BOOK REVIEW AND COMMENTARY

THE FOURTEEN TRANSFORMATIVE WORDS OF THE FIRST AMENDMENT:
FROM FEAR TO THE "COURAGE TO BE FREE"


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I. INTRODUCTION

Every great idea—whether embodied in a speech, a mathematical equation, a song, or a work of art—has an origin, a birth, and a life of enduring influence. In each book in the Basic Ideas series, a leading authority offers a concise biography of a text that transformed its world, and ours.1

This is the publishing credo at the end of the latest book by Anthony ("Tony") Lewis.2 He is a two-time Pulitzer Prize winner, and former Supreme Court

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reporter and op-ed columnist for The New York Times. Lewis has also been a law and journalism professor at Columbia, Harvard, and other universities. In his latest book, Lewis’s transformative text is the fourteen words in the free expression clause of the First Amendment of the United States Constitution: “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .”

Originally enacted in 1791 as the Third Amendment by the 1st Congress, the amendment with these fourteen key words became the First Amendment only after the States failed to ratify the first two proposed amendments. Another surprising fact is that Supreme Court jurisprudence on the First Amendment is

AND THE FIRST AMENDMENT (1991) (examining the historic Supreme Court opinion on defamation, N.Y. Times v. Sullivan, 376 U.S. 254 (1964), which held that the common law of libel violated the First Amendment when used by public officials against the media and requiring public officials to demonstrate “actual malice” to recover damages for a defamatory falsehood); ANTHONY LEWIS, GIDEON’S TRUMPET (1964) (examining the equally historic Supreme Court opinion, Gideon v. Wainwright, 372 U.S. 335 (1963), which held that an indigent defendant in a state criminal prosecution has the right to have court-appointed counsel as the Court makes the Sixth Amendment right to counsel in all criminal prosecutions obligatory on the states by the Fourteenth Amendment). The Court made its Gideon decision after receiving an unusual handwritten letter from Clarence Earl Gideon, a poor Florida prisoner. In it, he told the Justices he had been convicted without a lawyer and he thought that was unfair and unconstitutional. The Supreme Court treated his letter as a petition for review and granted it. See Anthony Lewis on Free Speech, Gitmo, Nazis, and American Rights, BUZZFLASH INTERVIEW, Jan. 15, 2008, www.buzzflash.com/articles/interviewes/090 [hereinafter BUZZFLASH INTERVIEW].


Id.

U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”) (emphasis added).

See LEWIS, supra note 1, at 9. The originally proposed “First Amendment” on the size of the House of Representatives and congressional apportionment has yet to be ratified by the States and added to the Constitution. The 1st Congress sent the proposed “Second Amendment” on congressional salaries to the states on September 25, 1789; however, the amendment was not ratified until May 7, 1992, thereby becoming the Twenty-Seventh Amendment. Id. (“No law, varying the compensation for the services of the Senators and Representatives, shall take effect until an election of Representatives shall have intervened.” (quoting U.S. CONST. amend. XXVII)); see also Fred Barbash, Fundamental Freedoms That Are Carved in Stone, WASH. POST, Apr. 6, 2008, at M9 (writing about the opening on April 11, 2008, of the Newseum, the new, interactive museum of the news industry on Pennsylvania Avenue in Washington, D.C. The front corner of the Newseum has engraved on its marble façade the 45 words of the First Amendment).
less than eighty years old. It took the Court 140 years after the First Amendment was ratified in 1791 to issue in 1931 its first opinion, Near v. Minnesota, interpreting the First Amendment in favor of press freedom and against prior restraint. Moreover, it was not until as late as 1965 in Lamont v. Postmaster General that the Supreme Court actually found a federal law to be in violation of the First Amendment.

II. THE IMPORTANT ROLE OF JUDGES AND COURTS

A. The “Fear” Factor in Judicial Decision Making on the First Amendment

Why have American courts led by the Supreme Court not always been champions of the First Amendment? This is a large part of the story Lewis tells so masterfully in Freedom for the Thought That We Hate: A Biography of the First Amendment. One explanation Lewis highlights is the recurrent “paranoid style” or “fear” factor in both American politics and law. Lewis writes with specific force about how fear has eaten away at free expression at different, difficult times in our national history. Lewis tells us that:

The First Amendment is meant to assure Americans that they can believe what they will and say what they believe. But repeatedly, in times of fear and stress, men and women have been hunted, humiliated, punished for their words and beliefs. We look

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7 See Near v. Minnesota, 283 U.S. 697 (1931) (holding unconstitutional as a prior restraint a state statute enjoining publication of allegedly defamatory newspaper regardless of validity of allegations in publication). Lewis cites Near as the starting point “for the courts to begin protecting dissenting speakers and publishers from official repression in the United States” and a “turning point for freedom of the press.” LEWIS, supra note 1, at xiii, 44.

8 LEWIS, supra note 1, at 125; see also Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (holding unconstitutional as a violation of First Amendment rights statute requiring U.S. Postal Service to detain and destroy unsealed mail from foreign countries determined to be “communist political propaganda” unless addressee returned a reply card indicating desire to receive such mail). Stromberg v. California was the first time the Court held a state statute unconstitutional in violation of the First Amendment. See Stromberg v. California, 283 U.S. 359 (1931) (invalidating a California law that forbade the display of a red flag “as a sign, symbol or emblem of opposition to organized government”). Lewis notes that Gitlow v. New York was the first case in which the Supreme Court “accepted the argument that the First Amendment’s protections of speech and press from federal repression were applied to the states by the Fourteenth Amendment. From then on, most of the development of First Amendment freedoms came in state cases.” LEWIS, supra note 1, at 109 (citing Gitlow v. New York, 268 U.S. 652 (1925)).

9 LEWIS, supra note 1.

10 Id. at 21 (“There have been repeated examples of what [the late Columbia University historian] Richard Hofstadter called ‘the paranoid style in American politics.’” (quoting Richard Hofstadter, The Paranoiac Style in American Politics, and Other Essays (1965)). Lewis further notes that repeatedly in American history “the public has been told that civil liberties must be sacrificed to protect the country from foreign threats.” LEWIS, supra note 1, at 21.
to the courts to maintain our faithfulness to freedom. This book, like others, tends to chart the state of American liberty in judicial decisions. But courts have hardly been consistent guarantors of free speech . . . [so that] those who looked to the courts to stand against the political manipulation of fear were [often] disappointed.11

"Courts did nothing," according to Lewis, "to restrain the harsh consequences of the Sedition Act of 1798,"12 or to stop the first "Red Scare" with its "Palmer Raids and other government repressions during and after World War I."13 The courts also did nothing to declare unlawful "what was very likely the greatest blow to constitutional rights in all the wars and times of stress in American history," namely the forced exclusion and relocation of nearly 100,000 American citizens of Japanese ancestry from the West Coast after the Japanese attack on Pearl Harbor in December 1941;14 or to confront the popular "passions and fears" of the first seven years of the "second Red Scare" led by Senator McCarthy, "the maestro of fear and hate," from 1950 until his Senate censure in 1954 and death in 1957.15

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11 Id. at 106, 118.
12 Id. (citing Sedition Act of 1798, one of four laws enacted in 1798 by the Federalists in Congress, signed into law by President John Adams, and known as the "Alien and Sedition Acts"). The Sedition Act, with the official title An Act for the Punishment of Certain Crimes against the United States, made it a crime to publish "false, scandalous, and malicious writing" against the government or its officials. Id. at 11. The law was designed by the Federalists to punish criticism of President Adams but not of the anti-Federalist Vice President, Thomas Jefferson, in the run up to the hotly contested presidential election of 1800 when Jefferson ultimately beat Adams. Id. at 12. In 1801, once in office, Jefferson "quickly pardoned" the fourteen journalists and others who had been convicted for violating the Sedition Act. Id. at 20. The law itself was never reviewed by the courts and expired by its own terms on March 3, 1801, the day before Jefferson was inaugurated as the third President of the United States. Id. at 12. Supreme Court Justice William J. Brennan, Jr. cited the Sedition Act of 1798 "at the heart of his analysis" in the historic libel law decision, N.Y. Times v. Sullivan. See 376 U.S. 254, 273 (1964). The Sedition Act, Brennan wrote, "first crystallized a national awareness of the central meaning of the First Amendment" and although "never tested in this Court, the attack upon its validity has carried the day in the court of history." N.Y. Times, 376 U.S. at 276. "With that, the Sedition Act was found unconstitutional 163 years after it expired." LEWIS, supra note 1, at 53.
13 LEWIS, supra note 1, at 106–07. The Palmer Raids were led by Attorney General A. Mitchell Palmer, and consisted of more than four thousand arrests and the deportation of over eight hundred aliens, including the famed radical speaker, Emma Goldman. Id. at 106.
14 Id. at 112–13.
15 Id. at 104, 122–23. Lewis notes:
The public's support for Red-hunting ebbed with the disgrace and death of Senator McCarthy after he was condemned by the Senate in 1954. In 1957, in Yates v. United States, the Supreme Court in an opinion by Justice Harlan read the law as prohibiting advocacy of violent overthrow [of the government] only when it was accompanied by an effort at action to that end, not mere abstract advocacy.
Id. at 123 (citing Yates v. United States, 354 U.S. 298 (1957)). Lewis also cites a rare instance in the 1950's when the Court "found that a legislative investigation violated the First Amendment" and that the amendment could protect "a witness accused of Communist associations." LEWIS, supra note 1, at 117–18 (citing Sweezy v. New Hampshire, 354 U.S. 234 (1957) (reversing on First Amendment grounds a contempt conviction of a college professor
As in post-September 11th America, no society is immune from the power of fear often "manipulated by politicians." This fear, in turn, is often accompanied by "excesses of patriotic fervor," a patriotism defined in the Bush Administration, according to one of its most caustic critics, as "flag lapel pins, the fear of terrorism and the prospect of perpetual war." So it is unsurprising that with some exceptions, neither the Supreme Court, nor any other Federal courts, have reviewed thoroughly, much less reversed, major aspects of the Bush Administration's "war on terror." Possibly to facilitate such a future court review, Lewis details alleged governmental abuses in this seemingly "endless" war on terrorism, a political tactic used throughout history.

