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Ronald A. Cass

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WEIGHING CONSTITUTIONAL ANCHORS: *NEW YORK TIMES CO. V. SULLIVAN* AND THE MISDIRECTION OF FIRST AMENDMENT DOCTRINE

RONALD A. CASS*

INTRODUCTION

*New York Times Co. v. Sullivan*¹ is one of the rare iconic court decisions nearly all American lawyers recognize and recall. (As a long-time law professor, I know that recall is even rarer than recognition!) Although the case no doubt would have been famous in any event, its prominence was propelled in part by Professor Harry Kalven's celebration of the decision as embodying the heart and soul of constitutional protection of speech freedom.²

Studying First Amendment law under Professor Kalven at the University of Chicago in the 1970s, *New York Times Co. v. Sullivan*, not surprisingly, was a pivotal case in my own education about freedom of speech, constitutional jurisprudence, and the development of legal doctrine. Professor Kalven's enthusiasm for the decision was infectious, spreading to students, colleagues in the professoriate, and First Amendment enthusiasts in the press. Kalven's admiration for *New York Times* remains the dominant reaction in law schools and the legal profession.

From the vantage of fifty years' experience, however, Kalven's excitement should be seen as understandable but short-sighted. This essay explains why Professor Kalven was excited by the decision, why it was so warmly received and so widely embraced as a triumph for the soul of constitutional governance, and why—despite its virtues—the *New York Times* decision was a mistake in constitutional jurisprudence

* President, Cass & Associates, PC; Chairman, Center for the Rule of Law; Dean Emeritus, Boston University School of Law; senior fellow, International Centre for Economic Research.

1. 376 U.S. 254 (1964).

2. Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191 (1964).

that set First Amendment doctrine down a path that threatened to undermine the very values Kalven embraced. It is an essay not about Harry Kalven, but about constitutional values, interpretive virtues, and unintended consequences. In the end, it is a hopeful as well as a cautionary tale.

I. CONSTITUTIONAL STARTING POINTS

When Harry Kalven enthused about the *New York Times* case, his starting points were devotion to liberty, appreciation of the threat to liberty posed by government power to suppress speech, and admiration for a society governed by a constitution that represented the historic commitment to the primacy of law over power. His classes on the First Amendment stressed the importance of freedoms of speech, press, association, and religion as bulwarks of liberty more broadly conceived. Most insistently, he instructed students that government power to suppress speech critical of those who govern threatens all liberties of a free, law-ruled people. The core of the First Amendment in Kalven's vision is the freedom to say whatever one thinks about the government, its conduct, and those who occupy the offices of government power.

That was much the same point made in the (no doubt apocryphal) story of Ronald Reagan's explanation to Mikhail Gorbachev about the reason America would prevail over the Soviet Union. Reagan's explanation didn't rest on the provision of better goods and services, a correlation of economic organization with consumer wants much touted as the basis for restlessness behind the Iron Curtain. Instead, Reagan tied American exceptionalism and its triumph in the competition among systems of government to our constitutional values, most of all to our protection of the freedom of speech. As the story goes, Reagan explained our commitment to freedom and to the rule of law by telling Gorbachev that anyone could stand in Lafayette Park, across from the White House, the quintessential symbol of America's government, and say the vilest things about the President of the United States—and no one would do a thing about it because the right to criticize the President was protected by law. Gorbachev is said to have replied that it was the same in the Soviet Union: anyone could stand in Red Square across from the Kremlin, the symbol of Soviet government power, and say the vilest things about the President of the United States.

Reagan's point—and Kalven's—was not about the law as written but about the law as applied. Any nation can have strong constitutional guarantees, and many of the worst offenders against freedom and the rule of law have the strongest paper protections of all kinds of rights.³ Having real, meaningful protections in practice is much harder,⁴ and maintaining them over time, harder yet.

The American Constitution provides powerful safeguards for liberty largely through structural features that inhibit concentration of unchecked power in any individual's (or institution's) hands.⁵ Those features both reflect and encourage popular support for critical limitations on the sorts of unconstrained discretionary power that have proved dangerous the world over.⁶ The Constitution's Framers (some quite reluctantly) agreed to, and the new Congress shortly added to the original Constitution, a relatively thin set of express protections for court-enforced rights correlated with particular abuses of power known to the framing generation—such as quartering troops in private homes, warrantless searches, imprisonment of opponents without fair process or speedy trial.⁷ But, whether insistent or skeptical of these judicially-metered protections, the Framers understood the structural protections of liberty to be more significant, more reliable, and more enduring.⁸

3. See, e.g., N. KOREA CONSTITUTION art. 67, available at http://www1.korea-np.co.jp/pk/061st_issue/98091708.htm; CONSTITUTION OF THE UNION OF FORMER SOVIET SOCIALIST REPUBLICS Oct. 7, 1977, art. 50, available at <http://www.constitution.org/cons/ussr77.txt>.

4. See, e.g., Ronald A. Cass, *Property Rights and the Rule of Law*, in THE ELGAR COMPANION TO PROPERTY RIGHT ECONOMICS 222, 227–43 (Enrico Colombaro, ed., Edward Elgar Pub. 2004) (discussing Zimbabwe's experience in respect of protections guaranteed property owners).

5. See THE FEDERALIST No. 51 (Alexander Hamilton and James Madison).

6. See, e.g., ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 126–93 (Arthur Goldhammer Trans., Library of America 1st ed. 2004) (1835).

7. See, e.g., GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 150–61, 447–53, 547–64 (The University of North Carolina Press 1998) (1969).

