Michigan Law Review

Volume 101 | Issue 6

2003

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Recommended Citation
Christina E. Wells, *Discussing the First Amendment*, 101 Mich. L. Rev. 1566 (2003).
Available at: https://repository.law.umich.edu/mlr/vol101/iss6/9

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DISCUSSING THE FIRST AMENDMENT

*Christina E. Wells**

ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA. Edited by *Lee C. Bollinger* and *Geoffrey R. Stone*. Chicago: The University of Chicago Press. 2002. Pp. x, 330. Cloth, $35.

Since the First Amendment's inception, Americans have agreed that free expression is foundational to our democratic way of life.[1] Though we agree on this much, we have rarely agreed on much else regarding the appropriate parameters of free expression. Is the First Amendment absolute or does it allow some regulation of speech? Should the First Amendment protect offensive speech, pornography, flag-burning? Why do we protect speech — to promote the search for truth, to promote self-governance, or to protect individual autonomy?[2] History is rife with disagreements regarding these issues to which there are no definitive answers. Certainly, the text of the First Amendment does not help;[3] nor do the contemporaneous but conflicting historical documents.

In light of the First Amendment's textual generality, the Supreme Court has had to make up free speech doctrine as it goes along, using whatever tools it can find. The result is a complex set of legal rules regulating speech and expressive conduct that evolved over the last century, which has endured its fair share of criticism. Increasingly, scholars claim that the Court's free speech decisions are theoretically incoherent[4] or untrue to the First Amendment's original

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1. DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 13 (1997); *see also* FIRST AMENDMENT CENTER, STATE OF THE FIRST AMENDMENT 2002, at 14, 23 (2002) (showing that Americans currently believe that First Amendment protections are essential to our way of life).

2. *Compare* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT 24-27 (1948) (self-governance theory), *with* David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974) (self-fulfillment theory), *and* Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213-18 (1972) (autonomy theory).

3. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

4. *See, e.g.*, Robert C. Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995).

roots.[5] Criticism of the Court is also apparent at the public level, albeit in a more indirect manner. Recent polls show that the American public, although valuing free expression in the abstract, increasingly believes that the "First Amendment goes too far in the rights it guarantees," a trend exacerbated by security concerns arising after the September 11th terrorist attacks.[6]

The Court has certainly left itself open to criticism. First Amendment doctrine *is* complex. Furthermore, the Supreme Court often fails to support adequately its decisions with sound reasoning, instead relying on rhetoric and/or selective precedent.[7] Finally, the increasing number of fractured (and sometimes rancorous) opinions suggests a lack of coherence to Supreme Court decisions or that the Court is more political than judicial in nature.[8] But to say that First Amendment doctrine is increasingly complex and controversial is not to say that it is incoherent or that free speech rights have gone too far. True, Supreme Court resolutions of individual, hard cases are often easily criticized. Nevertheless, the structure of our free speech law makes sense, providing a useful framework for resolving most disputes and understanding when and why speech should be protected. Moreover, the complexity and controversy associated with First Amendment doctrine are virtues rather than failings because they reflect the ongoing dialogue and experimentation that is as critical to constitutional adjudication as it is to democracy.[9]

At a time when the First Amendment is in danger of losing its cachet, *Eternally Vigilant*, an eclectic set of essays edited by Lee Bollinger[10] and Geoffrey Stone,[11] reminds us of the importance of

5. *See, e.g.*, ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 140-53 (1996); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20-35 (1971).

6. FIRST AMENDMENT CENTER, *supra* note 1, at 2, 9-10. While seventy-five percent of respondents to the First Amendment Center's survey believed that free speech was essential to our way of life, in response to concrete questions regarding particular speech, sixty-four percent believed that people should not be allowed to say racially offensive things in public and forty-six percent believed that the Constitution should be amended to ban desecration of the United States flag. In both circumstances, public opinion deviates from existing Supreme Court precedent.

7. *See* Christina E. Wells, *Of Communists and Anti-Abortion Protestors: The Consequences of Falling into the Theoretical Abyss*, 33 GA. L. REV. 1, 5-6 (1998).

8. *Id.* at 5 n.20; Ronald Dworkin, *The Great Abortion Case*, N.Y. REV. BOOKS, June 29, 1989, at 49, 53 (noting the increasingly "cynical" view that "constitutional law is only a matter of which president appointed the last few justices").

9. For a more in-depth discussion of the fluid nature of constitutional adjudication, see generally DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS (2002).

10. Professor of Law & President, Columbia University.

11. Harry Kalven, Jr., Distinguished Service Professor of Law, The University of Chicago Law School.

dialogue and experimentation in First Amendment doctrine. Rather than attempt to bring a rigid coherence to our system of free expression, *Eternally Vigilant* locates the heart of the First Amendment in its very complexity and embraces the resulting debate as part and parcel of the First Amendment itself. As the editors note, their goals are to "elucidate some of the more perplexing challenges and mysteries" associated with the protection of free expression and "inspire the kind of thought, deliberation, and debate that are essential" to free and open discourse (p. x).

Eternally Vigilant reinforces the positive dialogic aspects of the First Amendment in several ways. First, the diverse essays cover a variety of topics and viewpoints. This variety of lenses with which to view the First Amendment allows far greater access to the free speech debate than any single theory of free expression possibly could. Second, the often-conflicting essays aptly demonstrate that dialogue and debate about the First Amendment is an affirmative good in itself. Finally, many of the essays examine various potential influences on the creation and evolution of First Amendment law. They thus take free speech principles out of the isolated discussions of abstract theory and doctrine that so often dominate free speech scholarship. Such examination dramatically adds to our understanding and analysis of why the Court sometimes protects speech when it is controversial or counterintuitive to do so.

Despite its many good qualities, *Eternally Vigilant* nevertheless suffers from a flaw common to First Amendment scholarship — a tendency to give short shrift to study of the social, psychological, historical, and political factors that influence the Court's decision-making and, thus, free speech doctrine. Discussion including these influences would facilitate an even greater understanding of free speech doctrine and the principles that underlie it.