Lewis catalogs the Bush Administration's own assault on due process and civil liberties, which "broke sharply with American law." The particulars include: accusing and threatening to prosecute journalists from newspapers such as The New York Times and Washington Post for allegedly endangering national security in violation of the Espionage Act by disclosing secret and illegal wiretapping of American citizens; detaining indefinitely American citizens who refused to answer questions about one of his lectures or his political affiliations); cf. Barenblatt v. United States, 360 U.S. 109 (1959) (affirming contempt conviction of another college instructor who refused to answer questions about his beliefs or associations). For a discussion of Justice Hugo Black's vigorous dissent in Barenblatt, see infra notes 72–75 and accompanying text.

See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (holding that due process and writ of habeas corpus require that United States citizen being held as enemy combatant be given notice of, and meaningful opportunity to contest, factual basis for his detention before a neutral decision maker as well as access to counsel); Rasul v. Bush, 542 U.S. 466 (2004) (holding that federal habeas statute conferred on district court jurisdiction to hear challenges to the legality of their detentions filed by aliens held as "enemy combatants" at the U.S. Naval Base at Guantanamo Bay, Cuba); Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (holding that military commissions set up without explicit congressional authorization to try detainees at Guantanamo violated the Uniform Code of Military Justice as well as the Geneva Conventions of 1949); Al-Marri v.Wright, 487 F.3d 160 (4th Cir. 2007) (holding the President does not have inherent constitutional authority to order seizure and indefinite military detention of a civilian).

made it a crime when the nation was at war for any person: (a) willfully to "make or convey false reports or false statements with intent to interfere" with the military success of the United States or "to promote the success of its enemies;" (b) willfully to "cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the
citizens suspected of links to terrorism as “enemy combatants” without “trial or access to counsel;” authorizing “the use of torture and other harsh methods of interrogation on suspected terrorists detained in a prison in Guantanamo Bay, Cuba and elsewhere in secret CIA prisons;” working “to exclude press scrutiny—and hence public accountability—by the most sweeping secrecy in American history;” and trying to intimidate war critics who “scare peace-loving people with phantoms of lost liberty” and thereby “give ammunition to America’s enemies.”


23 LEWIS, supra note 1, at 21, 89, 127, 148.
24 Id. at 127.
25 Id. at 128.
26 LEWIS, supra note 1, at 150 (quoting former Attorney General John Ashcroft). For a recent, fervent, and thorough call to “end the ‘war on terror’ as a legal paradigm,” see Bruce Fein, The Presidency: End the war on terror as a legal paradigm, abolish military commissions, and restore FISA, SLATE, Apr. 2, 2008, http://www.slate.com/id/2187811. Fein is a former Reagan Administration General Counsel, Federal Communications Commission, but in more recent years, he has been an ardent critic of the alleged legal excesses of the Bush-Cheney Administration. Fein writes:

International terrorists are criminals, not warriors. The next president should see to it that terrorists will be captured, interrogated, prosecuted, and punished according to civilian law. The United States is not at war with international terrorism. The next president should ensure that we do not brandish the weapons of war in lieu of traditional law enforcement against international terrorists.

If the conflict of the United States with international terrorism amounts to a war, then this nation is permanently at war—a condition the Founding Fathers insisted was irreconcilable with freedom. War crowns the president with monumental powers and sweeping secrecy. It tends to gratify popular bigotries and encourages a conflation of any dissent with treason. Remember the imprisonment of Eugene Debs; the concentration camps for 120,000 Japanese-Americans; the burglary of the office of Lewis Fielding, Daniel Ellsberg’s psychiatrist; and President Bush’s water-boarding and warrantless spying on American citizens in criminal contravention of the Foreign Intelligence Surveillance Act of 1978. The next president must recognize the fundamental dangers of a permanent state of war and the granting of infinite power as commander in chief.

Id.
Lewis acknowledges that "[m]easures such as indefinite detention and torture [do] not engage the First Amendment." Nonetheless, he rightly adds that they are "reminders that the freedoms of speech and of the press are not the only tests of a humane and free society."

B. Courage in Judicial Decision Making on the First Amendment

On the positive side of the balance, however, Lewis also stresses the central role judges and courts have played in shaping the biography of the First Amendment, especially in the last eighty years since the Supreme Court's decision in *Near v. Minnesota*. Lewis writes that "[t]he story of the First Amendment is powerful testimony to the crucial role of judges in a political system that rests on a foundation of law." Lewis even dedicates his book to Chief Justice Margaret H. Marshall of the Supreme Judicial Court of Massachusetts—affectionately referred to as "Margie"—his wife. Judges have woven a "tapestry of rights" out of the fourteen free expression words of the First Amendment, and without their work, Lewis tells us, the country just "wouldn't have the First Amendment we have today." Our freedoms are "written in the case law, not in the words of the First Amendment itself."

Yet, in a famous 1944 speech at a wartime rally in Central Park entitled *The Spirit of Liberty*, then District Court and later Second Circuit Judge Learned Hand said:

'I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes, believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.'

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27 LEWIS, supra note 1, at 128.
28 Id. Lewis elaborates on the point as follows:
Freedom from arbitrary arrest, detention, and physical abuse is just as crucial. The central concern among the Framers of the American Constitution was concentrated power, and the checks and balances they built into our system of government were intended to prevent that kind of power. The aim of the Bush measures was to give the president precisely what the Framers had wanted to avoid: unilateral power unchecked by the other branches of government—and unchecked by the press.

Id.
30 LEWIS, supra note 1, at xii.
31 C-SPAN Interview, supra note 17.
32 Id.
33 LEWIS, supra note 1, at 107 (quoting Judge Learned Hand). Hand gave his famous speech in front of over one million people, including 150,000 newly naturalized citizens who on that same day had pledged their allegiance to their new country. See N. Bruce Duthu, Remarks at Dartmouth College Convocation (Sept. 25, 2007), http://www.dartmouth.edu/~news/releases/2007/09/25b.html.
To Lewis, although Judge Hand’s “rhetoric was memorable,” it was a “misleading overstatement.” Lewis instead argues convincingly that “modern history shows that courts can do much” to inspire a “devotion to freedom.”

Former Supreme Court Justices Oliver Wendell Holmes, Jr. and Louis D. Brandeis, for example, “had neither sword nor purse . . . . But they had words, and their words played a significant part in American society’s growing attachment to freedom of speech later in the twentieth century—in the fitful realization of the promise of the First Amendment.”

In his excellent book published in 2004, University of Chicago Law Professor Geoffrey R. Stone writes: “In the realm of free speech, judges with life tenure and a more focused attention to the preservation of constitutional liberties are much more likely to protect First Amendment rights than the elected branches of government.” Lewis agrees, noting that “the distinctive American contribution to the philosophy of government has been the role of judges as protectors of freedom.”

III. “LUMINOUS STATEMENT(S) ON FREEDOM OF EXPRESSION”

Lewis is a clear, crisp and felicitous writer who appreciates the equally felicitous writing of others. So one of the chief pleasures of reading his latest book is to have in one source key passages from the First Amendment case law. These are taken from decisions of such judicial giants as Holmes and Brandeis, as well as Robert H. Jackson, John Marshall Harlan II, Hugo L. Black and William J. Brennan, Jr.

These “protectors of freedom” bequeath to us what Lewis aptly describes as “luminous statement[s] on freedom of expression.” Lewis writes first of the brilliant dissents and concurring opinions Holmes and Brandeis wrote between 1919 and 1929. They dissented from the punishment of radical speech, overturning “the old, crabbed view of what the First Amendment protects,” and illustrating “the power of words to change minds.” The Holmes-Brandeis dissents and concurrences in such landmark cases as Abrams v. United States, 34

34 Lewis, supra note 1, at 107.
35 Id.
36 Id.
39 Lewis, supra note 1, at 132.
40 Id. at 35.
Whitney v. California, and United States v. Schwimmer, “changed the attitude of the country and the Court” to the First Amendment.

A. Justice Oliver Wendell Holmes, Jr.

Lewis describes Justice Holmes as “the closest we have had to a poet judge.” In 1919, Holmes dissented from the Supreme Court majority in Abrams, which affirmed the convictions of four young radicals under the Espionage Act of 1918. Three men were sentenced to twenty years in prison, and one twenty year-old woman was sentenced to fifteen years for distributing leaflets opposing President Wilson’s sending of troops into Russia after the Bolshevik Revolution. Fifteen or twenty years for criticizing the President of the United States is unthinkable now; however, in 1919, the Supreme Court upheld the convictions. Holmes that same year had previously authored three wartime opinions upholding similar convictions under the Espionage Act—Schenck v. United States, Frohwerk v. United States, and Debs v. United States. However, in that pivotal year of 1919, Holmes began to evolve in his thinking about the First Amendment.

According to Lewis, Holmes’s thinking began to change after a famous train ride conversation with Judge Learned Hand on June 19, 1918, between New York and Boston, and especially after reading Freedom of Speech in War

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44 Lewis, supra note 1, at 35.

