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Introduction

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Free Speech and Press in the Modern Age: Can 20th Century Theory Bear the Weight of 21st Century Demands?

Introduction

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As is likely to be the case at the dawn of every new century, at the start of the twenty-first America is facing new and emerging challenges to its commitment to freedom of speech and press. At the 2008 *Pepperdine Law Review* Symposium, we assembled many of the leading free speech scholars in this country, as well as distinguished jurists, government officials, and news media leaders,[1] to discuss and focus on three of the most prominent. The first set of challenges is that presented by extremist group speech, and especially terrorist propaganda, recruiting materials, and operational speech, as well as the government's responses to them. The second concerns the challenges presented by modern political campaigns and the mushrooming solicitations, contributions, and expenditures of money connected with conducting and participating in them. The third group of problems involves those engendered by our society's mass migration to digital, and increasingly interactive, platforms of communication, including the wrenching changes being experienced by the traditional news media.

Our experts were asked to address whether the free speech doctrines and theories developed by the U.S. Supreme Court in the twentieth century remained up to the task of striking the proper balance among the competing interests and values involved in addressing these new challenges of the modern age. In this special symposium edition of the *Pepperdine Law*

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1. We are very grateful for the participation in this symposium of then-*Los Angeles Times* publisher David Hiller, Chief Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit, then-Federal Communications Commission Chairman Kevin Martin, and Professors William Van Alstyne and Eugene Volokh. Although these participants did not submit symposium essays for publication, they made invaluable contributions to our discussions that both illuminated and sharpened the important topics which were considered.

Review, we present our scholars' responses. Geoffrey Stone leads off and builds a remarkable bridge for us to cross sure-footedly into the twenty-first century by summarizing ten key judgments made by the Court during the twentieth century that give modern free speech doctrine its essential shape and substance.[2] Stone suggests that by gradually building that doctrine using practical experience and common sense judgments, the Court has equipped us well to face new challenges presented by modern developments. As he views it, "by the end of the twentieth century the Court . . . had for the most part built a sensible and reasonably effective set of principles for sorting First Amendment issues and for reaching reasonably sound and predictable outcomes."[3]

Taking on the issue of extremist speech, Fred Schauer, Rodney Smolla and Nadine Strossen provide valuable and varied perspectives on that subject. Schauer provides us with an insightful and sobering caution that the search for truth theory used by the Court to justify much free speech doctrine, and in particular its broad tolerance for potentially dangerous speech such as terrorist propaganda that could incite others to commit violent acts, may contain questionable empirical assumptions about the capacity for true ideas to triumph over false ones.[4] If this is so, then we might wish to think harder and more systematically about the costs and benefits associated with a free speech principle that prefers a "better to risk the danger than suppress the speech" approach, as opposed to one grounded in the maxim that it is "better to be safe than sorry."[5]

Next, Rod Smolla artfully traces the Court's twentieth century evolution away from an early conception that there are inherently dangerous categories of speech, towards the principle that sufficient harm from speech must be demonstrated before it can be excised from the marketplace of ideas.[6] Although Smolla focuses primarily on the categories of profane and libelous speech, he teaches us that any attempt to move towards a more precautionary approach to potentially dangerous speech—as Schauer argues might be justified in some circumstances—could face resistance from this counter-trend in modern free speech law.

Nadine Strossen wraps up this segment with a poignant reminder that threats to free speech do not arise exclusively from challenges posed by

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2. Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273 (2009).

3. *Id.* at 299.

4. Frederick Schauer, *Is it Better to Be Safe than Sorry?: Free Speech and the Precautionary Principle*, 36 PEPP. L. REV. 301 (2009).

5. *Id.* at 307–313, 325–331.