I. ETERNALLY VIGILANT

Constructed primarily around ten essays written by the premier free speech scholars of our time, *Eternally Vigilant* begins with a colloquy between its two editors, themselves heavy hitters in the First Amendment field, that is designed to "introduce nonexperts to the labyrinth of theory, doctrine, and social texture that mark the jurisprudence of the First Amendment and the essays in [the] book" (p. x). It thus summarizes the history and foundations of free speech law, focusing initially on several post-World War I cases in which the Supreme Court, facing the First Amendment implications of seditious speech and attempts to punish it, generated the origins of modern

doctrine.[12] It then follows the evolution of this original doctrine through the twentieth century, explaining how it relates to various aspects of modern free speech law, including the Supreme Court's rules with respect to content-based and content-neutral regulations (pp. 15-16, 19-21), the legal issues associated with the Court's designation of some speech as "low value" (pp. 8-11), the rules relating to public access to certain public property (pp. 11-12), the prohibition against prior restraints (p. 17), and the differing treatment of various media outlets (pp. 12-14).

With the general overview of First Amendment law established, the essays begin with a historical piece, titled *Free Speech and the Common Law Constitution*, by David Strauss. A response to originalist and textualist conceptions of the First Amendment, Strauss posits that neither is the actual source of free speech doctrine (pp. 33-44). Rather, Strauss argues that the fundamental principles of constitutional law "did not begin to emerge as a coherent body of legal principles until well into the twentieth century" and that these principles emerged "in a way that was . . . typical of the common law" (p. 44). Tracing the evolution of free speech law from its roots in post-World War I decisions beginning with *Schenck v. United States*,[13] Strauss notes that modern free speech doctrine is a study of evolution, whereby the Court makes decisions based upon the particularized circumstances of a controversy, legal principles derived from past cases, and policy decisions appropriate for the time. As time passes, the Court, relying on previous decisions, modifies or abandons principles as it gains "a more thorough understanding of the kinds of issues involved in establishing constitutional protections for speech" (p. 47).

Vincent Blasi's essay, *Free Speech and Good Character*, shifts from an examination of doctrinal evolution to a discussion of the ultimate theoretical question associated with the First Amendment: *Why* should we protect expression? Acknowledging that most proponents of free expression accord it high priority for one of three reasons — promotion of human autonomy, promotion of the search for truth, and promotion of self-governance — Blasi proposes a fourth that he argues has greater explanatory power. Building upon the writings of John Milton, Blasi asserts that "a culture that prizes and protects expressive liberty nurtures in its members certain character traits such as inquisitiveness, distrust of authority, willingness to take initiative, and the courage to confront evil" that are valuable "for their instrumental contribution to collective well-being, social as well as political"

12. Pp. 1-8; *see* Dennis v. United States, 341 U.S. 494 (1951); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Schenck v. United States, 249 U.S. 47 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Abrams v. United States, 250 U.S. 616 (1919).

13. 249 U.S. 47 (1919).

(p. 62). In contrast, a culture without free expression reinforces certain character flaws, including laziness, stubbornness, lack of trust and confidence, and overzealous rush to judgment (p. 68). Thus, Blasi notes that the character building of the First Amendment is "a counterweight . . . to the natural tendency of all citizens . . . to lose confidence in reason and pursue their goals through force" (p. 78).

Like Strauss's article, Kent Greenawalt's *"Clear and Present Danger" and Criminal Speech* examines the Court's foundational decisions and their evolution to modern doctrine, primarily focusing on the meaning of the clear-and-present-danger test established in *Schenck*. As Greenawalt notes, that test was hardly speech-protective in its original form, allowing punishment of speech in circumstances when there was little danger of harm (pp. 98-103). In later cases, however, the test came to have new meaning as the Court's views on speech protection and the requirements of "clear" and "present" changed (pp. 104-07). Ultimately, after a series of fits and starts, the Court in *Brandenburg v. Ohio*[14] settled on the extremely speech-protective version of the test still in use today. Greenawalt uses this evolution to discuss the difficult issues associated with the question of whether criminal speech — for example, solicitation or counseling — should be protected, ultimately concluding that, because of the relationship to advocacy of political ideas, public forms of such speech should enjoy far greater protection than private forms (pp. 113-19).

Richard Posner's piece, *The Speech Market and the Legacy of* Schenck, similarly focuses on *Schenck*'s clear-and-present-danger test. His purpose, however, is to show that *Schenck* introduced an instrumentalist approach to the First Amendment, one that balances the costs and benefits of speech in a particular circumstance to determine whether that speech should be protected or subject to governmental regulation. Posner extends the clear-and-present-danger test's instrumentalist beginnings, formalizing it into an equation ($B \bullet pH/(1+d)^n + O\text{-}A$) that allows us to identify concrete costs and benefits of speech versus governmental regulation (p. 125). Using variables such as the costs and benefits of speech along with the likelihood and imminence of their occurrence, the expression's offensiveness, and the costs of regulation, Posner analyzes a variety of speech issues, ranging from seditious advocacy and campaign finance to regulation of hate speech and the Internet (pp. 127-31, 144-51).

In *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, Robert Post seeks to reconcile doctrine with popular theoretical accounts of free speech. As Post notes, two of the most powerful explanations for protecting free expression — the search for truth in the marketplace of ideas, and democratic self-governance —

14. 395 U.S. 444 (1969) (per curiam).

emerged from the Court's post-World War I decisions. There exist, however, significant doctrinal gaps and inconsistencies in the Court's decisions that these theories cannot explain (pp. 154-68). To fill these gaps, Post offers a different theoretical account — one he terms "participatory democracy" (p. 169). Post argues that American jurisprudence shows "an overriding constitutional conviction to interpret the First Amendment 'to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.' "[15] The commitment to participatory democracy explains the Court's willingness to protect some categories of speech, for example, offensive speech, when other theories cannot (pp. 168-69). Post concludes that the Court chooses between theoretical accounts to justify its doctrinal approach to various categories of speech, thus "limit[ing] the kind of doctrinal simplicity and clarity that is constitutionally obtainable" (p. 173).

Frederick Schauer's *First Amendment Opportunism* explores empirical bases of First Amendment doctrine. According to Schauer,

> the culture of First Amendment discourse . . . exhibits many of the same features as being faced with driving a nail with a pipe wrench. With surprising frequency, people and organizations with a wide array of political goals find that society has not given them the doctrinally or rhetorically effective argumentative tools they need to advance their goals. (p. 175)

They thus turn to the First Amendment as a second-best tool to further their agendas. Schauer examines this phenomenon of First Amendment opportunism in various arenas, including the regulation of commercial speech, nude dancing, and campaign finance (pp. 177-90), arguing that the existence and frequency of such opportunism "can tell us much about the power of the First Amendment today as a political force and rhetorical device" (p. 191). He concludes that, while First Amendment opportunism may be a problem for those who perceive it as distorting free speech doctrine, it also may simply reflect the Constitution's role as a common-law document (pp. 196-97).