45 Id. at 33.

46 Abrams, 250 U.S. 616.

47 Id.

48 Lewis also writes powerfully about how during World War I, seventy-nine citizens of Montana were convicted under a Montana sedition law and sentenced to lengthy prison terms at hard labor for criticizing the American war effort, often for just “muttering something in a tavern” such as the wartime food regulations were “a big joke.” Lewis, supra note 1, at 101; Buzzflash Interview, supra note 2. In May 2006, Montana Governor Brian Schweitzer posthumously pardoned these Montanans convicted under the 1918 sedition law. Lewis writes that Schweitzer made a pardon statement that the Governor said should have been made by his predecessor in 1918: “I'm sorry, forgive me and God bless America, because we can criticize our government.” Lewis, supra note 1, at 102.


50 Frohwerk v. United States, 249 U.S. 204 (1919).


52 See Lewis, supra note 1, at 30–31. For a more in depth examination of the Hand-Holmes relationship and its impact on the development of modern First Amendment juris-
Time by Harvard Law Professor Zechariah Chafee, Jr.\textsuperscript{53} Focusing on the "historical roots of the First Amendment," the article impressed Holmes with its historical evidence that the "First Amendment gave broad protection to speech even in the agitated circumstances of wartime."\textsuperscript{54}

Holmes, however, did not need Chafee's scholarship to draft his dissent in Abrams. Lewis tells us that "[w]hen he came to write" his opinion he "relied on his own rhetorical power—which was extraordinary."\textsuperscript{55} And "in words that forever changed American perceptions of freedom,"\textsuperscript{56} Holmes told posterity that:

\begin{quote}
[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .

That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. . . . While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. . . .\textsuperscript{57}
\end{quote}

prudence, see Gerald Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 STAN. L. REV. 719 (1975). Gunther examines the effect, for example, of Hand's 1917 decision in Masses Publishing Co. v. Patten, issued two years before Holmes wrote his majority opinion in Schenck, and his dissent in Abrams. See Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), rev'd, 246 F. 24 (2d Cir. 1917). In this decision, Hand, then a District Court judge, enjoined the government on free speech grounds from excluding from the mails under the Espionage Act of 1917 an issue of a monthly radical publication, The Masses. Though soon reversed by the Second Circuit, Hand's Masses decision was "especially remarkable given the practical and doctrinal climate of the times, so strikingly inhospitable to dissent." Gunther, supra, at 724; see also LEWIS, supra note 1, at 30 (discussing the free speech significance of Judge Hand's opinion in Masses). Long "overshadowed by the clear and present danger criterion [for suppressing speech] that emerged two years later" in Holmes's opinions in Schenck and Abrams, Hand advocated a more "objective" test focusing on the speaker's words: if the language used was solely that of direct incitement to illegal action, speech could be proscribed; otherwise, it was protected." Gunther, supra, at 721. Lewis writes of a similar test to deal with current terrorist incitement to violence. See LEWIS, supra note 1, at 166-67; see also infra Part V.C.


\textsuperscript{54} LEWIS, supra note 1, at 31. Chafee wrote that the Framers of the First Amendment like James Madison intended "to wipe out the common law of sedition and make further prosecutions for criticisms of the government, without any incitement to law-breaking, forever impossible in the United States." Id. (quoting Chafee, supra note 53).

\textsuperscript{55} Id. at 32.

\textsuperscript{56} Id.

\textsuperscript{57} Id. (quoting Abrams, 250 U.S. at 630) (Holmes, J., dissenting, joined by Brandeis, J.). Lewis points out as an interesting aside that "the phrase 'marketplace of ideas' is often used as if it were Holmes's, but he did not exactly say that. Professor Vincent Blasi traced the
Lewis notes that many regard Brandeis's strong concurrence in *Whitney v California*, in which Holmes joined, as "the greatest judicial statement of the case for freedom of speech." As Brandeis wrote:

> Those who won our independence . . . believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty . . . that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

Brandeis went on to declare in equally stirring words that:

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty . . . . If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

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58 LEWIS, supra note 1, at 35 (citing Whitney v. California, 274 U.S. 357, 372-80 (1927)). One of the additional pleasures lovers of history will get from reading Lewis's book are his frequent journalistic descriptions of the fates of the subjects of these historic First Amendment cases. He tells us, for example, of "Anita Whitney, a member of a socially prominent family who helped to found the Communist Labor Party of California," sentenced for her radicalism under California's "criminal syndicalism" statute to one to fourteen years in the San Quentin penitentiary, but then "a month after the Supreme Court turned down her appeal," being pardoned by the governor of California who quoted at length in his pardon message Brandeis's concurrence. *Id.* at 35–36. In contrast, Lewis tells us:

> The fate of the four radicals who lost in the *Abrams* case was different. They were released from prison in 1921 on condition that they go to the Soviet Union. Mollie Steiner and Jacob Abrams were unhappy with the tyranny they encountered under Leninism and left for Mexico. Hyman Lachowsky and Samuel Lipman stayed in the USSR—and died at the hands, respectively, of Soviet and Nazi terror.

*Id.* at 37.

59 Whitney, 274 U.S. at 375 (Brandeis, J., concurring, joined by Holmes, J.) (emphasis added).

60 *Id.* at 378 (emphasis added).
C. Justice Holmes Revisited

Finally, Lewis places the Supreme Court's rediscovery of the First Amendment in Holmes's eloquent dissent in *United States v. Schwimmer*. Holmes wrote this decision when he was already eighty-eight years old. His words gave Lewis the title of his book:

Some of [Schwimmer's pacifist opinions] might excite popular passion, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country. And recurring to the opinion that bars this applicant's way, I would suggest that the Quakers have done their share to make the country what it is, that many citizens agree with the applicant's belief and that I had not supposed hitherto that we regretted our inability to expel them because they believed more than some of us do in the teachings of the Sermon on the Mount.

61 United States v. Schwimmer, 279 U.S. 644 (1929). Lewis adds another fascinating "personal note" describing when he first read Justice Holmes's opinion in *Schwimmer*:

Some time around 1960, when I was reporting on the Supreme Court for the *New York Times*, I was talking with Justice Felix Frankfurter in his chambers. Suddenly, to make a point, he rose and strode across the room to his shelves of *United States Reports*, the volumes of Supreme Court opinions. He pulled one off the shelf, opened it, handed it to me. ["As he did so, he said, "You talk about liberals and liberalism. Here, read this!" C-SPAN Interview, supra note 17] It was the Holmes dissent in *United States v. Schwimmer*. I read. When I came to the final paragraph, ending "... Sermon on the Mount," I felt the hair rise on the back of my neck. LEWIS, supra note 1, at 38.

62 LEWIS, supra note 1, at 37–38 (quoting Schwimmer, 279 U.S. at 654–55 (Holmes, J., dissenting, joined by Brandeis, J.)) (emphasis added). Adding yet another humanizing note, Lewis tells us that Rosika Schwimmer was an immigrant from Hungary who applied for U.S. citizenship but because of her pacifist beliefs refused to swear that she would take up arms to defend the United States, a requirement at that time to become a U.S. citizen. As a result, she was denied the right to become a citizen and the Supreme Court upheld the denial. Id. at 37. Lewis also tells us that Holmes did not agree with the pacifism of Rosika Schwimmer. He was a Civil War veteran whose Union uniform was still hanging in his closet at his death in 1935, seventy years after the end of the Civil War in 1865. Id. at 34, 37. In fact, Holmes was wounded three times during the Civil War and attached a note to the uniform stating that the stains were his own blood. The Supreme Court, Justice Profiles, http://www.thirteen.org/pressroom/pdf/supremecourtlSupremeCourtJustices.pdf (last visited Apr. 15, 2008). Nonetheless, in his dissent, Holmes pointed out to the Court that Schwimmer's "refusal to swear was irrelevant, 'as she is a woman over fifty years of age, and would not be allowed to bear arms if she wanted to.'" LEWIS, supra note 1, at 37 (quoting Schwimmer, 279 U.S. at 653–54). Holmes then added his immortal words about the constitutional necessity of defending Schwimmer's freedom of thought, not merely "free thought for those who agree with us but freedom for the thought that we hate." Id.
D. Justice Robert H. Jackson

Later “luminous” jurists and elegant wordsmiths that Lewis quotes with obvious delight include former Supreme Court Justice Robert H. Jackson. Also a Solicitor General and Attorney General, Jackson was a close confidante of Franklin D. Roosevelt, who once considered Jackson his possible successor as President. Jackson was also United States Chief Prosecutor at the Nazi War Crimes tribunal at Nuremberg. Of particular relevance here, Jackson is widely considered one of the finest writers in the history of the Supreme Court.

Writing for a 6-3 majority in West Virginia Board of Education v. Barnette, Jackson held that state compulsion of the flag salute violated the First Amendment:

Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

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64 Jackson’s four-hour opening address to the war crimes tribunal in Nuremberg was widely praised as “magnificent” and “one of the finest examples of advocacy” in modern times. Id. at viii.

65 See HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 178 (5th ed. 2008) (“[I]f there were no other justification for holding Jackson in high esteem as a jurist, his magnificent prose—second in beauty and clarity perhaps only to that of Cardozo—has earned him the nation’s high regard and gratitude. Who could ever forget the haunting beauty of his phrases?”).

66 W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 641–42 (1943). Jackson also dissented eloquently from the Supreme Court’s decision in Toyosaburo Korematsu v. United States, which upheld the post-Pearl Harbor military order excluding and removing from the West Coast of the United States all persons of Japanese ancestry, including nearly 100,000 American citizens. Jackson declared that:

A military order, however unconstitutional, is not apt to last longer than the military emergency . . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.

