoughts, no less than the power to speak thoughts, belongs only to human beings, but the dissent sees no problem with a corporation’s enjoying the freedom of the press.”

²⁹ *Ibid.*, at page 929.

³⁰ *Ibid.*, at page 928.

Further in support of his view that with the foregoing right to free speech comes the right to spend money by the entity chosen by the individuals, he previously wrote in *McConnell v. FEC* as follows³¹:

Another proposition which could explain at least some of the results of today’s opinion is that the First Amendment right to spend money for speech does not include the right to combine with others in spending money for speech. *** The freedom to associate with others for the dissemination of ideas—not just by singing or speaking in unison, but by pooling financial resources for expressive purposes—is part of the freedom of speech.

Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. *NAACP v. Button*, 371 U.S. 415, 431[, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) [internal quotation marks omitted].

The First Amendment protects political association as well as political expression. The constitutional right of association explicated in *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L.Ed.2d 1488] (1958), stemmed from the Court’s recognition that [e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas, *** *Buckley*, *supra*, at 15, 96 S.Ct. 612 [internal quotation marks omitted].

We have said that “implicit in the right to engage in activities protected by the First Amendment” is “a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” *Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). That “right to associate ... in pursuit” includes the right to pool financial resources.

Justice Scalia also takes issue with that part of the majority opinion in *McConnell v. Federal Elections Commission*, 124 S.Ct. 619, that upheld certain provisions of the McCain-Feingold Act that regulate expenditure and contributions of money.³²

This is a sad day for the freedom of speech. *** [The Court herein smiles] with favor upon a law that cuts to the heart of what the First Amendment is meant to protect: the right to criticize the government. For that is what the most offensive provisions of this legislation are all about. We are governed by Congress, and this legislation prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice: national political parties and corporations, both of the commercial and the not-for-profit sort. It forbids pre-election criticism of incumbents by corporations, even not-for-profit corporations, by use of their general funds; and forbids national-party use of “soft” money to fund “issue ads” that incumbents find so offensive. To be sure, the

³¹ 124 S. Ct. 619, at pp. 724-25.

³² *Ibid.*, at page 720.

legislation is evenhanded: It similarly prohibits criticism of the candidates who oppose Members of Congress in their reelection bids. But as everyone knows, this is an area in which evenhandedness is not fairness.³³

He says that money used or contributed to affect speech is protected by the First Amendment. Herein the Court found there was no protection of such activities provided by the First Amendment and in his view the majority rejected the concept that “money is speech” that previously had been firmly accepted. He summarizes the contrasting positions as follows:

Majority:

Since this legislation regulates nothing but the expenditure of money for speech, as opposed to speech itself, the burden it imposes is not subject to full First Amendment scrutiny; the government may regulate the raising and spending of campaign funds just as it regulates other forms of conduct, such as burning draft cards, see *United States v. O’Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), or camping out on the National Mall, see *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) ***.³⁴

Scalia:

Until today, however, that view has been categorically rejected by our jurisprudence. As we said in *Buckley*, 424 U.S., at 16, 96 S.Ct. 612, ‘this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment ***. Our traditional view was correct, and today’s cavalier attitude toward regulating the financing of speech (the ‘exacting scrutiny’ test of *Buckley*, see *ibid.*, is not uttered in any majority opinion, and is not observed in the ones from which I dissent) frustrates the fundamental purpose of the First Amendment.³⁵

[W]here the government singles out money used to fund speech as its legislative object, it is acting against speech as such, no less than if it had targeted the paper on which a book was printed or the trucks that deliver it to the bookstore.³⁶[emphasis supplied]

FREE SPEECH AS TO SPECIFIC ISSUES

There are several Freedom of Speech issues that are believed to be of active concern to the Wesleyan Community, and Justice Scalia’s views thereon are here presented.

ANONYMOUS SPEECH

Justice Scalia, dissent in *McIntyre vs. Ohio Elections Commission*³⁷, found anonymity not necessarily honorable. He wrote, “It facilitates wrong by eliminating accountability, which is ordinarily the very

³³ *McConnell v. Federal Elections Commission*, 124 S.Ct. 619 at p. 720.