Stanley Fish's *The Dance of Theory* seeks to debunk the notion that neutral, theoretical explanations of the First Amendment exist. Fish dismisses the notion that the First Amendment stands "for" any particular proposition, such as protecting the marketplace of ideas, and argues that proponents of such propositions move from the realm of ostensibly neutral abstraction to a "regime of censorship" that infuses their own substantive notions of good (p. 199). Fish then deconstructs the arguments of several commentators who have ostensibly proposed neutral, theoretical regimes in response to their own criticisms of First Amendment doctrine (pp. 201-09) and argues that such regimes are "formal abstractions [which] have no content of their own,

15. Pp. 169-70 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982)).

and to get content they must go to the very realm of messy partisan disputes about substantive goods of which they claim to be independent" (p. 224). He concludes that the continuing lure of theory reflects both an unwillingness to admit that a free speech principle is unavailable and a desire to give one's views on free speech a special pedigree.

In the *Invisible Hand of the Marketplace of Ideas*, Lillian BeVier compares the current market for speech with other markets, noting that in recent years legal liability for harms resulting from political speech has decreased while legal liability for harms in other markets, such as products liability, has increased (pp. 233-41). She attributes this phenomenon to the Court's assumptions that "providers of political information must be protected from liability because the market fails to permit them to internalize the full social benefits of their activity, whereas producers of other products must be subjected to liability because the market permits them to externalize some of their costs" (p. 239). Although she critiques these assumptions as empirically unproven and incomplete, BeVier concludes that they reflect some "hitherto underappreciated features of the market for information," that allow the press to fulfill its constitutional function of informing the public (p. 242).

Owen Fiss's *The Censorship of Television* also focuses on contemporary First Amendment issues, specifically the regulation of television and its relationship to democracy. As one of the most important tools in the "informal educational system" essential to citizens participating in a democracy, Fiss argues, we must protect television from censorial threats to its educative role (pp. 257-60). Fiss identifies two kinds of censorship — traditional state censorship and managerial censorship involving a private actor within the television industry (pp. 260-80). The Court, Fiss argues, has had little trouble protecting the educative function of television from state censorship but more difficulty in decisions involving managerial censorship. He contends, however, that attempts to rein in managerial censorship preserve television's educative function although superficially appearing to be abridgments of speech. Despite the Supreme Court's past practices in the managerial-censorship area, Fiss notes with approval that recent free speech jurisprudence may increasingly protect against managerial censorship.

Like Fiss, Cass Sunstein grapples with whether the First Amendment allows regulation of certain media to improve the operation of the speech market in *The Future of Free Speech*. According to Sunstein, the First Amendment should be understood as promoting "deliberative democracy," a system that contemplates "a large degree of reflection and debate, both within the citizenry and within government itself" (p. 292). Emerging technologies pose a danger to deliberative democracy because they allow individuals increasingly to filter what they hear and thus withdraw from public debate (pp. 285-86).

Sunstein suggests that governmental regulation designed to enhance deliberative democracy may be appropriate, including such measures as disclosure requirements, must-carry rules, incentives for self-regulation, and government subsidies of speech (pp. 304-09).

II. DISCUSSING THE FIRST AMENDMENT

Truthfully, these essays break little new ground — previous publications present several of the authors' thoughts.[16] Nevertheless, there is great value in bringing these ideas together in a single volume. Although the authors have very different perspectives regarding the First Amendment, all of the essays are simply excellent. Exposure to such concentrated thoughtfulness is both illuminating and pleasurable to read.

More important, however, is that these different perspectives facilitate access to the First Amendment. Whether it is David Strauss's explanation of the evolving, piecemeal, and case-bound nature of free speech doctrine, Vincent Blasi's novel philosophical basis for protecting free expression, or Cass Sunstein's argument that free speech doctrine should move toward a concept respecting deliberative democracy, there is something for almost everyone in this book. Disagree with Blasi's theoretical precept regarding protection of speech? Then perhaps you will find what you want in Richard Posner's explicitly utilitarian accounting of costs and benefits of speech. For those trying to understand when and why to protect expression, this variety of perspectives brings the book to life in a concrete way and makes the First Amendment far more accessible than a single, static, or abstract approach to free expression. And the more accessible such ideas are, the easier they are to discuss.

Moreover, the variety of perspectives in *Eternally Vigilant* illustrates that debate, discussion, and even criticism of the First Amendment are a positive thing. Certainly, the contributors to *Eternally Vigilant* disagree in ways that we cannot easily reconcile. Vincent Blasi's account of the First Amendment freedoms as grounded in human dignity and character, for example, is inconsistent with Richard Posner's amoral cost-benefit analysis of those same freedoms. Similarly, Stanley Fish's mantra that no neutral theory of free expression exists is a direct attack on Robert Post's attempts to reconcile theory and doctrine. While some might view this disagreement as cause for concern — evidence that First Amendment doctrine

16. Professors Fish, Fish, and Sunstein, for example, openly acknowledge previous publication of pieces from which their essays are taken. Pp. 199 (Fish), 257 (Fiss), 185 (Sunstein). Professors Greenawalt and Strauss also have written extensively on closely related issues. *See, e.g.*, KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE (1989); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

and scholarship are incoherent or that the Court's decisions result from politics rather than rational principles — they are mistaken. The varying viewpoints contained within *Eternally Vigilant* show that First Amendment freedoms are *worth talking about*. Their value comes less from the ultimate conclusions reached by courts and scholars than from the existence of an ongoing dialogue among courts, scholars, and the public regarding their meaning. As John Milton argued with respect to censorship:

> There be [those] who perpetually complain of schisms and sects, and make it such a calamity that any man dissents from their maxims. 'Tis their own pride and ignorance which causes the disturbing, who neither will hear with meekness nor can convince, yet all must be suppressed which is not found in their [doctrines]. [They] are the troublers, . . . the dividers of unity, who neglect and permit not others to unite those dissevered pieces which are yet wanting to the body of truth. [But] [t]o be still searching what we know not, by what we know . . . this is the golden rule . . . and makes up the best harmony . . . not the forced and outward union of cold, and neutral, and inwardly divided minds.[17]

Surely, we can extend this positive view of public disagreement to discussions of what the First Amendment does or should do.