E. Justice John Marshall Harlan II

Lewis also cites Cohen v. California, another “luminous statement on freedom of expression.” The opinion was written by a more conservative Justice, John Marshall Harlan II, not remembered normally for his First Amendment jurisprudence. 67

A young man opposing the draft during the Vietnam War was convicted of “engaging in tumultuous conduct” by walking through a Los Angeles courthouse corridor wearing a jacket on which were inscribed the words “Fuck the Draft.” 68 Writing for a 5–4 majority, Harlan wrote that “one man’s vulgarity is another’s lyric,” and that in the context of opposing the Vietnam War, the “unseemly expletive” was used as a political protest. 69 Harlan explained his reasoning as follows:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us. . . . 70

Citing Brandeis’s concurrence in Whitney, Harlan went on to note:

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. 71

F. Justice Hugo L. Black

One of the final Supreme Court Justices Lewis praises for his First Amendment jurisprudence is Hugo L. Black. In 1959, Black dissented from a 5–4 majority in Barenblatt v. United States. 72 The majority rejected the First Amendment claim of a Vassar College psychology professor convicted for refusing to answer questions on his beliefs and associations from a subcommittee of the then “House Committee on Un-American Activities” investigating alleged “Communist infiltration” of higher education. 73 In a strong dissent, Black wrote that he could not

67 Cohen v. California, 403 U.S. 15 (1971). Interestingly, Justice Hugo L. Black, usually a First Amendment “absolutist” or “literalist,” dissented in this case. See infra note 129. Black also voted with the majority in Korematsu to uphold the relocation of Japanese-Americans from the West Coast in World War II. See supra note 66.
68 Lewis, supra note 1, at 31 (citing Cohen, 403 U.S. 15).
69 Cohen, 403 U.S. at 25.
70 Id. at 24.
71 Id. at 25.
73 Id.
agree with the Court's notion that First Amendment freedoms must be abridged in order to 'preserve' our country. . . . The First Amendment means to me, however, that the only constitutional way our Government can preserve itself is to leave its people the fullest possible freedom to praise, criticize or discuss, as they see fit, all governmental policies and to suggest, if they desire, that even its most fundamental postulates are bad and should be changed. . . . On that premise this land was created, and on that premise it has grown to greatness.\textsuperscript{74}

Ultimately, Black concluded that "all the questions in this case really boil down to one—whether we as a people will try fearfully and futilely to preserve democracy by adopting totalitarian methods, or whether in accordance with our traditions and our Constitution we will have the confidence and [the] \textit{courage to be free}."\textsuperscript{75}

In \textit{New York Times v. United States}, a 6–3 majority held in June 1971 that the Times, the Washington Post, and other newspapers could resume their enjoined publication of top-secret documents from an official history of the Vietnam War known as the "Pentagon Papers."\textsuperscript{76} Out of "10 different opinions offering diverse arguments," according to Lewis, Justice Black wrote "the most powerful, and no doubt the most lasting,\textsuperscript{77} with strong resonance down to today's unpopular war in Iraq. In his last opinion before his death in the summer of 1971, Black wrote that:

The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. \textit{And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, \textit{The New York Times}, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam War, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.}\textsuperscript{78}

G. Justice William J. Brennan, Jr.

The most recent First Amendment decisions Lewis quotes in his book are two cases on flag burning and desecration from 1989 and 1990 both written by Justice William J. Brennan, Jr. In \textit{Texas v. Johnson}, a 5–4 decision, the Supreme Court reversed on First Amendment grounds a conviction for burning the American flag in a political demonstration.\textsuperscript{79} Not without a vigorous dissent from Justice Stevens, as well as one from Justice Rehnquist, in which Justices

\textsuperscript{74} \textit{Id.} at 145–46 (Black, J., dissenting).
\textsuperscript{75} \textit{Id.} at 162 (emphasis added).
\textsuperscript{76} \textit{N.Y. Times v. United States}, 403 U.S. 713 (1971).
\textsuperscript{77} \textit{LEWIS, supra} note 1, at 47.
\textsuperscript{78} \textit{N.Y. Times}, 403 U.S. at 717 (emphasis added).
tics White and O'Connor joined, and a “personal” concurring opinion from Justice Kennedy, the Johnson decision interpreted the First Amendment to protect the “expressive conduct” of burning the flag as “symbolic speech.” Writing for the majority, Justice Brennan declared:

*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. We have not recognized an exception to this principle even where our flag has been involved. . . . In short, nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it.*

Then in 1990, the Supreme Court, in *United States v. Eichman*, by the same 5–4 majority, held the Flag Protection Act of 1989 unconstitutional on First Amendment grounds. Enacted by Congress as a response to the Johnson decision, the law punished anyone “who, except to dispose of a worn or soiled flag, ‘mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States.’” Again writing for the majority, Justice Brennan noted that each of the terms of the statute “unmistakably connote[d] disrespectful treatment of the flag” and suggested “a focus on those acts likely to damage the flag’s symbolic value.” Therefore, the Federal law suffered “from the same fundamental flaw” as the Texas statute the Court invalidated in Johnson: it suppressed “expression out of concern for its likely communicative impact.”

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80 In his concurring opinion, Justice Kennedy wrote:

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

*Id.* at 420–21 (Kennedy, J., concurring). Justice Scalia, to the surprise of some observers, also voted with his more liberal colleagues, Justices Brennan, Thurgood Marshall, and Harry Blackmun, to overturn the flag desecration convictions. *See Johnson*, 491 U.S. 397; United States v. Eichman, 496 U.S. 310 (1990).

81 Johnson, 491 U.S. 310; *see also* Lewis, *supra* note 1, at 40, 165.

82 Johnson, 491 U.S. at 414–15 (citations omitted) (emphasis added) (citing thirteen Supreme Court precedents for support); *see also* FCC v. Pacifica Found., 488 U.S. 726, 745 (1978) (“[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. If it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection.”); *cf. infra* notes 115–22 and accompanying text (discussing the current litigation over the FCC’s policy to enforce its broadcast indecency regulation against the use of “fleeting expletives” “in any context”).

83 *Eichman*, 496 U.S. 310.

84 *Id.* at 314.

85 *Id.* at 317.

86 *Id.*
Brennan acknowledged that "desecration of the flag is deeply offensive to many." But he added that "the same might be said . . . of virulent ethnic and religious epithets . . ., vulgar repudiations of the draft . . ., and scurrilous caricatures," all of which the Court had tolerated and upheld on First Amendment grounds in previous decisions. Repeating the same "bedrock principle underlying the First Amendment" he enunciated in Johnson, Brennan concluded his Eichman opinion by noting, "[p]unishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering."

IV. THE ROBERTS COURT: NOT YET "SOUNDING THE FIRST AMENDMENT BUGLE"

Lewis has nothing to say about the First Amendment decisions of the Court since John Roberts began his tenure as Chief Justice in October 2005. This is not surprising as the Roberts Court is just beginning to make its mark on First Amendment jurisprudence. Nonetheless, it is a mark about which Lewis might well raise some questions.

A. Federal Election Commission v. Wisconsin Right to Life: The First Amendment "Tie Goes to the Speaker"

On June 25, 2007, at the end of his second term, Chief Justice Roberts received extensive media attention for his majority opinion in Federal Election Commission v. Wisconsin Right to Life. This 5–4 decision held violative of the First Amendment the provision in the campaign finance law known as the "McCain-Feingold Act" prohibiting the use of a candidate’s name in a televi-

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87 Id. at 318.
90 Eichman, 496 U.S. at 319.
91 The phrase comes from Chief Justice Roberts’s majority opinion in Morse v. Frederick. 127 S. Ct. 2618, 2629 (2007) ("Striped of rhetorical flourishes . . . the debate between the dissent and this opinion is less about constitutional first principles than about whether Frederick’s banner constitutes promotion of illegal drug use. We have explained our view that it does. The dissent’s contrary view on that relatively narrow question hardly justifies sounding the First Amendment bugle."); see infra Part IV.B for further discussion of Morse.
92 For access to citations and summaries of other free expression cases in the Roberts Supreme Court dockets since he assumed the position of Chief Justice in October 2005, see First Amendment Center, First Amendment Library, http://www.firstamendmentcenter.org/faclibrary/index.aspx (last visited Apr. 11, 2008).
sion campaign advertisement, or "electioneering communication," thirty days before a primary election or sixty days before a general election.\(^9\)

This prohibition on electioneering communications was a key provision of the McCain-Feingold Act that aimed to limit the impact of special interest money on political campaigns. The Roberts decision vindicated Wisconsin Right to Life's strategy to run a television advertisement just before the 2006 Wisconsin Senate primary that attacked Wisconsin Senator Russell Feingold's support of a Democratic filibuster against President Bush's most conservative judicial nominees. Roberts wrote that the statutory prohibition at issue was an unconstitutional infringement on the rights of corporations, labor unions, and special interest groups like Wisconsin Right to Life to engage in issue advocacy. "Discussion of issues," Roberts wrote, "cannot be suppressed simply because the issues may also be pertinent in an election."\(^9\)\(^5\) He then added his widely-quoted line: "Where the First Amendment is implicated, the tie goes to the speaker, not the censor."\(^9\)\(^6\)

Despite Roberts's rhetoric, critics quickly condemned his decision as a "big win for big money" that would only "encourage a financial arms race between well-heeled special interest groups" and "reopen[] the door to corruption."\(^9\)\(^7\) Others suggested that Roberts "only . . . embraced the First Amendment" in Wisconsin Right to Life to "protect[] corporate free-speech interests."\(^9\)\(^8\) One observer described the decision even more caustically, stating that "the implication that [the Roberts] court defends First Amendment rights is pretty much hogwash. . . . the court is really saying that the tie goes to speakers who have money and power. That is, if the speaker is rich and influential, then free speech wins. If not, free speech loses."\(^9\)\(^9\)

This cynical viewpoint may have been reinforced by the fact that Roberts's glowing language about the First Amendment appeared "in the only case of the [2006–07] term in which the First Amendment claimant was the clear winner

\(^9\)\(^5\) Wis. Right to Life, 127 S. Ct. at 2669.
\(^9\)\(^6\) Id.
\(^9\)\(^7\) Robert Barnes, 5-4 Supreme Court Weakens Curbs on Pre-Election TV Ads, WASH. POST, June 26, 2007, at A1.
\(^9\)\(^9\) See Garrett Epps, Free Speech for the Rich and Powerful, SALON.COM, www.salon.com/opinion/feature/2007/06/29/supreme_court/. Epps is a Professor of Law at University of Oregon School of Law. In contrast, Richard W. Garnett, an Associate Professor of Law at University of Notre Dame School of Law, has noted that "[t]his criticism is not well founded" since non-corporate groups like the American Civil Liberties Union and the AFL-CIO "urged the position that Roberts and the Court majority took" in Wisconsin Right to Life. Mauro, supra note 98.
over a government adversary." As one journalist described, “[i]t was that kind of term for the First Amendment: soaring rhetoric on one hand, less-than-positive results on the other.” Indeed, Roberts read his “speaker” over “censor” words from the bench just moments after he read from another First Amendment decision in which “the censor was the clear winner over the speaker.”