³⁴ *Ibid.*, at p. 722.

³⁵ *McConnell*, at page 721.

³⁶ *Ibid.*, at page 722.

purpose of the anonymity.” He felt that anonymous communications were not speech protected by the First Amendment unless a showing could be made of a reasonable probability that the compelled disclosure would result in “threats, harassment or reprisals” by governmental officials or private parties.³⁸

Justice Scalia’s minority view on the extent to which the First Amendment protects anonymous speech is resolved in part by applying “strict scrutiny” standard of a “compelling interest”, which in this case was the need to protect the electoral process. Citing the cases, he said they “suggest that no justification for regulation is more compelling than protection of the electoral process. ‘Other rights, even the most basic, are illusory if the right to vote is undermined.’”³⁹

Will his judicial expressed strong negative position on anonymity carry over into the jurisprudence to be developed with respect to freedom of expression in cyberspace?

OBSCENITY

Justice Scalia’s views as to the difficulty in placing restrictions on obscenity are chronicled in *FW/PBS Inc. v. City of Dallas*, 110 S. Ct. 596 (1990), wherein he dissented from the judgment striking down the ordinance that controlled the licensing of certain “sexually oriented businesses”.

Since this Court first had occasion to apply the First Amendment to materials treating of sex, some three decades ago, we have been guided by the principle that “sex and obscenity are not synonymous,” *Roth v. United States*, 354 U.S. 476, 487, 77 S.Ct. 1304, 1310, 1 L.Ed.2d 1498 (1957). The former, we have said, the Constitution permits to be described and discussed. The latter is entirely unprotected, and may be allowed or disallowed by States or communities, as the democratic majority desires.

Distinguishing the one from the other has been the problem. Obscenity, in common understanding, is material that “treat[s] sex in a manner appealing to prurient interest,” *id.*, at 488, 77 S.Ct., at 1311. But for constitutional purposes we have added other conditions to that definition, out of an abundance of concern that “the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.” *Ibid.* To begin with, we rejected the approach previously adopted by some courts, which would permit the banning of an entire literary work on the basis of one or several passages that in isolation could be considered obscene. Instead, we said, “the dominant theme of the material taken as a whole” must appeal to prurient interest. *Id.*, at 489, 77 S.Ct., at 1311 [emphasis added]. We have gone on to add other conditions, which are reflected in the three-part test pronounced in *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973):

³⁷ 115 S. Ct. 1511 (1995), at page 1537. The Court held that an Ohio law prohibiting the distribution of anonymous campaign literature abridged freedom of speech in violation of the First Amendment. Pp. 1516-1524.

³⁸ *Ibid.*, at p. 1537, also at pp. 1534-35.

³⁹ *Ibid.*, p. 1534.

The basic guidelines for the trier of fact must be: (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”

These standards’ immediate purpose and effect—which, it is fair to say, have met with general public acceptance—have been to guarantee the access of all adults to such works of literature, once banned or sought to be banned ***. It does not seem to me desirable to perpetuate such a regime of prohibition by indirection. I think the means of rendering it unnecessary is available under our precedents and should be applied in the present cases. That means consists of recognizing that a business devoted to the sale of highly explicit sexual material can be found to be engaged in the marketing of obscenity, even though each book or film it sells might, in isolation, be considered merely pornographic and not obscene. It is necessary, to be sure of protecting valuable speech, that we compel all communities to tolerate individual works that have only marginal communicative content beyond raw sexual appeal; it is not necessary that we compel them to tolerate businesses that hold themselves forth as specializing in such material. Because I think that Dallas could constitutionally have proscribed the commercial activities that it chose instead to license, I do not think the details of its licensing scheme had to comply with First Amendment standards.⁴⁰