The editors of *Eternally Vigilant* clearly recognize the importance of "dialogue" as a primary good of both First Amendment doctrine and scholarship, most notably in their characterization of the history of free speech as an "experiment" that implies "a need for ongoing review and adjustment" (p. ix). Their prefatory colloquy, structured as a dialogue between Stone and Bollinger, further emphasizes that fact. As that colloquy moves from topic to topic, it allows the editors to discuss the many facets of free speech history and scholarship, reflecting their complexity, richness, and varied nature. To be sure, the editors disagree on certain issues. But they do so in the context of a discussion, which allows give and take and aptly illustrates the value of dialogue. With this as the foundation for later essays, it should be obvious to the reader that the differing viewpoints are not an evil. Rather they are both a natural aspect of our daily lives and necessary to the evolution and understanding of free speech jurisprudence.

Perhaps the most valuable aspect of *Eternally Vigilant*, however, is that so many of the essays go beyond abstract theoretical and doctrinal discussions to explore influences on how First Amendment law is made and how those influences affect past and current decisions. David Strauss's essay describing the common-law overtones of free speech jurisprudence does this best, as he meticulously describes how the Court's doctrine evolved from early decisions to the current state of the law. Kent Greenawalt also focuses on the evolution of the clear-and-present-danger test and its implications for criminal speech.

17. JOHN MILTON, AREOPAGITICA 42-43 (George H. Sabine ed., 1951).

Frederick Schauer's demonstration that nonspeech issues are as responsible for free speech doctrine as free expression concerns also has an empirical focus, as do Cass Sunstein's and Owen Fiss's approaches, which view the law of free expression through the reality of modern broadcasting. Even Vincent Blasi's primarily philosophical essay reflects an understanding of actual human behavior often missing in theoretical scholarship.

This differs somewhat from most scholarship associated with the First Amendment, which often involves an examination and critique of the appropriate theoretical underpinnings for the protection of expression, the current doctrinal rules, or the relationship between theory and doctrine. There are many advantages to this scholarship, primarily that it provides valuable new insights into protection of expression.[18] But isolated discussions of theory and doctrine can take us only so far and rarely explain the entire picture. As Jerome Frank noted years ago, legal decisions are the result of many influences, of which the rule applied and its underlying theory are but two.[19] The Court is a cultural institution where judges make decisions in often difficult social and political contexts that change over time. There are unspoken assumptions or events underlying these decisions that ultimately come to be expressed in different doctrinal rules. The collection of essays in *Eternally Vigilant*, by examining various potential influences on the development of free speech law, recognizes this fact and brings a greater maturity to our understanding of the First Amendment.

To illustrate, one need look no further than the clear-and-present-danger test that is the focus of so many of *Eternally Vigilant*'s essays.[20] That test allowed courts to assess whether speech posed "a clear and present danger that [it] will bring about the substantive evils that Congress has a right to prevent."[21] First announced in *Schenck v.*

18. For example, philosophical accounts of free expression often have broad rhetorical appeal for those looking for reasons to protect speech. See, for example, Justice Brandeis's eloquent appeal in Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). They also often identify "broad patterns in constitutional law" that have great explanatory power regarding doctrinal issues. *See* FARBER & SHERRY, *supra* note 9, at 141. Finally, theoretical accounts, with their reliance on principle and consistency, "may help sustain a faith that constitutional practice involves a shared commitment to live by principle, and not by opportunism, sophistry, and manipulation." Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 566 (1999). Doctrinal scholarship can similarly find broad patterns in law, *see, e.g.*, Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983), as well as highlight significant flaws or advantages in the Court's approach.

19. Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17, 40 (1931).

20. It is always difficult when reviewing a collected set of essays to focus on only one aspect of them as one risks missing other significant contributions. I focus on the clear-and-present-danger test primarily because it has such significance to free-speech doctrine and because it provides a continuous example for discussion.

21. Schenck v. United States, 249 U.S. 47, 52 (1919).

United States, the Court used it for decades to assess whether seditious advocacy or other "dangerous" speech was subject to criminal punishment, or protected expression under the First Amendment. Conventional wisdom now holds that *Schenck*'s clear-and-present-danger test was a disaster, allowing punishment of speech that posed no harm to the government or public,[22] and most people readily applaud the Court's apparent repudiation of it in favor of a much stricter standard in *Brandenburg v. Ohio*.[23] But how do we reach this conclusion? Neither abstract theory nor doctrine helps much in this regard.

Of course, judges and scholars have appealed to theory in criticizing the clear-and-present-danger test — most notably Justices Holmes and Brandeis in their influential opinions condemning several decisions applying that test to uphold convictions of speakers who did little more than criticize the government. Holmes, for example, claimed that "the theory of our Constitution" is that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[24] Brandeis argued that our Constitution protects "the power of reason as applied through public discussion."[25] This is powerful rhetoric — so powerful that it still resonates with modern courts and individuals, who frequently cite it as a normative foundation for protecting speech. But it tells us little about the clear-and-present-danger test. While the Holmes/Brandeis philosophies may support a more speech-protective version of the clear-and-present-danger test than applied in the Court's early cases, they do not compel that result. Nothing in Holmes's marketplace of ideas theory or Brandeis's autonomy theory tells us how "clear" or how "present" the danger must be, or what kinds of dangers justify suppression of speech. Theoretical accounts are simply too vague to have much normative value with respect to the clear-and-present-danger test.

Furthermore, the Holmes/Brandeis philosophies do not provide a positive explanation of the Court's actions in moving away from the clear-and-present-danger test. There is no evidence that the *Brandenburg* Court adopted these theoretical accounts as its driving force in seditious advocacy cases. In fact, the opinion is devoid of philosophical discussion, instead focusing on the concrete problem of where to draw

22. *See, e.g.*, David R. Dow & R. Scott Shieldes, *Rethinking the Clear and Present Danger Test*, 73 IND. L.J. 1217 (1998); Hans A. Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163 (1970).

23. 395 U.S. 444, 447-48 (1969) (per curiam) (holding that state can punish speech only if it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

24. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

25. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

the line between punishable incitement of illegal activity and protected speech.

Abstract, doctrinal discussions also have only weak explanatory power regarding our dislike of, and the Court's movement away from, the clear-and-present-danger test. There is nothing inherently wrong with that test as a doctrinal tool. True, it is fundamentally a balancing test susceptible to subjective judgments of harm, but that alone does not condemn it. The world of constitutional adjudication is full of balancing tests that seem to work reasonably well. In fact, outside of the context of seditious advocacy, the clear-and-present-danger test was often applied in a manner quite protective of speech,[26] suggesting that balancing as a concept was not so much the problem as was the application of that balancing in a particular context.