8. See THE FEDERALIST NO. 51 (James Madison). The combination of governance structures and popular attitudes have proven remarkably effective in constraining the worst abuses of government power, supporting fidelity to limitations on personal power, and particularly at curbing temptations to expand executive power through means common in many other nations, such as extending time in office, canceling elections, dissolving the legislature, ignoring judicial commands or per-

Both the Constitution and the Bill of Rights must be seen in this context as products of an effort to enable good government on matters of national scope but even more as designs to prevent bad government, blocking tyranny of the minority and, in some measure, tyranny of the majority as well.⁹ The specific protections included in the Bill of Rights, taken largely from the English Bill of Rights of 1689 and from explanations of common-law rights by Coke and Blackstone (sources widely read by the Framers), focused on specific instances of tyrannical governance that were of special concern to those who feared increased national power.¹⁰

The First Amendment's Freedom of Speech Clause in particular was directed at a very few potential problems. During the founding era, the term "freedom of speech" was used in opposition to either the use of government power to punish statements made in legislative debate (especially statements critical of the executive) or the use of prior licensing (also principally statements critical of particular government officials or policies).¹¹ Proponents of speech and press freedoms often adverted to common law rights (to jury trials, to process that provides fair notice of potentially offending behavior, and so on) that offered protection against

sonally intimidating judges. Even where a President's personal power, prestige, or political future are on the line, the historical record has been one of obeisance to Constitution and courts. *See, e.g.*, RONALD A. CASS, *THE RULE OF LAW IN AMERICA* (Johns Hopkins Univ. Press 2001).

9. *See, e.g.*, THE FEDERALIST Nos. 10, 51 (James Madison and Alexander Hamilton).

10. *See, e.g.*, Elbridge Gerry, *Observations on the New Constitution*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES (2000) (De Capo Press 1968) (1788) (hereinafter PAMPHLETS) (authorship attributed to Gerry but later reported to have been written instead by Mercy Otis Warren); ALPHEUS T. MASON, *THE STATES' RIGHTS DEBATE: ANTIFEDERALISM AND THE CONSTITUTION* 141-78 (Oxford Univ. Press, 2d ed. 1972) (1964); ROBERT A. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776-1791*, at 6-10 (Northeastern University Press 1983) (1955); WOOD, *supra* note 7, at 463-99, 536-47.

11. *See, e.g.*, Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1443-47 (1987) (hereinafter *Perils*); William T. Mayton, *Seditious Libel and the Lost Guarantee of Freedom of Expression*, 84 COLUM. L. REV. 91 (1984); David Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795 (1985). *See also* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977) (hereinafter *Checking Value*).

self-interested and manipulative speech suppression in these contexts or in related contexts, such as prosecutions for treason.¹² The limited discussion of speech freedom during the debates over the Constitution and the Bill of Rights primarily revealed concern that similar common-law protections be extended to the national domain.

This background produces a conundrum for First Amendment interpretation, at least for those of us who see contemporaneously understood meaning of constitutional text as the touchstone for its interpretation.¹³ The steps taken in the original Constitution—explicit prohibition on liability for legislative speech or debate, heightened proof requirements for treason convictions, and limitations on *ex post facto* laws and bills of attainder—incorporated critical common law safeguards and legal protections against the most feared government abuses of speech regulation before the Bill of Rights was passed by Congress for submission to the states.¹⁴ While these constitutional provisions did not wholly eliminate all concerns of the general sort comprehended by contemporaneous use of the term “freedom of speech,” they certainly reduced the scope for judicially-enforced federal constitutional speech protection under the speech clause, and the inclusion of a press clause in the First Amendment

12. See, e.g., Richard H. Lee, *Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention* (1787), in PAMPHLETS, *supra* note 10, at 277, 316; Rabban, *supra* note 11; Melancthon Smith, *Address to the People of the State of New York* (1787), in PAMPHLETS, *supra* note 10, at 88–115.

13. This approach, largely associated with Justice Antonin Scalia, see, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 37–47 (Princeton Univ. Press 1997) (hereinafter *MATTER OF INTERPRETATION*), turns out to be widely embraced as a starting point or as a constraint on other interpretive approaches, and it provides an essential underpinning for any serious interpretation of constitutional directives as binding sources of law. See, e.g., *Checking Value*, *supra* note 11; *Perils*, *supra* note 11; Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009); John O. McGinnis & Michael Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981); Frederick Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797 (1982); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

14. See, e.g., *Checking Value*, *supra* note 11; *Perils*, *supra* note 11; Mayton, *supra* note 11; Rabban, *supra* note 11.

(presumably to address prior restraint-licensing concerns) occupied much of what remained in this field.

Whatever is left within the contours of the freedom of speech clause, then, from the outset of American constitutional speech protection was uncertain in its detail yet certainly (along with the other Bill of Rights provisions) connected to fears of self-interested government conduct likely to produce harm not readily corrected by mechanisms independent of government.¹⁵ This provenance makes it easy to understand the paucity of cases striking down government actions as contrary to the freedom of speech clause for the first 150 years of its existence.

II. THE *NEW YORK TIMES* CASE: HISTORY'S CHAFF, FREEDOM'S CORE

Prior to *New York Times Co. v. Sullivan*, there was little question that states (subject to an "incorporated" First Amendment through the Fourteenth Amendment's Due Process clause)¹⁶ could apply defamation laws to assess penalties for libel and slander. These laws were ubiquitous before and at the time the Constitution and Bill of Rights were adopted, and no objection was made to the notion of legal accountability for defamatory statements. Further, the Supreme Court had repeatedly declared that defamatory speech was within the class of communications that lay outside First Amendment protection, most famously in *Chaplinsky v. New Hampshire*.¹⁷ Justice Murphy's opinion in *Chaplinsky* states that "the lewd and obscene, the profane, the libelous, and the insulting or

15. This does not define what is protected against government intrusion but explains the characteristics of cases that concerned the framing generation and suggests appropriate considerations behind doctrinal choices in free speech jurisprudence. See, e.g., Ronald A. Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. CIN. L. REV. 1317, 1354–81 (1988) (hereinafter *Commercial Speech*).