6. Rodney A. Smolla, *Words "Which By Their Very Utterance Inflict Injury": The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317 (2009).

extremist groups, but can also emerge from disproportionate governmental responses to those threats.[7] Strossen not only points to frequently made complaints about excessive government secrecy and overly intrusive surveillance programs, but also argues that the very branch of government charged with protecting free speech rights, particularly in "pathological" times,[8] is abdicating that duty by imposing undue procedural hurdles to conducting substantive review of overreaching action by the Executive Branch.[9] Resisting such government action or inaction, Strossen concludes, is also vital to the enduring health of our democracy.[10]

Moving to the topic of campaign finance regulation, Sam Issacharoff contributes an illuminating essay concerning the lack of a logical animating principle underlying our current constitutional treatment of this issue.[11] Issacharoff describes how many major Western democracies create time periods preceding elections that are heavily regulated to provide an equal opportunity for different views to be expressed, and to prevent those with greater financial means from overwhelming the electorate with campaign propaganda. These systems contrast with that created in America by the Court where, by equating free spending with free speech, it has essentially guaranteed that election periods will be free-for-alls of campaign fundraising and spending. It is curious if not illogical then, according to Issacharoff, that recent major reform efforts in this country have moved towards the adoption of a more regulated electioneering period without the constitutional commitments to allow it to achieve the purposes for which it is normally designed.

My essay follows in which I examine the extent to which the theory relied on by the Court to justify its approach to assessing the constitutionality of campaign finance regulation comports with the realities of modern electioneering and new findings in political psychology regarding the impact of electoral communications on voter decision making.[12] I argue that the Court's theory and attendant doctrine bear little resemblance to what

7. Nadine Strossen, *The Regulation of Extremist Speech in the Era of Mass Digital Communications: Is* Brandenburg *Tolerance Obsolete in the Terrorist Era?*, 36 PEPP. L. REV. 361 (2009).

8. Stone, *supra* note 2 at 278.

9. *See* Strossen, *supra* note 7, at 364–365.

10. *See id*, at 372.

11. Samuel Issacharoff, *The Constitutional Logic of Campaign Finance Regulation*, 36 PEPP. L. REV. 373 (2009).

12. Barry P. McDonald, *Campaign Finance Regulation and the Marketplace of Emotions*, 36 PEPP. L. REV. 395 (2009).

actually occurs on the ground in modern elections, both in terms of the nature of electoral communications and the way in which they influence voter decisions. A more accurate constitutional model would, I conclude, justify greater regulatory oversight of election-related fundraising and spending. In contrast to Issacharoff and me, Lillian BeVier is more sanguine about the Court's approach in this area.[13] Indeed, she makes a rousing defense of it based on the notion that those challenging freedom, and particularly the freedom to raise funds and spend them in connection with political campaigns, bear the burden of showing that constraints on those liberties can be justified. In her view, critics of the Court in this area and proponents of electoral reform have failed to meet that burden.

Lastly (but certainly not least), Jack Balkin and Scot Powe explore free speech and press issues arising out of our world's transition to digital platforms of communication. Balkin makes a powerful argument that the furtherance of free speech values and goals in the future will have less to do with the Court and the First Amendment law it makes, and more to do with the legislative, regulatory, and technological decisions our society makes.[14] Hence, Balkin suggests, we need to take great care that in fashioning the knowledge and information policy that will be the product of these decisions, they continue to promote traditional free expression goals and values such as "the promotion and dissemination of knowledge and opinion."[15]

We are pleased that Scot Powe then comes out of retirement on mass media law analysis to ask whether Geof Stone's commendation of the Court's twentieth century free speech work product is altogether justified, at least in the area of broadcast regulation. In a playful but pointed romp through the Court's *Red Lion* and *Pacifica* decisions, Powe answers an emphatic "no."[16] Among other things, he argues that neither spectrum scarcity nor signal pervasiveness could justify the Court's decisions to accord broadcast media less than full free speech protection, which becomes even more apparent as we head further into the digital age.

We are fortunate to have assembled such an eminent group of experts to discuss these major issues of free expression in the modern age. Although we recognize these questions cannot be fully answered here, we hope this collection of articles and essays will provide a good trailhead for future expeditions that will surely follow to revisit them.

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13. Lillian R. BeVier, *Can Freedom of Speech Bear the Twenty-First Century's Weight?*, 36 PEPP. L. REV. 415 (2009).

14. Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427 (2009).

15. *Id. at* 428.

16. L.A. Powe, Jr., Red Lion *and* Pacifica*: Are they Relics?*, 36 PEPP. L. REV. 445 (2009).