In order to understand truly our dislike of the clear-and-present-danger test, we must look beyond this abstract balancing test to the influences on its application. As David Strauss's and Kent Greenawalt's essays aptly demonstrate, our condemnation of the clear-and-present-danger test, and the Court's ultimate repudiation of it, are both largely the result of evolutionary processes. As the Court repeatedly upheld convictions of seemingly innocuous speech, judges and scholars began to question the wisdom of the clear-and-present-danger approach in the seditious advocacy context. Thus, the Court's evolution to the rule in *Brandenburg* was not simply repudiation of one abstract test in favor of another. It was a response to the decisions upholding convictions that came before, which the Court began to view as mistaken applications of a test that proved far too malleable and subject to political pressure, especially during certain crisis periods. In essence, our view of the clear-and-present-danger test, and the Court's retreat from it, reflect the accumulated wisdom of fifty years of history, which revealed the kind of abuse that such a test might engender. By going beyond isolated theoretical or doctrinal accounts and examining the impact that this evolution had on the law, Strauss and Greenawalt flesh out our understanding of how First Amendment doctrine came to be what it is and what the implications of that evolution are for current doctrine. Whether one does this in the context of the clear-and-present-danger test or in the many other contexts contained in the other essays, the desire to explore outside influences on the law can only enrich the already rich First Amendment literature.

26. *See, e.g.*, Schneiderman v. United States, 320 U.S. 118 (1943); Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Taylor v. Mississippi, 319 U.S. 583 (1943); Bridges v. California, 314 U.S. 252 (1941); Thornhill v. Alabama, 310 U.S. 88 (1940).

III. FURTHER FACILITATING FIRST AMENDMENT DISCUSSIONS

For all that *Eternally Vigilant* contributes to a better understanding of First Amendment doctrine, it could have done more. Although the contributors' explanations of legal doctrine and its real-world context are valuable, the essays still focus mainly on the evolution of legal doctrine alone, with little discussion of the social, political, psychological, or other influences that inform many of the decisions they discuss. To be fair, many of the contributors explicitly acknowledge these influences. David Strauss and Kent Greenawalt, for example, refer to certain historical accounts of social and political conditions during World War I, the Red Scare, and the Cold War periods, in which the most significant clear-and-present-danger cases were decided. But their references are limited with no detailed discussion of those conditions' impact on the Court's decisions. As such, they tend to reinforce the notion that law can be studied in isolation, although I do not think that the authors or the editors intend this. A greater examination of these types of influences on the Court's decisions would complement the evolutionary approach discussed above and advance our understanding of the Court's doctrine even further.[27] By providing a concrete context in which to place the Court's doctrine, this examination would give greater access to it and further facilitate discussion.

Continuing with the clear-and-present-danger test discussed above, this Section will first examine *Schenck* and the social, historical, and political forces surrounding it. It will then discuss how examination can facilitate better understanding of and dialogue regarding the Court's jurisprudence.

A. Schenck *and Its Historical, Social, and Political Context*

Schenck, the decision in which the clear-and-present-danger test originated, arose out of government prosecutions of members of the Socialist Party for conspiring to obstruct the draft in violation of the Espionage Act of 1917. During World War I, Charles Schenck and other party members mailed pamphlets attacking the draft to potential draftees.[28] One side of the pamphlet urged that the draft was unconstitutional and that people join the Socialist Party in its attempt to repeal

27. There are many scholars who have done admirable historical work on free expression issues. *See, e.g.*, MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE" (2000); MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991); RABBAN, *supra* note 1; Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335 (2003); William M. Wiecek, *The Legal Foundations of Domestic AntiCommunism: The Background of* Dennis v. United States, 2001 SUP. CT. REV. 375. Unfortunately, such studies are usually free-standing, and other scholars rarely incorporate these or other historical studies in an in-depth manner.

28. Schenck v. United States, 249 U.S. 47, 49 (1919).

the Conscription Act.[29] The other side contained somewhat stronger language, urging people to "assert [their] rights" and arguing that "[i]n lending tacit or silent consent to the conscription law, in neglecting to assert your rights, you are (whether unknowingly or not) helping to condone and support a most infamous and insidious conspiracy to abridge and destroy the sacred and cherished rights of a free people."[30] Finding that such statements tended to interfere with the war effort, a jury easily convicted Schenck.

On appeal, the Supreme Court rejected Schenck's argument that the First Amendment protected the pamphlets' statements. Justice Holmes, writing for a unanimous Court, acknowledged that in peacetime, defendant's speech might have been protected by the First Amendment.[31] Noting, however, the wartime context and that the "character of every act depends upon the circumstances in which it is done," Holmes framed the First Amendment test as "whether the words used [were] in such circumstances and [were] of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[32] Although Holmes acknowledged that many of the statements urged lawful resistance, he nevertheless found that they presented a clear and present danger of draft obstruction. According to Holmes, the defendant's intent to obstruct the draft could be presumed (despite the lack of evidence) because the pamphlet "would not have been sent unless it had been intended to have some effect."[33] This presumed intent — combined with wartime circumstances — justified extreme caution and the rejection of Schenck's free speech claim.

Holmes's opinion is notable for its recognition that the clear-and-present-danger test depends largely upon the concrete circumstances in which it is applied, although, ironically, he ignored such circumstances, other than the general wartime reference, in reaching his decision. To the extent Holmes found the wartime circumstances important, it is useful to examine them. How did the Espionage Act and related legislation come about? How was it used? What was the public sentiment regarding World War I and those who protested it? What were the government's actions with respect to the war and those who spoke out against it? All of these questions are part of the *Schenck* equation and the answers to them shed considerable light on our response to the clear-and-present-danger test and related issues.

29. RICHARD POLENBERG, FIGHTING FAITHS 213-14 (1987).

30. *Id.* at 214.

31. *Schenck*, 249 U.S. at 52.

32. *Id.*

33. *Id.* at 51.