16. The sensible approach to analysis of the rights that became enforceable against state government abridgement by virtue of the ratification of the Fourteenth Amendment runs through the Privileges or Immunities clause, U.S. Const., amend. XIV, § 1, cl. 2, not the Due Process clause, U.S. Const., amend. XIV, § 1, cl. 3. That was not the route taken, so we live with tortured language and an oddly twisted analysis, but not necessarily an anti-constitutional result. See, e.g., *Near v. Minnesota*, 283 U.S. 697 (1931) (holding that a Minnesota law that targeted publishers of "malicious" or "scandalous" newspapers violated the First Amendment as applied through the Fourteenth Amendment).

17. 315 U.S. 568 (1942).

'fighting' words"¹⁸ comprise categories of speech whose "prevention and punishment . . . have never been thought to raise any Constitutional problem."¹⁹ That statement was repeated by Justice Frankfurter for the Court in *Beauharnais v. Illinois*,²⁰ which expanded on the exclusion of libel from the First Amendment:

Libel of an individual was a common-law crime, and thus criminal in the colonies. Indeed, at common law, truth or good motives was no defense. In the first decades after the adoption of the Constitution, this was changed by judicial decision, statute or constitution in most States, but nowhere was there any suggestion that the crime of libel be abolished.²¹

The Court's decision in *New York Times*, hence, was a marked departure from precedent. It declared that this class of speech regulations was not only in tension with the First Amendment's Free Speech Clause but, at least in respect of one set of libel cases, constituted the core case of government acts the clause proscribes. Despite historic acceptance of the government's authority to punish libel, from the founding to shortly before *New York Times*, as *Beauharnais* demonstrates, Justice Brennan's opinion elaborates reasons that a libel action brought by a public official against critics of his official conduct threatens core First Amendment values.²²

In one of his more memorable lines, Brennan said that the controversy over the Sedition Act of 1798 had "crystallized a national

18. *Id.* at 572.

19. *Id.* at 571–72.

20. 343 U.S. 250 (1952).

21. *Id.* at 254–55. Truth was accepted as a defense in civil actions for libel before it was accepted for criminal libel prosecutions, as the latter were predicated not primarily on a public interest in preventing spread of falsehoods but in public interest in preserving peace and security. *See, e.g.,* *Garrison v. Louisiana*, 379 U.S. 64, 67–70 (1964). For a different explanation of libel's roots, looking more to personal interests in reputation than to the public interest in security and conflict-avoidance, *see* Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691 (1986).

22. 376 U.S. 254, 269–83.

awareness of the central meaning of the First Amendment.”²³ His opinion cites both contemporaneous critics of the Sedition Act (principally, political opponents of the Adams government who perceived the Act as targeted at them) and modern critics (including passing comments in dissenting opinions in other cases).²⁴ Certainly, Justice Brennan’s assertion that “the attack upon [the Sedition Act’s] validity has carried the day in the court of history”²⁵ was a good deal broader and more conclusive than the evidence merited.²⁶ The opinion is highly selective in its citations and does not, for instance, note that justices cited as aware of the unconstitutionality of the Adams-era Sedition Act found later, similar legislation to be constitutional.²⁷ If the specific provisions of the 1798 law are regarded as having overstepped the mark by those who focus on the matter, that is hardly proof of the broader proposition that all would agree that any legal restraint on speech that can be analogized to seditious libel is generally understood to violate the First Amendment.

New York Times is both ahistorical in its treatment of libel as if it were of questionable constitutionality from early in the nation’s history and a bit disingenuous in its exposition. Putting aside the decision’s leap over non-constitutional grounds for setting aside the judgment (such as the difficulty of reading the advertisement at issue as actually referring to and disparaging Commissioner Sullivan personally, a matter the Court gets to after revising the constitutional grounds for assessing libel law²⁸), the opinion weaves bits and pieces of precedent, public commentary, and academic analysis together in a way that is tailored to reach a conclusion rather than to reflect more honest evaluation of the state of the law.

23. *Id.* at 273.

24. *Id.* at 274–76.

25. *Id.* at 276.

26. See, e.g., LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (Belknap Press 1960); Mayton, *supra* note 11. While the reference in *New York Times* broadly follows the account given in ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* (Harvard Univ. Press 1941), the fuller historical record casts doubt on the facile assertion that seditious libel was the focus of free speech concerns at the framing and was proscribed by the First Amendment. See, e.g., *Perils*, *supra* note 11, at 1460.

27. See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919) (opinion for a unanimous Court by Justice Holmes, joined by, among others, Justice Brandeis).

28. 376 U.S. at 288–92.

Despite these criticisms, the decision does underscore a critical concern animating the First Amendment. Brennan's basic contention regarding the Sedition Act is that prosecution for seditious libel can provide an avenue for government officials to suppress public comment by citizens when the best understanding of the Constitution and the First Amendment is that the citizenry retains the right to discuss the operation of government, to criticize the performance of public officials, and use such discussion and criticism to control the selection and behavior of the individuals who (temporarily) are entrusted with public office. His opinion connects that point to the existence of qualified immunity from liability for officials who make statements, even defamatory statements, within the course of their official duties, asserting that the citizenry should be on equal footing with respect to statements disparaging officials, limiting the immunity to statements that are not malicious, based on knowledge of falsity.²⁹ Brennan also rightly notes that this connection is bolstered by cases striking down other government actions punishing critical comment about officials' conduct, such as the use of contempt authority to punish public criticism of (or disrespect to) the judge wielding the contempt power.³⁰

New York Times' pronouncement that the First Amendment at its core protects against the risk of self-interested suppression of speech by government officials—most of all speech that concerns official conduct, that has potential significant public benefit, and that is unlikely to be provided as readily if subject to liability³¹—is the aspect of the decision that so excited Professor Kalven.³² And it is right.³³ Whether a particular

29. *Id.* at 281–82.