B. Morse v. Frederick: School “Censor” Wins Over Student “Speaker”

*Morse v. Frederick* was a 6–3 opinion in which Chief Justice Roberts was joined by Justices Scalia, Kennedy, Thomas, and Alito—the same conservative majority in *Wisconsin Right to Life*—as well as by Justice Breyer concurring in the judgment but dissenting as to the decision’s rationale. From a student’s perspective, this decision is undoubtedly the Roberts Court’s most prominent First Amendment opinion to date. The Court held that a high school principal did not violate a student’s right to free speech when she confiscated the student’s banner declaring “BONG Hits 4 JESUS” at an off-campus, school-approved activity and suspended the student for ten days. Reversing the Ninth Circuit, which had overturned a District Court grant of summary judgment for the school district, Chief Justice Roberts noted that schools may take steps to safeguard those entrusted to their care from speech that can “reasonably be viewed as promoting illegal drug use” in violation of school policy. Thus, the school officials did not violate the First Amendment by confiscating the pro-drug banner and suspending the student. Roberts further noted that

100 Mauro, *supra* note 98.

101 *Id.*

102 *Id.* Mauro notes that First Amendment claims were also denied in several other cases during Roberts’s second term. *Id.* (citing Tenn. Secondary Sch. Athletic Ass’n v. Brentwood Acad., 127 S. Ct. 2489 (2007) (involving speech rights of private school coaches); Davenport v. Wash. Educ. Ass’n, 127 S. Ct. 2372 (2007) (involving public-sector unions’ spending of nonmembers’ fees for election-related purposes); Hein v. Freedom From Religion Found., 127 S. Ct. 2553 (2007) (holding that taxpayers did not have standing to challenge President Bush’s “faith-based initiative” as an Establishment Clause violation)).

103 Morse v. Frederick, 127 S. Ct. 2618 (2007). In his concurrence, Justice Breyer wrote that the Court “should not decide this difficult First Amendment issue on the merits,” but “should simply hold that qualified immunity bars the student’s claim for monetary damages and say no more.” *Id.* at 2638 (Breyer, J., concurring).


105 Morse, 127 S. Ct. 2618.

106 *Id.*
“the constitutional rights of students in public school are not automatically co-extensive with the rights of adults in other settings” and the First Amendment must be “applied in light of the special characteristics of the school environment.” Ultimately, Roberts concluded that the Court’s decision to restrict student free speech rights under these circumstances “hardly justifies sounding the First Amendment bugle.”

Yet, sound it the three dissenters did. Justice Stevens, joined by Justices Souter and Ginsburg, did not dispute the points Chief Justice Roberts argued, but noted that:

The First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students. This nonsense banner [did] neither, and the Court [did] serious violence to the First Amendment in upholding—indeed, lauding—a school’s decision to punish [the student] for expressing a view with which it disagreed.

Citing Brandeis’s concurrence in Whitney and Holmes’s dissent in Abrams, Justice Stevens concluded that:

Even in high school, a rule that permits only one point of view to be expressed is less likely to produce correct answers than the open discussion of countervailing views. In the national debate about a serious issue, it is the expression of the minority’s viewpoint that most demands the protection of the First Amendment. Whatever the better policy may be, a full and frank discussion of the costs and benefits of the attempt to prohibit the use of marijuana is far wiser than suppression of speech because it is unpopular.

Despite Stevens’s rhetorical flourishes à la Brandeis and Holmes, Morse may have limited First Amendment significance. Asked to comment on the case during an interview about his book, Lewis responded that “this is a marginal case and is not very telling” as to the future of the First Amendment in the Supreme Court.

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107 Id. at 2621 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986)).
109 Id. at 2629.
110 Id. at 2644 (Stevens, J., dissenting).
111 Id. at 2651 (citing Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring, joined by Holmes, J.); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting, joined by Brandeis, J.)).
112 C-SPAN Interview, supra note 17. Similarly, another observer noted that the interesting aspect of Morse is the “divisions among the conservatives” rather than the holding of the case itself. Mauro, supra, note 98 (quoting Notre Dame Law School Professor Richard Garnett). For example, Justice Alito, joined by Justice Kennedy, “wrote a separate concurrence to underscore that the Court was making a narrow decision that cannot be used to justify broader restriction of student speech on political or social issues.” Id. Alito agreed with the majority that “public schools may ban speech advocating illegal drug use” but he regarded such regulation “as standing at the far reaches of what the First Amendment permits.” Id. (quoting Morse, 127 S. Ct. at 2638 (Alito, J., concurring)). In contrast, Justice Thomas took a “more extreme position,” and wrote in his concurrence that Tinker should be overturned altogether. Id. Cited by Chief Justice Roberts in his majority opinion, Tinker is the 1969
C. Fox Television Stations, Inc. v. FCC: “Arbitrary and F^@#*$! Capricious?”

A case that may be more “telling” as to the future direction the Roberts Court will take on the First Amendment will be briefed by the parties, heard and decided by the Court in its 2008–2009 term. On March 17, 2008, the Supreme Court granted certiorari in the first broadcast indecency case it has accepted in over thirty years since the Court’s landmark 1978 decision in FCC v. Pacifica Foundation upholding the Federal Communications Commission’s (“FCC”) broadcast indecency regulations.

The Roberts Court will review the Second Circuit’s decision in Fox Television Stations, Inc. v. FCC. In a 2–1 decision, a three-judge panel held that the FCC’s policy to sanction broadcast licensees for the use of “fleeting expletives” like “fuck” and “shit” was arbitrary and capricious under the Administrative Procedure Act because it was a “dramatic change in agency policy...
without adequate explanation."\(^{117}\) The change the majority referred to was the FCC's shift from evaluating the "full context" of the alleged indecency rather than just the "isolated or fleeting" use of an expletive before sanctioning a licensee, to a policy of sanctioning the \textit{per se} use of such expletives "in any context" regardless of how "isolated or fleeting."\(^{118}\)

Bound by the Court's \textit{Pacifica} precedent upholding the FCC's broadcast indecency policy, the Second Circuit also exercised its judicial self-restraint under the canon of "constitutional avoidance," and refrained from ruling on the constitutionality of the FCC's indecency policy and enforcement regime under

\(^{117}\) \textit{Id.} at 454. The lone dissenting judge concluded that the FCC "gave a reasoned explanation for its change of standard and thus complied with the requirement of the Administrative Procedure Act." \textit{Id.} at 467 (Leval, J., dissenting).

\(^{118}\) \textit{Compare In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, Policy Statement, 16 F.C.C.R. 7999, ¶¶ 9, 17–18} (Mar. 14, 2001) (specifying that "[i]n determining whether material is patently offensive, the \textit{full context} in which the material appeared is critically important" and citing examples of material found from the context not to be not indecent because they were "isolated or fleeting" in nature) (emphasis in original) \textit{with In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, Memorandum Opinion and Order, 19 F.C.C.R. 4975, ¶ 8} (Mar. 3, 2004) [hereinafter 2004 Order] (concluding that any use of the "F-Word" has an inherent sexual connotation "in any context" and thus falls within the first prong of the FCC's indecency definition). The 2004 Order explicitly rejected "prior Commission and staff action" indicating "that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon," and concluded that "any such interpretation is no longer good law." \textit{Id.} ¶ 12; see, e.g., \textit{In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, Memorandum Opinion and Order, 18 F.C.C.R. 19,859, ¶¶ 5–7} (Oct. 3, 2003) (deciding that when the rock singer Bono said that it was "really, really, fucking brilliant" upon accepting an award during a live broadcast of the Golden Globe Awards on the Fox Television Network, he was not using the "F-Word" to describe "sexual or excretory organs or activities," but as a language "intensifier," "an adjective or expletive to emphasize an exclamation," and thus "the various licensees that aired the ‘Golden Globe Awards’ program . . . did not violate the law, and . . . no action is warranted"). The 2004 Order further stated that "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." \textit{2004 Order, supra,} ¶ 12. The 2004 Order, which Fox and other TV networks are challenging in \textit{Fox v. FCC}, ultimately found that the Golden Globe broadcast of Bono's remark was indecent under the broadcast indecency statute, 18 U.S.C. § 1464. However, the Order did not impose a forfeiture on the broadcast licensees because it was reversing Commission precedent regarding the broadcast of the "F-Word." \textit{Id.} ¶ 17. For an extensive discussion and analysis of the "evolution of the FCC's indecency regulations," and the Golden Globe Awards decision, see \textsc{Angie A. Welborn} \& \textsc{Henry Cohen}, \textsc{Regulation of Broadcast Indecency: Background and Legal Analysis} (2005). This Congressional Research Service Report also details the infamous "wardrobe malfunction," and subsequent FCC decision to impose a $550,000 forfeiture on several Viacom-owned CBS affiliates for the broadcast of the Super Bowl XXXVIII halftime show on February 1, 2004, in which performer Justin Timberlake exposed for a brief moment the breast of his co-performer, Janet Jackson. \textit{See CBS Broadcasting, Inc. v. FCC}, No. 06-3575 (3d Cir. argued Sept. 11, 2007).
the First Amendment. However, the court strongly noted in several pages of dicta its skepticism "that the Commission can provide a reasoned explanation for its 'fleeting expletive' regime that can pass constitutional muster." The "potential [constitutional] problems" with the FCC's indecency policy, the court noted, are that "the FCC's indecency regime is unconstitutionally vague; the FCC's indecency test permits the Commission to make subjective determinations about the quality of speech in violation of the First Amendment; and the FCC's indecency regime is an impermissible content-based regulation of speech that violates the First Amendment." 