From its inception, World War I was largely unpopular among influential groups who were " 'apathetic if not actually hostile to fighting.' "[34] Like Charles Schenck, many of those opposing the war were foreign-born Americans or immigrants (especially Irish and German), socialists, pacifists, and progressives who belonged to radical groups, such as the Industrial Workers of the World ("IWW"), Non-Partisan League ("NPL"), and the Socialist Party of America ("SPA").[35] Such groups were especially vocal, calling for "[c]ontinuous, active, and public opposition to the war, through demonstrations, mass petitions, and all other means within [their] power."[36] Although radical groups were not popular with Americans generally, during this early period there were substantial increases in IWW, NPL, and SPA membership, giving them an even more powerful voice against the war.[37]

Concerned about vocal antipathy toward the war and convinced of the need to present a united patriotic front, the Wilson administration found ways to repress antiwar sentiment. President Wilson himself tried to whip up national hysteria regarding opponents to the war, relying heavily on negative portrayals of immigrants and other foreign influences. As early as his 1915 State of the Union address to Congress, Wilson claimed that

> the gravest threats against our national peace and safety have been uttered within our own borders. There are citizens of the United States . . . born under other flags but welcomed by our generous naturalization laws . . . who have poured the poison of disloyalty into the very arteries of our national life . . . .[38]

In his 1917 address asking Congress to recognize a state of war, Wilson claimed that German spies hidden within the United States government and its communities threatened security.[39] A few months later, in an address that was widely distributed throughout the country, Wilson accused "the military masters of Germany" of filling

34. ROBERT JUSTIN GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA 105 (1978) (quoting THOMAS A. BAILEY, WOODROW WILSON AND THE LOST PEACE 15 (1944)).

35. HARRY N. SCHEIBER, THE WILSON ADMINISTRATION AND CIVIL LIBERTIES 7 (1960).

36. NATHAN FINE, LABOR AND FARMER PARTIES IN THE UNITED STATES, 1828-1928, at 13-14 (1928) (reprinting Majority Report of the SPA as adopted at its April 1917 national convention); *see also* JAMES WEINSTEIN, THE DECLINE OF SOCIALISM IN AMERICA, 1912-1925, at 125-27 (1967).

37. GOLDSTEIN, *supra* note 34, at 105-06; ROBERT K. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA 28-29 (1955).

38. President Woodrow Wilson, Address to Congress (Dec. 7, 1915), *in* 53 CONG. REC. 99 (1915).

39. President Woodrow Wilson, Address to Congress (Apr. 2, 1917), *in* 55 CONG. REC. 104 (1917).

"our unsuspecting communities with vicious spies and conspirators and [seeking] to corrupt the opinion of our people."[40] Wilson further explicitly linked foreign enemies to radical groups, noting that German officials employed "liberals in their enterprise. They are using men . . . socialists, the leaders of labor" to sow disloyalty.[41] Thus, people like Schenck, who were little more than social activists, came to be equated with spies and other traitors.

Wilson's efforts, aided by a mainstream press generally willing to engage in propaganda and groups of private vigilantes willing to spy upon their neighbors, sowed the seeds of intolerance and suspicion of radical or heavily immigrant groups.[42] In the years leading up to and during the war, there were numerous acts of violence expressing "nativist loathing of the foreign-born and irrational fear of radical groups."[43] Despite these actions, antiwar groups remained vocal. As the Wilson administration became concerned that existing laws and actions were insufficient to handle antiwar sentiment,[44] it looked to more formal means to repress dissent.

The Wilson administration used a variety of legal tools to deal with the "problem" of disloyalty. In 1917 the President issued a series of proclamations that allowed the government to register, arrest, and intern "enemy aliens," and that established, among other things, a loyalty program for federal employees, a "Committee on Public Information" (a propaganda committee designed to corral the press into voluntary self-censorship), a "Board of Censorship" responsible for scrutinizing communications leaving the country, and a program expanding the censorship power of the Navy over cable lines.[45] In addition, arguing that censorship was "absolutely necessary to the public safety,"[46]Wilson also proposed legislation designed to "repress 'political agitation,' particularly 'disloyal propaganda' threatening the formation and maintenance of the armed forces."[47]

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40. President Woodrow Wilson, Flag Day Address (June 14, 1917), *in* 55 CONG. REC. app. at 332 (1917).

41. *Id.* at 334; *see also* JEFFERY A. SMITH, WAR AND PRESS FREEDOM 135 (1999) (discussing distribution of flag day address).

42. MURRAY, *supra* note 37, at 20; SMITH, *supra* note 41, at 135-37.

43. MURRAY, *supra* note 37, at 32; SCHEIBER, *supra* note 35, at 50-51; SMITH, *supra* note 41, at 135.

44. RABBAN, *supra* note 1, at 249-50; SCHEIBER, *supra* note 35, at 23.

45. GOLDSTEIN, *supra* note 34, at 108-09; SCHEIBER, *supra* note 35, at 14-17, 21.

46. SCHEIBER, *supra* note 35, at 18 (quoting Letter from President Woodrow Wilson to Rep. Webb (May 22, 1917), *reprinted in* 3 PUBLIC PAPERS OF WOODROW WILSON 46 (1927)).

47. RABBAN, *supra* note 1, at 249 (quoting John Lord O'Brian, Special Asst. Atty Gen.).

In proposing the original version of the Espionage Act, Wilson sought substantial authority to forbid the publication of hostile utterances that might interfere with the war effort.[48] Congressional and public response to such censorship power was ambivalent at best and eventually that aspect of the legislation died.[49] As adopted, the Espionage Act instead provided criminal penalties for intentionally making false reports that interfere with the war effort, causing insubordination or disloyalty in the military forces, or obstructing the draft. It further authorized the Postmaster to refuse to mail materials violating the Act.[50] Although these provisions did not amount to the prior restraint Wilson sought, there is evidence that much of Congress desired the Act to be used to restrict speech.[51]

In 1918 Congress took yet another step toward repression. Despite the fact that over 250 people had been convicted under the Espionage Act in less than a year, members of Congress and the Wilson administration were unhappy with the Act's inability to reach some disloyal utterances.[52] Claiming that "some of the most dangerous types of propaganda were either made from good motives or else that the traitorous motive was not provable," the Attorney General argued that the intent requirement of the Espionage Act posed too high a barrier for conviction and urged Congress to adopt a law specifically aimed at disloyal utterances.[53] The Sedition Act,[54] adopted in May of 1918, solved this problem by punishing publication of information intended to cause contempt for the United States government, the Constitution, or the flag of the United States, or to support a country at war with the United States.

The Wilson administration viewed the Espionage and Sedition Acts as its "most effective method of suppressing unwanted 'propaganda' and of dealing with 'disturbing malcontents.' "[55] During the war, federal attorneys brought over 2,100 indictments under the

48. SMITH, *supra* note 41, at 131.

49. RABBAN, *supra* note 1, at 250-55; SMITH, *supra* note 41, at 131; Stone, *supra* note 27, at 346-49.

50. Act of June 15, 1917, ch. 30, tit. I, § 3, 40 Stat. 217, 219.

51. The extent of congressional desire to suppress speech is open to debate. David Rabban argues that contemporaneous legislative debates "reveal that the majority of Congress intended the Espionage Act to encourage the restrictive [judicial] decisions that resulted." RABBAN, *supra* note 1, at 250. On the other hand, Geoffrey Stone argues that "[a]lthough Congress' stance in enacting the Espionage Act could hardly be characterized as civil libertarian, [most congressmen had] a genuine concern for the potential impact of the legislation on the freedom of speech and of the press." Stone, *supra* note 27, at 352.