30. 376 U.S. at 272–73 (citing *Bridges v. California*, 314 U.S. 252 (1941)); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 331 U.S. 367 (1947); *Wood v. Georgia*, 370 U.S. 375 (1962).

31. For an explanation of the importance of these variables, see *Commercial Speech*, *supra* note 15.

32. See Kalven, *supra* note 2.

33. See, e.g., *Checking Value*, *supra* note 11; Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978) (hereinafter *Political Speech*); *Perils*, *supra* note 11; *Commercial Speech*, *supra* note 15; Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981) (hereinafter *Categories*). See also Elena Kagan, *Private Speech, Public Purpose*:

restraint is included within the speech clause's ambit or not is a separate question from identifying the principle that best explains the clause, but Justice Brennan's opinion makes a contribution by drawing together a fair number of prior cases into a coherent explanation of the central purpose of the clause and, in substantial measure, the First Amendment overall.³⁴

Kalven's article extends and sharpens the theoretical analysis, placing the considerations at the center of the decision in a context that fits with the structural provisions in the Constitution. Kalven recognizes that judges are government officials and that structural elements such as separation of powers among government authorities will not always be enough to protect core liberty interests.³⁵ Those charged with restraining other official actors may have their own reasons for failing to do so, for bending the law, or for erroneous application of existing rules.

The *New York Times* case itself is illustrative. The Alabama judicial system found that the *Times* advertisement referred to Commissioner Sullivan, though it did not mention him, his position, or the entity he worked for, and most of the actions criticized had no connection to him; the judges and jury stretched to reach decisions adverse to defendants in a racially-charged atmosphere, essentially using libel law to punish disfavored critics of the government's response to protests, as the Court's opinion makes plain (albeit as coda to its revision of constitutional law rather than as a means for decision on non-constitutional grounds).³⁶

The Role of Governmental Motive in First Amendment Doctrine, 63 U. CHI. L. REV. 413 (1996).

34. See Kalven, *supra* note 2; see also 376 U.S. at 269–70.

35. See Kalven, *supra* note 2.

36. 376 U.S. at 288–92. It is far from clear whether the defendants were laboring under a special burden because they were at odds with the governing authorities, with entrenched social norms, or because their identity (minorities and a news organization from New York) independently marked them as “outsiders.” Any of these explanations placed them in a category that created greater risk of having expression suppressed for reasons in tension with the principles enunciated in *New York Times*. For a broad exposition of, inter alia, the First Amendment's special concern for dissent and dissenters, see STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (Princeton Univ. Press 1999); but see Lawrence B. Solum, *The Value of Dissent*, 85 CORNELL L. REV. 859 (2000) (reviewing STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999) (exploring difficulties of utilizing that concern in crafting First Amendment doctrine)).

Kalven's conception would have the First Amendment function as an insurance policy, an extra safeguard against self-interested suppression of criticism where there are special risks that the established structures of democratic government will not to curb abuse of government power, whether through misapplication of legal rules or otherwise.³⁷ That is not just a defensible reason for the Amendment; it is an accurate rendition of the animating principle in its adoption. And the application of that principle to assessment of penalties for criticism of government policies and officials' conduct in office focuses on the central case for concern.

III. *NEW YORK TIMES*' LEGACY: LOOSED MOORINGS, BAD LAW

Although Justice Brennan's identification of core concerns about government speech suppression is laudable (and Professor Kalven's recapitulation of the concerns even more clearly articulates the basis for core First Amendment protections), the *New York Times* decision has had two sorts of unfortunate effects on the law.

First, the Court adopted a rule that, by shifting the inquiry to the intentions of those whose statements defame public officials and requiring "actual malice" in the form of knowledge that the defamatory statements were false, generated several practical problems. It has (paradoxically) encouraged some classes of plaintiffs to file suit *because* of the difficulty of succeeding, has inflated the damages awarded when plaintiffs do succeed, has increased litigation costs, and has at least along some margins reduced incentives for accurate reporting.³⁸ These are serious problems. Yet, in order to get a true picture of the decision's practical impact, the costs associated with these problems must be balanced against the benefits of sturdier insulation against socially wasteful recoveries and reduced inhibitions on some useful speech critical of public of-

37. See Kalven, *supra* note 2.

38. See, e.g., David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487 (1991); Ronald A. Cass, *Principle and Interest in Libel Law After New York Times: An Incentive Analysis*, in *THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS* 69 (1989) (hereinafter *Incentive Analysis*); Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782 (1986); William P. Marshall & Susan Gilles, *The Supreme Court, the First Amendment, and Bad Journalism*, 1994 SUP. CT. REV. 169 (1994). See generally RODNEY A. SMOLLA, *SUING THE PRESS* (Oxford Univ. Press 1986).

ficials. I have written before about some of the practical effects of *New York Times*;³⁹ they are not, however, the focus of this essay.