PUBLIC CAMPAIGN FINANCING

In the light of the tidal wave of money finding its way into the election process since the Supreme Court’s decision in the *Citizens Union* case, the focus of public debate has re-intensified about effective and robust legislation for public financing of elections. Many believe that recently the Court has dealt a blow to such efforts by its decision in *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) (which decision Justice Scalia joined).⁴¹ Therein, the Court struck down crucial public financing provisions of an Arizona statute because they placed a “substantial burden” on privately funded candidates’ freedom of expression rights. Further, Arizona failed to show a “compelling state interest” that would sustain an evasion of the privately funded candidate’s speech rights. The Court rejected both of the proponents of the Statute’s constitutionality arguments of “compelling interest” which were: (1) To equalize electoral spending because the Court in previous decisions repeatedly rejected it⁴², and (2) Prevention of such corruption or an appearance thereof, as the Statute had no effect on “quid pro quo corruption”, because other of its laws provided the means of curbing such corruption.⁴³

The nub of the majority’s (which included Justice Scalia) reasoning in its opinion by Chief Justice Roberts was that increasing public moneys to match increased spending by the privately funded candidate imposed a

⁴⁰ *FW/PBS Inc.*, at pp.617-19.

⁴¹ In this case, future candidates for Arizona state political offices who ran or planned to run privately financed campaigns and two political action committees (PACs) who funded such candidates filed lawsuit seeking to enjoin enforcement of the matching funds provision of Arizona’s Citizens Clean Elections Act, as violative of their rights under the First Amendment and the Equal Protection Clause. The Supreme Court held (5-4) unconstitutional provisions that automatically increased public funding to candidates, who opted into the plan, to match in two jumps privately funded candidates expenditures already made. The triggering mechanism for additional funding was an increase total spending by the privately financed candidate and independent groups (PACS) supporting the candidate.

⁴² *Arizona Free Enterprise*, pp. 2825-26.

⁴³ *Ibid.*, p. 2826-27.

substantial burden on the candidate's First Amendment's free speech campaign rights. Why did it do so? Its answer: The record contained evidence of "burden". Although it did not quantify the same, it concluded that because "burdens might occur", that in and of itself is sufficient to support a finding of "substantial burden". It said "*** we do not need empirical evidence to determine that the law at issue is burdensome. See 554 U.S., at 738–740, 128 S.Ct. 2759 (requiring no evidence of a burden whatsoever)."⁴⁴

The Court identifies the "burden" as the direct and automatic increased public funding that had been triggered by the total spending of privately financed candidate and independent groups supporting that person. It appears to acknowledge that such candidate can control spending to keep below the triggering total, but that meaningful control "is to some extent out of the privately financed candidate's hands." That candidate has no control or say in the raising or spending of funds by the independent group, but such moneys are counted to determine the triggering event that gives the publicly financed person additional funds.⁴⁵

The Court's decision does not dispose of the dangers of unlimited contributions to, and spending on, elections. As Justice Scalia and many others have said, the Constitution provides the road to remedial action—amend the Constitution. This writer suggests that "We, the People" must undertake this most difficult task and relentlessly pursue it until it is accomplished.

CONCLUSION

Surveying the current scene and the recent past it is fair conclude that the focus of the Supreme Court Constitutional Jurisprudence as to the meaning and application of the First Amendment's protection of the liberty of freedom of expression has shifted. In the past most of the pivotal cases dealt with the issue of the degree of protection afforded the speech's content. It is now settled law that the "First Amendment generally prevents government from proscribing speech, *** or even expressive conduct, *** because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." See herein, *supra* at page 8.

The current battleground is on the issues of the establishment of a "compelling governmental interest," which will override the protection of speech afforded by the Amendment (first in importance) and the standard of scrutiny to be applied in determining the foregoing.

With the Court as presently constituted, it seems certain that the Jurisprudence, as to this issue, that will bear most heavily in the discussion, and most likely to win the day, will be that of Justice Scalia.

In discussing the meaning of free speech, he emphasizes that money and the use thereof to present and gain access to listeners is an essential ingredient of the free speech right. It seems obvious that those with the most money have the ability to gain control of the media outlets, and most important, to purchase the available time and space in the media. The question that needs to be posed and answered is: Will money and its use in dissemination of speech content become "settled law" that prevents "government from proscribing speech", i.e., making reasonable regulations with respect to speech's content dissemination?

⁴⁴ *Ibid.*, p. 2823.

⁴⁵ *Ibid.*, p.2819