52. SCHEIBER, *supra* note 35, at 23.

53. *Id.* at 23-24. For a more in-depth account of the causes leading up to the Sedition Act, see POLENBERG, *supra* note 29, at 30-34.

54. Act of May 16, 1918, ch. 75, §§ 1, 3, 40 Stat. 553, 553 (repealed 1921).

55. RABBAN, *supra* note 1, at 256.

Acts.[56] Most of these indictments involved speech critical of the war or the government rather than overt acts of disloyalty.[57] Thus, individuals were indicted for such things as

- advising conscripted men that they should have "a pick and shovel laboring for the working men instead of carrying a gun for the capitalists";
- distributing a pamphlet preaching that "Christians should not kill in wars";
- petitioning the governor of South Dakota to change a political decision exempting certain counties from the draft;
- stating that the capitalists' war would make liberty bonds worthless;[58]
- stating that "[w]e must make the world safe for democracy, even if we have to bean the goddess of liberty to do it";
- stating that "[m]en conscripted to Europe are virtually condemned to death and everyone knows it";
- stating that "I am for the people and the government is for the profiteers";
- "circulating a pamphlet urging the re-election of a Congressman who had voted against conscription";[59]
- claiming "to hell with Wilson; I am a Republican";
- writing a letter denouncing Liberty Loans; and
- giving a speech denouncing the conscription of Puerto Rican citizens who refused to accept American citizenship.[60]

Such indictments reached far into the realm of seemingly innocent speech, especially given that many statements were made in private conversations rather than public addresses.[61] Many prosecutions, however, went beyond overly zealous and were specifically designed to destroy the radical, socialist groups feared by the Wilson administration, such as the IWW and SPA of which Charles Schenck was a member. Thus, as one scholar notes,

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56. GOLDSTEIN, *supra* note 34, at 113.

57. ZECHARIAH CHAFFE, JR., FREE SPEECH IN THE UNITED STATES, 60-69 (1941); GOLDSTEIN, *supra* note 34, at 113. As one Wilson administration official later acknowledged, no person was convicted of actual espionage activity under the 1917 Act. JOHN LORD O'BRIAN, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 49-50 (1955).

58. These examples come from RABBAN, *supra* note 1, at 259-60.

59. These examples are found in GOLDSTEIN, *supra* note 34, at 113-14.

60. These last three examples are from SCHEIBER, *supra* note 35, at 23 nn.47, 53. For further examples, see CHAFFE, *supra* note 57, at 51-57; Stone, *supra* note 27, at 338-41.

61. GOLDSTEIN, *supra* note 34, at 115.

> seemingly random prosecutions had a pattern behind them; persons or publications "who had assured economic and social status, did not question the basis of our economic system, accepted the war as a holy crusade and expressed their views in somewhat temperate language" were allowed to criticize the government; those who suffered were "those whose views on the war were derived from some objectionable economic or social doctrines . . . regardless of their attitude towards Germany" along with obscure individuals who used "indiscreet or impolite, sometimes vulgar language to express their views."[62]

In this way, such prosecutions were used less to punish disloyalty than to enforce national conformity — either by frightening into silence those without sufficient social position to fight back or by systematically harassing disfavored groups.

The courtroom provided protestors little protection from such harassment. Given the nativist sentiment and hysteria stirred up by the Wilson administration, most judges and juries easily convicted those accused under the Acts, apparently with the attitude that "an opponent of war was guilty unless proved innocent."[63] At least 1,055 of the 2,100 defendants indicted were convicted, including over 150 IWW leaders.[64] Courts reached these conclusions by construing the requirements of the Espionage and Sedition Acts loosely. One judge, for example, instructed a jury that the defendant's attempts to obstruct Red Cross fundraising efforts violated the Espionage Act because it interfered with the "military and naval forces of the United States."[65] To the extent that defendants raised First Amendment defenses to their prosecutions, courts either ignored them or resolved them under the prevailing "bad tendency" test, an extremely deferential test allowing punishment of speech if it might tend to cause harm.[66] In many courtrooms, judges and jurors viewed their verdicts as patriotic statements and imposed severe sentences "as a means of fostering unity and bolstering morale."[67] Thus, federal courtrooms, the last bastion of defense against unfair convictions for simple criticism of the government or war effort, were dominated by actors whose response to the war was so extreme that even Justice Holmes, the author of *Schenck*, later described it as "hysterical."[68]

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62. *Id.* (quoting SCHEIBER, *supra* note 35, at 32).

63. H.C. PETERSON & GILBERT C. FITE, OPPONENTS OF WAR 1917-1918, at 153 (1957); *see also* RABBAN, *supra* note 1, at 256-61.

64. SCHEIBER, *supra* note 35, at 19.

65. RABBAN, *supra* note 1, at 260.

66. *Id.* at 256.

67. SCHEIBER, *supra* note 35, at 43 n.7.

68. Letter from Justice Holmes to Harold J. Laski (Mar. 16, 1919), *in* 1 HOLMES-LASKI LETTERS 189, 190 (Mark DeWolf Howe ed., 1953).

B. *Some Lessons from History*

This is the context in which *Schenck* arose; it is not pretty. It certainly was not conducive to free expression given a president who, determined to suppress any possible barriers to his goals, enlisted Congress and the public to create an atmosphere of national hysteria and nativist sentiment that silenced critics. The hysteria engendered by the administration permeated the courtroom as well, with zealous prosecutions and jurors imbued with patriotic fervor making it nearly impossible for accused protestors to avoid convictions. Awareness of these circumstances gives context to our discussion of *Schenck*'s clear-and-present-danger test in a way that even Strauss's and Greenawalt's evolutionary accounts cannot.

This history reveals, for example, that Justice Holmes's characterization of the clear-and-present-danger test was merely an extension of lower courts' use of the bad-tendency test to silence dissent in wartime.[69] Holmes never meant for the clear-and-present-danger test to be applied in a protective manner — at least not in *Schenck*. True, one can probably glean this from reading the case, but the historical discussion gives an added flavor emphasizing the strength and depth of judicial hostility toward war protestors that informs our assessment of the clear-and-present-danger test's application and our desire to move away from such a test over time.