A. Casting Off: Principle Abstracted from Precedent

The other class of unfortunate effects from the *New York Times* decision concerns legal doctrine. The decision's strength in First Amendment theory was matched by its weakness in judicial decision-making, particularly its infidelity to decisional constraints evidenced in Brennan's casting off the lines of historical understanding of the Amendment's meaning. With long-accepted laws in areas consistently excepted from the Amendment's reach now in play, changes in the law almost certainly would not stop with the *Times* decision—and did not. *New York Times* encouraged theorizing about what the Amendment meant by reference to principle extracted from precedent; that exercise proved rather more liberating than reliance on historically accepted understanding (admittedly not a cast iron constraint, but still one with more drag than reasoning from abstract principle).

Almost immediately things started going off-track. In a series of cases on privacy and defamation, the Court showed its preference for free-form balancing of considerations such as the plaintiff's ability to gain access to public communications media to disseminate his or her views, the significance of the individual in shaping events of importance to the public, or the interest of the public in the plaintiff's life, actions, and views.⁴⁰ At first, the Court only took baby steps away from its *New York Times* reasoning. In *Rosenblatt v. Baer*,⁴¹ for instance, the Court expanded the limitations of *New York Times* by restricting constitutionally permissible inferences about whether comments actually referred to a particular individual and announcing that who qualified as a "public official" would be determined by reference to the principles underlying the Speech and Press Clauses.⁴² In concluding that a supervisor of a county-owned recreation area hired by the county commissioners could be a public official covered by the *New York Times* rule, the justices tied their

39. See *Incentive Analysis*, *supra* note 38.

40. See, e.g., *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

41. 383 U.S. 75 (1966).

42. *Id.* at 79–86.

reasoning back to observations about the centrality of preventing suppression of criticism of current holders of government power:

Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the “public official” designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.⁴³

Not long after, however, the justices moved more boldly away from that limiting focus. In *Curtis Publishing Co. v. Butts*,⁴⁴ the majority agreed that the *New York Times* case’s formula prescribing limits on libel judgments against public officials should apply as well to judgments against “public figures.”⁴⁵ Chief Justice Warren explained:

[A]lthough they are not subject to the restraints of the political process, “public figures,” like “public officials,” often play an influential role in ordering society. And surely as a class these “public figures” have as ready access as “public officials” to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of “public officials.”

43. 383 U.S. at 85 (citation omitted).

44. 388 U.S. 130 (1967).

45. See *id.* at 162–65 (Warren, C.J., concurring); *id.* at 170–72 (Black & Douglas, JJ., concurring in part and dissenting in part); *id.* at 172 (Brennan & White, JJ., concurring in part and dissenting in part).

The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct.⁴⁶

The recognition of the Court's *New York Times* decision that penalties for criticism of the government constituted the special evil that concerned the framing generation was replaced in the Chief Justice's opinion with the observation that "[i]ncreasingly in this country, the distinctions between governmental and private sectors are blurred" because of the "high degree of interaction between the intellectual, governmental, and business worlds" since World War II.⁴⁷ Those views were adopted as well by Justices Brennan, White, Black, and Douglas. Justices Black and Douglas, however, had a broader reason why the differentiation of public officials from public figures was of no moment: abstracting heroically from the actual concerns of those who wrote and ratified the First Amendment and from the contemporary understanding of its import, Justices Black and Douglas concluded that "the First Amendment was intended to leave the press free from the harassment of libel judgments" regardless of the identity of the plaintiff, the truth of the libelous statement, or the subject the statement concerns.⁴⁸

Similar reasoning led the Court to find that the First Amendment also limits suits by purely private individuals—those who are neither public officials nor public figures—in *Rosenbloom v. Metromedia, Inc.*,⁴⁹ and *Gertz v. Robert Welch, Inc.*⁵⁰ Writing for the plurality in *Rosenbloom*, Justice Brennan observed that, although the constitutional constraints identified in *New York Times* were "in the context of defamatory falsehoods about the official conduct of a public official, later decisions have disclosed the artificiality, in terms of the public's interest, of a simple distinction between 'public' and 'private' individuals or institutions .

46. 388 U.S. at 164 (Warren, C.J., concurring).

47. *Id.* 163.

48. *Id.* 172 (Black & Douglas, JJ., concurring in part and dissenting in part).

49. 403 U.S. 29 (1971).

50. 418 U.S. 323 (1974).

...⁵¹ For Brennan now, the First Amendment limited libel recoveries in any case “involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous”—and decidedly without regard to whether they hold public office.⁵²

Justice Powell, writing for the majority in *Gertz*, declared that, at least for speakers classified as part of “the communications media,”⁵³ a different rule must apply. Public officials and public figures, Powell says, both have more opportunity to rebut libels and less desert for sympathy on being the victims of libel, given the likelihood that they have voluntarily thrust themselves into positions where they exercise substantial power (of some sort) or seek to influence public affairs (in some way).⁵⁴ The *Gertz* majority concluded that “the press and broadcast media” should not face strict liability for any defamation, even defamatory statements not deemed to involve “an issue of public or general interest[.]” but that in setting bounds for defamation recoveries by private figures states are free to depart from the *New York Times* rule.⁵⁵ The opinion purports to balance competing public interests in protecting the undefined class of writers and speakers comprising “the communications media,” on the one hand, and, on the other hand, in safeguarding the good names and reputations of individuals who have not succeeded in endeavors that bring fame or fortune, nor sought public office, nor engaged in conduct that makes it likely they intended to influence important public matters.⁵⁶ The categories of speakers and subjects of speech that the decision comprehends may be imprecisely defined, but

51. 403 U.S. at 41.

52. *Id.* at 44.

53. 418 U.S. at 345.

54. *Id.* at 344–46.

55. *Id.* at 346–48.