119 Fox, 489 F.3d at 462. The canon of "constitutional avoidance" is a rule of statutory interpretation providing:

When the validity of an act of the Congress is drawn into question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. Ashwander v. Tenn. Valley Auth., 297 U.S 288, 348 (1936) (Brandeis, J., concurring) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

120 Fox, 489 F.3d at 462. For the court's dicta on its skepticism that the FCC's "'fleeting expletive' regime" can "pass constitutional muster," see id. at 462–66.

121 Id. at 454 (numbers omitted). For example, the court noted that it was sympathetic to the Networks' contention that the FCC's indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague. Although the Commission has declared that all variants of "fuck" and "shit" are presumptively indecent and profane, repeated use of those words in "Saving Private Ryan," for example, was neither indecent nor profane. And while multiple occurrences of expletives in "Saving Private Ryan" was not gratuitous, a single occurrence of "fucking" in the Golden Globe Awards [for which Fox was cited] was "shocking and gratuitous."

Id. at 463 (citations omitted). The court further noted the FCC's "inconsistency" in finding numerous expletives as "integral" to a fictional movie about war, but "indecent" and "profane" when spoken by real musicians in Martin Scorsese's PBS documentary The Blues:Godfathers and Sons because "the educational purpose of the documentary 'could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives.'" Id. (citations omitted). Martin Scorsese, protesting the FCC's indecency ruling on his documentary, told the FCC that

profanity was integral to the language of his TV documentary and that to censor it would "strip the documentary of its essential authenticity and historical accuracy. . . . The language of blues musicians often was filled with expletives that shocked and challenged America's white dominated society of the forties, fifties and sixties. . . . To accurately capture the essential character of the blues music and the subculture in which it originated and flourished, it was important to preserve in the film the actual speech and discursive formations of the participants." To do otherwise would be 'whitewashing the blues.'

See John Eggerton, FCC 'Whitewashing' Blues, Says Scorsese, BROAD. & CABLE, May 8, 2006, http://www.broadcastingcable.com/article/CA6332444.html. This is almost identical to the rationale the Commission itself used when explaining why it was not sanctioning the use of the same "indecent," "profane" words in Saving Private Ryan: because editing them out "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers." See In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, Notices of Apparent Liability and Memorandum Opinion and Order, 21 F.C.C.R. 2664, ¶82 (Feb. 21, 2006)
If Tony Lewis had his way, the Supreme Court would ultimately find the FCC's entanglement in indecency enforcement unconstitutional on First Amendment grounds. Lewis believes the FCC is too "dogged" in its role as

(citing In re Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the film "Saving Private Ryan," Memorandum Opinion and Order, 20 F.C.C.R. 4507, ¶¶13-14 (Feb. 3, 2005)). For further critique of this alleged FCC inconsistency and intrusion into artistic decision making and their implications for the First Amendment, see Stephen A. Weiswasser & Robert M. Sherman, Oprah and Spielberg vs. Without a Trace and Scorsese: Indecent Inconsistency at the FCC, COMM. LAW., Spring 2006, at 3-8 ("The Commission's detour into the world of 'artistic necessity' is the only apparent objective distinction between Godfathers and Private Ryan, and it is perhaps without precedent in the history of governmental regulation of protected speech. The upshot is that a documentary attempting to give the audience a feel for the actual figures who shaped a national musical movement should not have shown them as they are or captured how they speak, but a fictionalized portrayal of an event could use the same language to portray characters who are totally imaginary. As others have observed, the lesson apparently to be drawn from a comparison of the two cases is that reality is permissible when fictionalized but prohibited when real people and actual people are involved.").

122 Robert Corn-Revere is a leading First Amendment attorney in private practice, former Legal Adviser to former FCC Commissioner James Quello, former lecturer in the Institute for Communications Law Studies, The Catholic University of America, Columbus School of Law, and long-time opponent of the FCC's indecency regime. He and two of his colleagues summarized the Second Circuit's constitutional dicta argument as follows:

Citing the Supreme Court's decision in Reno v. ACLU that invalidated as unconstitutionally vague a legal standard nearly identical to the FCC's formulation of its indecency rule, the court said: "we are hard pressed to imagine a regime that is more vague than one that relies entirely on consideration of the otherwise unspecified 'context' of a broadcast indecency." The court also stated that "the FCC's indecency test" also raises "the separate constitutional question of whether it permits the FCC to sanction speech based on [the agency's] subjective view of the merit of that speech." It added, "the FCC's current indecency regime" of requiring that "the broadcaster . . . demonstrate to the satisfaction of the Commission, under an unidentified burden of proof, that the expletives were 'integral' to the work . . . gives too much discretion to government officials" in violation of the First Amendment.

The court noted that "all speech covered by the FCC's indecency policy is fully protected by the First Amendment." Although the court stopped short of saying that broadcast media should be subject to strict First Amendment scrutiny, it observed that it is getting extremely difficult to describe the broadcast media as "uniquely pervasive," as it was when the Supreme Court first allowed more onerous restrictions on broadcast "speech." Accordingly, it cited the United States v. Playboy decision for the proposition that strict scrutiny may soon apply to broadcasting. The court cited the availability of less restrictive means of avoiding the perceived harm through, for instance, the use of the V-Chip. It concluded: "The FCC is free to regulate indecency, but its regulatory powers are bounded by the Constitution. If the Playboy decision is any guide, technological advances may obviate the constitutional legitimacy of the FCC's robust oversight."

In his February 2008 C-SPAN interview, Lewis critiqued the FCC’s indecency enforcement regime as a “fantastic waste of time” and “politically ridiculous.” Commenting on the FCC’s decision to fine forty-four stations affiliated with, or owned-and-operated by, the ABC Television Network $27,500 each for briefly airing a “bare buttocks” during an otherwise artistically serious episode of the critically acclaimed television police drama, *NYPD Blue*, Lewis asked why the FCC is “asserting itself to deny this reality to us.” He added, “if the FCC believes an eight or ten year old child hasn’t seen a bare buttocks or hasn’t used a four letter word, the FCC is living back in 1872, or 1772.” In his book, Lewis acknowledges that critics are “right to worry about the flood of pornography and the general coarsening of our societies.” But he nonetheless concludes that the “bluenoses who kept Americans from reading [*Ulysses* by James] Joyce and [*Lady Chatterley’s Lover* by D.H.] Lawrence made censorship intellectually unacceptable, and attempts to draw a line somewhere else—by judges and politicians—[do] not work.”

V. A FIRST AMENDMENT SKEPTIC, NOT ABSOLUTIST

Despite such traditionally “liberal” pronouncements on the First Amendment, however, Lewis is not a First Amendment absolutist or “literalist,” as former Justice Hugo Black has been described. Lewis recognizes the occa-

Coincidentally, the Second Circuit's decision issued later on the same day the FCC's Daily Digest announced it had amended its rules to implement the Broadcast Decency Enforcement Act, by revising the provision that establishes the maximum possible forfeitures for various offenses to reflect a tenfold increase in maximum fine for indecency violations to $325,000 per violation up to a maximum of $3,000,000 for any single act.

Id.

123 *LEWIS*, supra note 1, at 140.

124 C-SPAN Interview, *supra* note 17.


126 C-SPAN Interview, *supra* note 17.

127 *LEWIS*, supra note 1, at 141.

128 Id.

129 See MARC A. FRANKLIN, DAVID A. ANDERSON & LYRISSA BARNETT LIDSKY, MASS MEDIA LAW, CASES AND MATERIALS 29 (7th ed. 2005) (describing Justice Black’s literal, absolutist approach to the First Amendment); see also Edmund Cahn, *Justice Black and First Amendment “Absolutes”: A Public Interview*, 37 N.Y.U. L. REV. 549, 554 (1962) (“[The First Amendment] says ‘no law,’ and that is what I believe it means.” (quoting Justice Black in an interview)). Franklin noted, “the only restrictions that Justice Black believed permissible under the First Amendment were incidental restrictions on the time, place, and manner of an individual’s freedom of expression.” *FRANKLIN*, *supra*, at 29. But as Franklin further notes:

Even Justice Black found himself forced to narrow the scope of what counts as speech
sional need to balance the free speech and press values of the First Amendment against other societal values such as the Sixth Amendment right to a fair trial, or the protection of personal privacy and reputation. Entitling one of his book chapters "Balancing Interests," Lewis notes that "[p]eople invoke 'the First Amendment' as if those words would settle whatever issue was being debated. But in truth the freedoms of speech and of the press have never been absolutes. The courts and society have repeatedly struggled to accommodate other interests along with those.'\(^\text{131}\)

A. Press Shield Laws

Consider, for example, one of Lewis's own "struggles" in the book and his unorthodox position on "reporter's privilege" and "shield" laws.\(^\text{132}\) These laws, in order to reach the "correct" result in a speech case. In \textit{Cohen v. California}, Justice Blackmun, joined by Justice Black, argued that the state could punish one of its citizens for wearing a jacket that said "Fuck the Draft." According to Justice Black, wearing a jacket expressing this sentiment was not speech but physical conduct that a state could legitimately regulate. \textit{Id.} (citing 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting, with Black, J. joining)). Franklin adds that "[t]he literal approach did not allow Justice Black to balance the State's interests against the right to freedom of expression. Thus, he was forced to resort to strained reasoning to avoid what to him was an unacceptable outcome." \textit{Id.} Black also dissented in \textit{Tinker v. Des Moines Independent Community School District}, another free speech case involving protesting young people and the Vietnam War. 393 U.S. 503 (1969) (Black, J., dissenting) (upholding the right of students to wear a black arm band to school in protest of the Vietnam War as long as such protest did not disrupt school discipline or the educational process). In his dissent, Black peevishly criticized the Court for "subject[ing] all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students." \textit{Id.} at 525.