This study also reveals much about the nature of human actors, which may facilitate further understanding of our dislike of the clear-and-present-danger test. When one is aware of intense public hysteria surrounding radical groups and protestors, it is relatively easy to predict that the clear-and-present-danger test will be an ineffective tool for protecting speech. As cognitive psychologists have tested empirically, in times of great fear, people tend to overestimate greatly the likelihood that certain particularly dreaded or catastrophic events will occur.[70] As a result, they favor regulation of such risks, even if the actual likelihood of occurrence is minute.[71] There is little reason to think that judges are immune to such cognitive biases.[72] Thus, the clear-and-present-danger test, when used by judges in times of crisis, may provide little if any protection for speech.[73] *Schenck* is arguably

69. RABBAN, *supra* note 1, at 279-98.

70. PAUL SLOVIC, THE PERCEPTION OF RISK 220-31 (2000).

71. HOWARD MARGOLIS, DEALING WITH RISK 171, 174-75 (1996); SLOVIC, *supra* note 70, at 152.

72. Chris Guthrie & Jeff Rachlinksi et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 816-18 (2001) (noting that judges are often subject to the same cognitive biases as average individuals).

73. *See, e.g.*, Christina E. Wells, Fear and Loathing in Constitutional Decision-making: A Case Study of *Dennis v. United States* (June 16, 2003) (unpublished manuscript, on file with author).

an example of that fact, as are many other cases decided in crisis times.[74] It is only by examining the history surrounding these cases, however, that we truly come to understand the clear-and-present-danger test as grounded in human nature and not simply as an abstract, but flawed, doctrinal tool.

The Wilson administration's apparent dual motives in suppressing speech further inform our response to the clear-and-present-danger test. The Wilson administration used the Espionage and Sedition Act prosecutions not just to silence dissent but also to destroy certain disfavored groups. These mixed motives suggest a willingness on the executive's part to use crises as excuses to further other agendas. The lenient application of the clear-and-present-danger test in *Schenck* and other crisis-period cases facilitated the administration's pretextual use of such crises. This government opportunism, while perhaps inevitable,[75] is hardly desirable, as the Court has come to acknowledge that certain governmental motives for regulating speech are illegitimate.[76] Thus, our distaste for the clear-and-present-danger test may stem in part from its inability in times of crisis to protect against illegitimate government actions.

This historical account complements Strauss's and Greenawalt's evolutionary accounts of the test. As Strauss noted, judges deciding constitutional cases respond to previous decisions and determine whether adjustments or retrenchments are needed when ruling on the case before them. They do not, however, view law in a vacuum, determining simply that X application of Y rule was bad. Rather, they examine the broader context in which rules are constituted and applied and their consequences. Thus, the *Brandenburg* Court eschewed the clear-and-present-danger test not simply because the defendant Ku Klux Klansman involved in that case was harmless but because, with fifty years of hindsight, *most* of the defendants involved in clear-and-present-danger cases were harmless. That political machinations and hysteria were often the primary motivators for

74. *See, e.g.*, cases cited *supra* note 12; *see also* Korematsu v. United States, 323 U.S. 214 (1945). For a discussion of judicial capitulation to hysteria in *Korematsu* and related cases, see Christina E. Wells & Joseph Kuhl, *The Japanese-American Detention Cases and Their Relationship to Events in the United States After September 11th*, 5 INT'L & COMP. L. REV. 91, 94-101 (2002).

75. *See generally* CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP (1948).

76. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 503 (1996) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.") (opinion of Stevens, J., writing for plurality); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). For a discussion of illegitimate government motives, see Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 174-75 (1997).

earlier decisions was a fact of which the Supreme Court was aware and against which it was trying to guard in *Brandenburg*.

Finally, this study of history can inform modern debate regarding First Amendment freedoms both for scholars and for the public. For example, the modern Court's doctrine treats laws regulating speech based upon content with far greater antipathy than those laws that do not. The Court's hostility toward content-based regulations is closely associated with the clear-and-present-danger cases, although the Court rarely links the two explicitly.[77] Knowledge and understanding of this history may inform scholarly debates sparked by commentators who increasingly criticize the Court's hostility toward content-based regulations.[78]

The importance of *Schenck*'s history with respect to the public may be more straightforward. In the current climate of heightened fear that exists post-September 11th, citizens have expressed the notion that civil rights may need to be sacrificed in the name of security. In fact, the phrase "clear and present danger" has reared its ugly head again as a justification for limiting civil liberties.[79] In such times, it is useful to be reminded of the depth and magnitude of past mistakes made with that same sentiment in mind.

IV. CONCLUSION

None of this is to say that the editors of *Eternally Vigilant* should have put together a different book. As it currently stands, the editors' and authors' contributions to the discussion regarding the First Amendment are substantial and thoughtful. *Eternally Vigilant* is, however, representative of much First Amendment scholarship, which focuses too often on theory and doctrine without also discussing the variety of real-world influences on constitutional decisions. In a book that celebrates the "experimental" nature of free speech law, recogni-

77. Many of the cases involving the clear-and-present-danger test reflect the presence of an illegitimate government motive that is at the heart of the Court's antipathy to content-based regulations. For example, many of the seditious advocacy cases involved government fear that antiwar speech would persuade citizens to oppose the war. *See, e.g.*, Whitney v. California, 274 U.S. 357, 371 (1927); Abrams v. United States, 250 U.S. 616, 617 (1919). Concern with attempts to regulate persuasive effect clearly underlies the Court's approach to content-based regulations. *See* Wells, *supra* note 76, at 173-75 (and cases cited therein); *cf.* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2447 (1996) (noting the relationship between the Court's use of strict scrutiny and earlier clear-and-present-danger precedents).

78. David Rabban, for example, uses much of the history surrounding *Schenck* to respond to Professors Sunstein and Fiss, who argue that we should welcome governmental regulation of content in some instances. RABBAN, *supra* note 1, at 381-93.

79. Testifying before Congress in the immediate aftermath of the terrorist attacks, Attorney General John Ashcroft claimed that "terrorism is a clear and present danger to Americans today." Press Release, U.S. Dep't of Justice, Attorney General Ashcroft Outlines Mobilization Against Terrorism Act (Sept. 24, 2001).

tion of the importance of the circumstances under which that experiment takes place would be welcome — a fact made even more true given the authors' expressed desire to reach "non-experts." The belief in free expression is a widely held ideal. It is, however, an abstract one that the public and, occasionally, legal scholars are willing to sacrifice in certain concrete circumstances. The more one is educated regarding the concrete influences on the development of First Amendment law, the better our discussion of the merits of those sacrifices can be.