56. *Id.* at 344–48. The opinion does not hide its method of arriving at a conclusion, speaking of the need to identify the right balance “between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury,” 418 U.S. at 342, or the “balance between the needs of the press and the individual’s claim for compensation for wrongful injury,” 418 U.S. at 343; the decision speaks of “[o]ur accommodation of the competing values at stake in defamation suits by private individuals,” 418 U.S. at 348, declares that the Court’s “approach provides a more equitable boundary between the competing concerns involved here[.]”, 418 U.S. at 347–48, and explains “here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment[.]” 418 U.S. at 349.

the constitutional grounds for the Court's balancing are far more difficult to divine.⁵⁷

B. Sailing with the Wind: Free Speech and Campaign Finance

Having encouraged decision-making not by fitting within established precedent and textual command as closely as possible but by reasoning from the principles found within what the justices now saw as the right understanding of the relevant clause's legal purpose, the Court's decisions following *New York Times* ceded the ground claimed in that case for the core of First Amendment jurisprudence. The *New York Times* case's insight that criticism of government and government officials "is at the very center of the constitutionally protected area of free discussion"⁵⁸ suggests special skepticism about government restrictions aimed at speech related to officials' performance in office and, what is virtually inseparable, selection of officials to hold public office.⁵⁹ To be sure, the justices have not abandoned concern about governmental burdens on speech critical of government.⁶⁰ However, majorities have embraced the notion that government regulation of conduct intertwined with, supporting, and funding speech critical of government—regulation that places special burdens on that speech in the election context, including in contests to replace incumbents *because* of their conduct in office—could be acceptable if the regulation reflects good motives and

57. See, e.g., *id.* at 369–404 (White, J., dissenting). Justice White's dissent makes that point sharply, noting that "[s]cant, if any, evidence exists that the First Amendment was intended to abolish the common law of libel," *id.* at 381, and that "the Court apparently finds a clean slate where in fact we have instructive historical experience[.]" *id.* at 387.

58. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

59. See, e.g., Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 1045 (1985); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 34 (1971).

60. See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 219 (1989); *Federal Elec. Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007).

does not go too far, a reflection of the move from precedent to balancing.⁶¹

The Court's 1976 decision in *Buckley v. Valeo*⁶² is exemplary. The *Buckley* decision, while striking down limitations on certain election-related expenditures, upheld restrictions on contributions used to finance speech in election campaigns on the view that such restraints did not amount to a limitation on speech or that the government's interest in avoiding corruption or the appearance of corruption outweighed the interference with speech.⁶³ In subsequent cases, the justices have balanced these "corruption" concerns (fears of conduct that disrupts acceptable political process and fears that perceived corruption could harm democratic governance by discouraging participation, among other things) against the degree of interference they find with protected speech.⁶⁴ The "corruption" that justifies speech restriction has not been clearly articulated by the justices who are persuaded by this argument,⁶⁵ and the balance be-

61. See, e.g., *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by Citizens United v. Federal Elec. Comm'n*, 558 U.S. 310 (2010); *Federal Elec. Comm'n v. Colorado Repub. Fed. Campaign Comm.*, 553 U.S. 431 (2001); *McConnell v. Federal Elec. Comm'n*, 540 U.S. 93 (2003), *overruled in part by Citizens United v. Federal Elec. Comm'n*, 558 U.S. 310 (2010). Of course, the ambit of the regulation of speech and of expenditures that primarily facilitate speech in the election context is not limited to speech critical of government or of current government officials, and the reasons for the regulation are not confined to concerns about the criticism of such officials. But a good deal of the impact of the regulation concerns restrictions on speech that is critical of government officials; the regulations have the capacity and, in all likelihood to at least some extent, the design to advantage current officials and to disadvantage opponents who also are apt to be critical of those officials. See, e.g., BRADLEY A. SMITH, *UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM* 66–70 (Princeton Univ. Press 2003) (discussing incumbent protection aspect of campaign finance regulation).

62. 424 U.S. 1 (1976).

63. *Id.* at 23–38.

64. See, e.g., *Federal Elec. Comm'n v. Nat'l Conserv. Polit. Action Comm.*, 470 U.S. 480 (1985); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by Citizens United v. Federal Elec. Comm'n*, 558 U.S. 310 (2010); *Colorado Repub. Fed. Campaign Comm. v. Federal Elec. Comm'n*, 518 U.S. 604 (1996); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000); *Federal Elec. Comm'n v. Colorado Repub. Fed. Campaign Comm.*, 533 U.S. 431 (2001); *McConnell v. Federal Elec. Comm'n*, 540 U.S. 93 (2003).

65. See, e.g., Ronald A. Cass, *Money, Power, and Politics: Governance Models and Campaign Finance Regulation*, 6 SUP. CT. ECON. REV. 1 (1998) [hereinafter *Governance Models*] (explaining the different possible models of government that

tween speech and other concerns is sufficiently unstructured to allow considerable variation from justice to justice and case to case.⁶⁶ Judge Frank Easterbrook complained of the lack of guidance these cases provide to lower courts (among others), rightly suggesting that there are plenty of campaign finance cases that might find “five Justices [who] will go along” with outcomes boldly inconsistent with established principles of constitutional law.⁶⁷ The Supreme Court’s decision in *McConnell v. Federal Election Commission*,⁶⁸ upholding an array of explicit and far-reaching restrictions on speech about candidates for election to federal office, may be the best evidence for Judge Easterbrook’s complaint.⁶⁹

In *Citizens United v. Federal Election Commission*,⁷⁰ the Court (at least temporarily) took a different turn, as a majority of the Court struck down a prohibition on use of funds for “electioneering” speech by corporations or unions—speech referring to a clearly identified candidate, promoting election or defeat, made within 30 days of an election.⁷¹ The prohibition mostly affected speech by small corporations and non-profit enterprises; although in theory the prohibition swept more broadly, larger profit-seeking corporations tend to be politically risk-averse for fear of offending potential customers.⁷² Despite condemnation by an array of politicians, pundits, and professors, the Court’s decision has at its core the same understanding that animated the *New York Times* Court: that government action is most suspect, and cuts most directly against

might inform the justices’ decisions and the interplay between those models and notions of “corruption,” which seems for many justices to encompass a great deal of conduct that advantages outcomes preferred by one or another sort of group but does not readily fit core conceptions of “corruption”).