\(^{130}\) For an excellent book on balancing free speech on the Internet and personal privacy and exploring "the profound implications of the online collision between free speech and privacy," see \textsc{Daniel J. Solove, The Future of Reputation: Gossip, Rumor, and Privacy on the Internet} 205 (2007). A law professor at George Washington University, Professor Solove examines such issues as "the virtues and vices of gossip and shaming, the effect of new technologies on the spread of information, and the ways in which law, technology, and norms interact." \textit{Id.} Solove also evaluates the need for new legal protections in a new media age of blogs, chatrooms, and online discussion groups as well as "cyberbullying" and "Internet vigilantism" when everyone can write and "publish" but not everyone considers, or can be held accountable for, what they write and distribute over cyberspace. \textit{Id.}\

\(^{131}\) \textsc{Lewis, supra note 1, at 169.}

\(^{132}\) \textsc{See Branzburg v. Hayes, 408 U.S. 665 (1972) (holding that reporters do not have a press privilege to withhold testimony from a grand jury). For contrasting arguments on a Federal shield law, absent a Supreme Court decision to protect the confidentiality of journalists' sources, compare Patrick J. Fitzgerald, \textit{Shield Law Perils}, \textsc{Wash. Post}, Oct. 4, 2007, at A25, and Theodore Olson, . . . \textit{Or Safeguards?}, \textsc{Wash. Post}, Oct. 4, 2007, at A25. For a summary of the more than thirty state shield laws as well as lower court cases upholding at least a qualified form of reporter's privilege, see Bill Kenworthy, \textit{State Shield Statutes & Leading Cases, First Amendment CTR.}, Oct. 17, 2005,
common in most of the states but yet to be enacted on the Federal level, would protect reporters in many, but rarely all, instances from revealing their confidential sources in civil or criminal cases. Press advocates likely will disagree with Lewis’s surprising skepticism about the necessity for, or efficacy of, these press shield laws like the one currently pending in Congress.133 Lewis entitles http://www.firstamendmentcenter.org/press/topic.aspx?topic=shield laws; see also Reporters Comm. for Freedom of the Press, Privilege Compendium, http://www.rcfp.org/privilege (last visited Apr. 18, 2008).


Hauling journalists to jail or personally bankrupting them to reveal their confidential sources is not the American way. Our country spends millions of dollars promoting a free and vibrant press abroad, but here at home the press is under fire from prosecutors and civil litigants chilling the free flow of information to the American public. . . . There are times when the compelled disclosure of a confidential source’s identity may be necessary for national security, personal safety and law enforcement reasons. S. 2035, the “Free Flow of Information Act,” carves out exceptions to appropriately balance these legitimate concerns. S. 2035 is NOT an absolute privilege, but carefully balances the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information.

Id. But for a more skeptical journalist’s perspective on the pending Federal shield law, see Jack Shafer, We Don’t Need No Stinkin’ Shield Law, Slate, Apr. 16, 2008, http://www.slate.com/id/2189186 (arguing that the limited number of media subpoenas the Department of Justice has issued under its current guidelines has been “hardly a landslide” of sixty-five between 2001 and 2006, that “the current legal ambiguities and discretionary guidelines may actually benefit the press,” while “legally codifying the process of subpoe-
his chapter on this issue, “A Press Privilege?” Acknowledging that the press has a genuine interest in maintaining its ability to use confidential sources, Lewis would balance that concern in civil cases against “the interest of the person whose good name has been sullied.” He asks: “[w]ould we want to deprive someone whose reputation has been trashed by an anonymous source of any real chance of repairing that reputation in court?” Lewis answers that he would not.

As for “shield” laws giving journalists a Federal, statutory testimonial privilege they have yet to obtain in the Federal courts, Lewis notes they “do not dispose of all the doubts about exempting journalists from the universal citizens’ duty to testify in court when called.” Lewis illustrates those doubts by detailing the case of Wen Ho Lee, a nuclear scientist at the Los Alamos National Laboratory:

[He] was described in various press stories in the late 1990s as an atomic spy. The stories, evidently a result of leaks from government sources, said Lee was suspected of giving secrets to China. He was arrested, charged with fifty-nine felony counts, and held for nine months in solitary confinement. Then the government dropped all but one of the counts, a charge that he mishandled information that had been retroactively classified as “secret.” The judge handling the case apologized to Lee and said officials had “embarrassed our entire nation and each of us who is a citizen of it.” A Boston Globe editorial said the suspicions about Lee came from an intelligence official “with a reputation for right-wing zealotry and racist behavior.”

Lee sued the government for violation of his privacy in the leaks to the press. His lawyers subpoenaed five reporters and asked about the sources of their stories. They refused to answer, and they were held in contempt and ordered to pay fines of $500 a day until they agreed to respond. Then five news organizations—ABC News, the Los Angeles Times, the New York Times, the Washington Post, and the Associated Press—settled the case and ended the contempt sanctions by agreeing to pay Lee $750,000. The government also contributed $895,000 toward his lawyers’ fees and taxes.

In settling the case, the news organizations made no apology for their contemptible treatment of Wen Ho Lee. They said they agreed to settle “to protect our journalists from further sanctions” and to protect their ability to obtain information that can come “only from confidential sources.” In other words: We don’t care what we did to Wen Ho Lee; we care about our own needs. The Boston Globe, which had not been part of the attack on Lee, saw the real situation in an editorial on the settlement. It said: “it is important to remember what was done to Lee because powerful institutions rarely admit abuse of their powers, and because the rule of law is imperiled when the government and a compliant or gullible press tramples on the rights of a single private citizen.”

naing journalists” could mainly benefit the “corporate press” and “lead to the licensing of journalists”); see also 28 C.F.R. § 50.10 (2007).

134 LEWIS, supra note 1, at 81–100.
135 Id. at 83.
136 Id.
137 Id.
138 Id. at 91.
139 Id. at 92–93.
After this detailed telling of Lee's story, Lewis asks:

Suppose that a federal shield law had existed when Wen Ho Lee sued to seek some compensation for his nightmare ordeal. The journalists who wrote the damaging stories would have had their subpoenas dismissed, and without the names of the leakers Lee would probably have had to give up his lawsuit. Is that what a decent society should want? Would that have really benefited the press? Or would it have added to the evident public feeling that the press is arrogant, demanding special treatment?

To Lewis, "the press, as James Madison told us long ago, can be a crucial force in countering abuse of official power. But it is not always the good guy. It can be a compliant or gullible handmaiden of government abuse." And with "ethical and other compelling interests on both sides of the privilege issue," Lewis believes journalists should be more "cautious in relying on unnamed sources in what they write," especially when quoting anonymous sources with pejorative comments on individuals.

Lewis also correctly points out that the constitutional claim for special treatment of journalists in the courts is "difficult to sustain." The Supreme Court, he correctly notes, "has shown no interest in reexamining the issue" since its 1972 decision in Branzburg v. Hayes, which rejected a reporter's privilege to withhold grand jury testimony. Lewis adds that "the chance [the Court] will read the First Amendment to give journalists a testimonial privilege is zero."

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140 Id. at 93.
141 Id.
142 Id. at 96.
143 Id. at 97.
144 Id. at 96 (citing Branzburg v. Hayes, 408 U.S. 665 (1972).
145 Id. at 96–97. Lewis explains that:

The trouble with the constitutional claim is that it fits awkwardly with the general course of First Amendment decisions on the freedom of the press. Starting in 1931, the Supreme Court largely immunized the press from prior restraints (in Near v. Minnesota) and subsequent penalties for what it published (in New York Times v. Sullivan). It hardly ever read the First Amendment as assuring the acquisition of information, and then only when the complaint was against closed courtrooms. And in those courtroom cases the Supreme Court gave no special access to the press, deciding rather that courtrooms must be open to the public at large. To prevail with its constitutional argument on the privilege issue, the press would have to persuade the Supreme Court to take two new steps: First, it would have to decide that the First Amendment gives the press (however defined) access to information not given to the public, and then it would have to decide that keeping sources secret is crucial to that access. Journalists and their lawyers often speak as if the First Amendment, in guaranteeing the freedom of "the press," protected an institution—the organized press. Indeed, Justice Stewart made that assumption in a lecture. But in the eighteenth century there was nothing like the organized press institutions that developed later. In promising "the freedom of speech, or of the press," the amendment surely meant merely to cover both oral and written expression: pamphlets and books just as much as newspapers. Once the premise of a specially protected institution is put aside, the constitutional claim for special treatment of journalists in the courts becomes more difficult to sustain.
This suggests to Lewis that the question of a testimonial privilege for journalists is more one of public policy than of constitutional law. And the policy he supports relies on a testimonial privilege statute Congress enacted in 1975 to authorize the federal courts to adopt a qualified federal privilege for journalists.\(^{146}\) Lewis cites approvingly in this regard a concurring opinion issued in 2005 by D.C. Circuit Judge David Tatel, in the contempt proceedings of Judith Miller of \textit{The New York Times} and Matt Cooper of \textit{Time}.\(^{147}\) Judge Tatel proposed a special balancing test to resolve the free press-fair trial conflicts that have frequently arisen in recent years. Under his test, Judge Tatel would "weigh the interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value."\(^{148}\) For example, "if the government wanted to learn who leaked the story of President Bush's order for wiretapping without required warrants, a court would weigh the harm caused by that leak against the impor-