66. Compare, e.g., *Colorado Repub. Fed. Campaign Comm. v. Federal Elec. Comm’n*, 518 U.S. 604 (1996), with *Federal Elec. Comm’n v. Colorado Repub. Fed. Campaign Comm.*, 533 U.S. 431 (2001).

67. See *Majors v. Abell*, 361 F.3d 349, 358 (7th Cir. 2004) (Easterbrook, J., *dubitante*).

68. 540 U.S. 93 (2003).

69. See *id.*

70. 558 U.S. 310 (2010).

71. *Id.*

72. See, e.g., Vicki Kemper & Deborah Lutterbeck, *The Country Club*, 22 COMMON CAUSE MAG., MAR. 22, 1996, at 16, available at <http://legacy.library.ucsf.edu/tid/msx56b00/pdf;jsessionid=9412CBB76BB0659D28FD9FE34121264F.tobacco04>.

First Amendment commands, when it favors or disfavors speakers or messages related to the performance or selection of government officials.⁷³ Those are the regulations that are most likely to be self-interested, least likely to advance public interests in ways divorced from officials' personal gain, and most apt to unduly discourage speech of public value.⁷⁴ In this sense, *Citizens United* should be lauded as a return to the values that Harry Kalven celebrated in *New York Times* as well as to a mode of interpretation more likely to provide a firmer anchor for protecting against risky government interference with speech.

Critics of *Citizens United*—a large and very vocal crowd—were aghast that the Court would invalidate legal provisions intended to reduce the potential influence of corporations and unions (especially corporations) on elections.⁷⁵ The critics, including the dissenting justices, insisted that in the balance of social concerns, fears of corporate domi-

73. See 558 U.S. at 339–41, 371–72.

74. See, e.g., Cass, *Governance Models*, *supra* note 65, at 56–57. See also Blasi, *Checking Value*, *supra* note 11; Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 54–63 (1981); BeVier, *Political Speech*, *supra* note 33; Cass, *Commercial Speech*, *supra* note 15, at 1368–73; Kalven, *supra* note 2; Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1 (1989). Related concerns respecting the self-interest of promoters of legislation restricting campaign finance and expenditure and the implementation of campaign finance regulations are found in Bradley A. Smith, *Campaign Finance Reform's War on Political Freedom*, CITY J., Jul. 1, 2007, available at <http://www.city-journal.org/html/ws2007-07-01bs.html>.

75. See, e.g., Eugene J. Dionne, Jr., *The Citizens United Catastrophe*, WASH. POST, Feb. 5, 2012, available at http://www.washingtonpost.com/opinions/the-citizens-united-catastrophe/2012/02/05/gIQAtoEfsQ_story.html; Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. REV. BOOKS, MAY 13, 2010, at 8, available at <http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy/?pagination=false>; Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011); Lawrence Norden, *How to Put US Voters Back in Charge of Their Democracy*, CHRISTIAN SCI. MONITOR, Jan. 21, 2014, available at <http://www.csmonitor.com/Commentary/Opinion/2014/0121/How-to-put-US-voters-back-in-charge-of-their-democracy>; Jamie Raskin, "Citizens United" and the Corporate Court, THE NATION, Oct. 8, 2012, available at <http://www.thenation.com/article/169915/citizens-united-and-corporate-court#>.

nance of election discourse were more serious and better grounded than fears of official use of the laws to suppress critical speech.⁷⁶

Yet that criticism, built on a framework of assumptions about how to balance speech interests against other interests, misapprehends what the First Amendment does. True enough, the Amendment has never been understood to constitute a blanket proscription against regulation of speech, even of speech expressing opposition to government, in all forms and at all costs—notwithstanding absolutist assertions of scholars such as Alexander Meiklejohn and judges such as Justice Hugo Black.⁷⁷ Even so, the protection afforded by the First Amendment at its core cannot be subject to the sort of case-by-case balancing of interests that is suggested by advocates of campaign finance reform.

Under any approach to interpretation of the First Amendment, other interests can overwhelm concerns about unwise suppression of speech in particular instances, even speech that is related to government's operation. So, for example, prohibitions on disclosure of troops' movements and locations in war-time are universally acknowledged as legitimate limitations on speech.⁷⁸ But the legitimacy of this sort of government control is not based on a relatively free-form balancing of inter-

76. See, e.g., *Citizens United*, 558 U.S. at 394–95, 469–75 (Stevens, J., concurring in part and dissenting in part) (joined by Ginsburg, Breyer & Sotomayor, JJ.); Hasen, *supra* note 75; James Kwak, *Citizens United v. FEC Turns 2—And It's Still Wrong*, THE ATLANTIC, Jan. 20, 2012, available at <http://www.theatlantic.com/business/archive/2012/01/citizens-united-v-fec-turns-2-and-its-still-wrong/251706/>. See also President Barack Obama, *State of the Union Address*, 156 CONG. REC. H414, Jan. 27, 2010 (“[T]he Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. I don’t think American elections should be bankrolled by America’s most powerful interests, or worse, by foreign entities. They should be decided by the American people.”).

77. For a statement of the absolutist position, see Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961) (a position that requires contortions to save speech by the for-profit news media even as it leaves unprotected speech integrally related to political decision-making when communicated by individuals, such as lobbyists, paid to make the case for others); see also Edmund Cahn, *Justice Black and First Amendment “Absolutes”: A Public Interview*, 37 N.Y.U. L. REV. 549 (1962) (“[The First Amendment] says ‘no law’, and that is what I believe it means.”).

78. See, e.g., Thomas I. Emerson, *Freedom of Expression in Wartime*, 116 U. PA. L. REV. 975, 979 (1968); GEOFFREY STONE, *FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (W.W. Norton 2004).

ests. It is grounded in appreciation that the category of speech consisting of public revelation of factual information whose secrecy is essential to national security is outside the ambit of expression protected by the First Amendment;⁷⁹ disclosure of information that puts lives of our soldiers at risk does not appreciably advance discourse about governance nor call government officials to account, and while secrecy can be inimical to public accountability, fears about protection of such sensitive factual information played no role in the framing of the Free Speech Clause and disclosure of this sort of information decidedly was not understood at the time to fall within the Speech Clause's terms.

That approach, resting on the understanding of the clause's meaning and the categories of speech restraints proscribed, is both more likely to provide clear bounds around the range of government actions that are permitted and around the speech that is protected.⁸⁰ Some scholars and judges have relied on forms of "categorical balancing" that are not radically different from approaches based on the historical understanding of the Amendment's scope to identify protected categories; but balancing in general, and case-by-case balancing in particular, provides less secure safeguards against the sorts of impositions that the Amendment was intended to preclude.⁸¹ When freedom from self-interested suppression of speech that is potentially threatening to government officials turns on how a majority of judges weighs the interests that go into

79. See, e.g., Emerson, *supra* note 78, at 979–80 (arriving at this conclusion, however, through the redefinition of the disclosure as "action" rather than "expression").

80. See, e.g., Schauer, *Categories*, *supra* note 33; SCALIA, *MATTER OF INTERPRETATION*, *supra* note 13, at 37–47. While the approach generally requires some abstraction from the narrow set of situations whose treatment under the text was understood at the time of the rule's adoption, categorization within the structure of the rule's initial understanding tends to be more constraining—to admit to a narrower range of potential outcomes—than most alternatives, especially *ad hoc* balancing.

81. See, e.g., T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L. J.* 943 (1987); John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 *HARV. L. REV.* 1482 (1975); Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 *CALIF. L. REV.* 935 (1968); Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 *HASTINGS L.J.* 711 (1994); Schauer, *Categories*, *supra* note 33.

the balance neither consistency nor strong protections of speech should be expected. The campaign finance cases from *Buckley* through *McConnell* right up to *Citizens United* (and perhaps beyond) certainly fit that prediction.

CONCLUSION

For a case that prompted so much adulation and excitement at the time it was announced—and that still is much admired by professors, reporters, and commentators—*New York Times Co. v. Sullivan* has been far from the successful turning point in the law its champions expected. While it aptly captured a truth about the fears and hopes that led to adoption of the First Amendment, pinpointing the special risks associated with suppression of speech critical of government and government officials, the decision rested on the soft ground of balancing and abstraction rather than the firmer (though far from rock-solid) soil of history, accepted textual understanding, and precedent. What followed this change in interpretive method fit well Lord Macaulay's prediction that the American Constitution would turn out to be "all sail and no anchor."⁸²

The move to a less constrained mode of constitutional interpretation led quickly to a series of decisions that moved away from seeing the First Amendment in terms of what *New York Times* so eloquently described as the heart and soul of free speech concerns, the "central meaning" that Professor Kalven exalted. The Court's evolving balance of considerations erred in leading it to strike down whole bodies of law long accepted as consistent with First Amendment concerns—accepted as such before the First Amendment's adoption, at the time of its assimilation into the Constitution, and for almost 175 years after that as well.

Much more troublesome, balancing different values allowed the Court to approve restrictions of political speech and of conduct integrally connected to and supporting such speech in exactly the settings that

82. Letter from Lord Thomas B. Macaulay to Henry S. Randall (May 23, 1857), available at <http://www.nytimes.com/1860/03/24/news/macaulay-democracy-curious-letter-lord-macaulay-american-institutions-prospects.html>. Lord Macaulay feared that increasing democratization of the American republic would lead eventually to the destruction of liberty and a fall of America akin to the fall of Rome to the barbarians. *Id.* The Macaulay quote is a favorite of my former colleague and long-time friend Glen Robinson, who brought it to my attention too many years ago.

should be seen as most likely to produce government action serving officials' self-interest and reducing speech that serves public interests by bringing criticisms of government to light. The threat to speech at issue in the campaign finance cases fits the paradigm of core First Amendment concerns far more readily than the class of speech that prompted Justice Brennan's flight of rhetorical fancy in *New York Times*. Campaign finance laws regulate speech that informs the public about official behavior in the context of election contests, the most powerful and immediate way of policing public officials, while libel laws target speech that is likely to be false as well as harmful to particular individuals.

Conceptions of the First Amendment that support, inform or explain these decisions are at odds with the understanding of what the Amendment meant when adopted and for generations after that, and the method of deciding whether government conduct is permitted or prohibited leaves the core of constitutionally protected speech at risk. It remains to be seen whether *Citizens United* signals a victory for the more traditional, and traditionally grounded, vision of the First Amendment and a more predictable demarcation of the limits of speech regulation for the future or, instead, a temporary, short-lived triumph for that vision before it returns to the sidelines. Maybe—just maybe—renewed attention to the central concerns highlighted in *New York Times* and to what went wrong following *New York Times* will provide both inspiration and caution to those who interpret and who write about the Constitution. Should we meet again for the 75th anniversary of the *Times* case to see?