\(^{147}\) See In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005), cert. denied, 125 S. Ct. 2977 (2005), reissued as amended with redactions of classified filings by the Special Prosecutor, 438 F.3d 1141 (D.C. Cir. 2006) (Tatel, J., concurring). As Judge Tatel explains in his concurring opinion:

In 1975—three years after \textit{Branzburg}—Congress enacted Rule 501 of the Federal Rules of Evidence, authorizing federal courts to develop evidentiary privileges in federal question cases according to "the principles of the common law as they may be interpreted . . . in the light of reason and experience." Given Branzburg's instruction that "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned," Rule 501's delegation of congressional authority requires that we look anew at the "necess[ity] and desirab[ility]" of the reporter privilege—though from a common law perspective.

\(^{148}\) \textit{Id.}, at 988–89 (citations omitted). The Miller case arose when a Federal court found reporters Judith Miller, \textit{New York Times}, and Matthew Cooper, \textit{Time}, in civil contempt for refusing to give evidence by disclosing confidential sources in response to grand jury subpoenas. These were issued by Special Prosecutor, Patrick Fitzgerald, as part of his criminal investigation into the leaking of the identity of Valerie Plame, a former operative with the Central Intelligence Agency and wife of former Ambassador and Iraq War critic, Joseph Wilson, by Lewis "Scooter" Libby, former Chief of Staff to Vice President Dick Cheney, and later convicted of perjury. Miller spent eighty-five days in jail until Libby "assured her in a telephone call . . . that a waiver he gave prosecutors authorizing them to question reporters about their conversations with him was not coerced." Susan Schmidt & Jim VandeHei, \textit{N.Y. Times Reporter Released From Jail}, \textit{WASH. POST}, Sept. 30, 2005, at A01.
tance of the information to the public."\textsuperscript{149} In Lewis's opinion, "the latter would plainly prevail, and the reporters would have a privilege not to disclose their sources."\textsuperscript{150}

Lewis concludes his "Press Privilege?" chapter by noting that the press should take the Miller case and Judge Tatel's concurrence "as a warning against pressing its claims too far and separating itself from the mainstream of the law and public opinion."\textsuperscript{151}

B. Hate Speech

Lewis also examines "American tolerance for hateful speech"\textsuperscript{152} against blacks, homosexuals, Jews, Muslims, or other minority groups. He writes, for example, about Collin v. Smith, in which the Seventh Circuit ultimately declared unconstitutional an ordinance designed to stop a threatened Nazi march in Skokie, Illinois, a community with a large number of Holocaust survivors.\textsuperscript{153} Lewis notes that in Canada, as well as in Germany, Austria, and other European countries, it is a crime to deny the fact of the Holocaust, as David Irving, "a notorious, English Holocaust denier," learned in 2006 when he went to prison for thirteen months in Austria.\textsuperscript{154} In the United States, however, "the

\textsuperscript{149} Id. at 98–99.
\textsuperscript{150} Id. at 99. Ironically, in applying his proposed test to the facts of Judith Miller, Judge Tatel concluded that neither Miller nor Cooper deserved a testimonial privilege regarding the leaking of the identity of CIA operative, Valerie Plame. He concluded his very thought-ful opinion by stating:

Were the leak at issue in this case less harmful to national security or more vital to public debate, or had the special counsel failed to demonstrate the grand jury's need for the reporters' evidence, I might have supported the motion to quash. Because identifying appellants' sources instead appears essential to remedying a serious breach of public trust, I join in affirming the district court's orders compelling their testimony.

*Judith Miller*, 397 F. 3d at 1004.

\textsuperscript{151} LEWIS, supra note 1, at 100.

\textsuperscript{152} Id. at 160; see also RONALD J. KROTOZYNKI, JR., THE FIRST AMENDMENT IN CROSS-
CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH (2006). Krotoszynski is a professor of law at Washington and Lee University School of Law. His book offers a comparative law perspective on free speech in other democracies, including Canada, England, Germany, and Japan, all of which have less tolerance for hate speech than the United States. In Germany, for example, for obvious historical reasons, "human dignity, not freedom of speech, is the preeminent constitutional value," its Basic Law mandates balancing free expression with other social interests such as banning Holocaust denial and the display of Nazi symbols, and unlike the United States, also protects free expression against violations by private parties as well as by government officials. See Kyu Ho Youm, University of Oregon, School of Journalism and Communication, Book Review, http://www.b sos.umd.edu/gvpt/lpbr/subpages/reviews/kroto1106.htm.

\textsuperscript{153} LEWIS, supra note 1, at 159–60, 162–63 (citing Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978)).

\textsuperscript{154} Id. at 161.
First Amendment protects the right to deny the fact of the Holocaust." Lewis quotes a French jurist explaining that this American tolerance may be based on our "in tertate social and historical optimism—which Europeans could not be expected to share after their tragic experience at the hands of the Nazis and Communists." Lewis believes that "every society has to be its own judge of these matters." The Germans, for example, cannot be as self-confident about brushing off hate mongers as just part of the "lunatic fringe" "because they lived through somebody who started in a Munich beer hall and killed six million people." As for Lewis, he finds it "painful to protect" hate speech but "grits [his] teeth" to do so. Lewis agrees with The Economist that "criminalizing Holocaust denial and other forms of racist speech ... could be interpreted to punish or restrain speech that 'merely causes offense,'" and "in the name of stopping bigots, one may end up by stopping all criticism."

According to some, the reason to permit hateful speech is "that it makes the rest of us aware of terrible beliefs and strengthens our resolve to combat them." To counter this argument, Lewis quotes another English source, Jeremy Waldron, a professor of law and philosophy. Waldron tells us:

The costs of hate speech ... are not spread evenly across the community that is supposed to tolerate them. The [racists] of the world may not harm the people who call for their toleration, but then few of them are depicted as animals in posters plastered around Leamington Spa [an English town]. We should speak to those who are depicted in this way, or those whose suffering or whose parents' suffering is mocked by the [Skokie neo-Nazis] before we conclude that tolerating this sort of speech builds character [or presumably educates or motivates the rest of us to resist it].

C. Dangerous, Imminent Violence Speech

Lewis is much more skeptical and ambivalent, however, about the toleration of "genuinely dangerous" hate speech that has intensified "with the rise of Islamic extremism and terrorist acts at the beginning of the twenty-first century." He cites the British example where "[a] number of imams allegedly urged violent jihad in sermons in their mosques" and one Muslim leader in...
Britain said it was "legitimate to attack British soldiers and policemen" because Britain was allied with America fighting Muslims in Iraq and Afghanistan.\textsuperscript{164} Then in July 2005, four Muslims suicide bombers killed fifty-two people in a terrorist attack aimed at London's public transportation system.\textsuperscript{165} Later, another British Islamic militant was arrested and charged with encouraging terrorism after a number of speeches, including one in which he described the July 2005 attack as "praiseworthy."\textsuperscript{166}

Lewis notes that "the great statement of reasons for allowing even the most noxious speech was made by Brandeis" in his famous \textit{Whitney} opinion: "Discussion affords ordinarily adequate protection against the dissemination of noxious doctrine . . . [and] [t]he fitting remedy for evil counsels is good ones."\textsuperscript{167} But Lewis points out that "[i]n an age when words have inspired acts of mass murder and terrorism," in America and Britain as well as in Rwanda, where radio broadcasts in 1994 urged the majority Hutus to slaughter the minority Tutsis and over 500,000 were massacred in the genocide, "it is not as easy for [him] as it once was to believe that the only remedy for evil counsels, in Brandeis's phrase, should be good ones."\textsuperscript{168}

Lewis further notes that "even the Supreme Court's highly tolerant decision in \textit{Brandenburg v. Ohio} would allow legal action against speech that is intended to incite imminent lawlessness and is likely to do so."\textsuperscript{169} However, Lewis finds the \textit{Brandenburg} imminence requirement "inappropriate," given the context—a call for the murder of police and other officials in Britain followed by an actual terrorist bombing in London murdering over fifty civilians.\textsuperscript{170} Lewis concludes instead that "we should be able to punish speech that urges terrorist violence to an audience some of whose members are ready to act on the urging."\textsuperscript{171} For Lewis, and possibly many of his American and British readers, "[t]hat is imminence enough."\textsuperscript{172}

\textsuperscript{164} \textit{Id.} at 161.
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.} at 162.
\textsuperscript{167} \textit{Id.} (quoting \textit{Whitney v. California}, 274 U.S. 357, 372–80 (1927)).
\textsuperscript{168} \textit{Id.} at 166.
\textsuperscript{169} \textit{Id.} at 162 (citing \textit{Brandenburg v. Ohio}, 395 U.S. 444 (1969)).
\textsuperscript{170} \textit{Id.}
\textsuperscript{171} \textit{Id.} at 167.
\textsuperscript{172} \textit{Id.; see also Abrams v. United States}, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting, joined by Brandeis, J.) ("Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech.'"). The questions always remain, however, who decides whether an emergency exists to justify abridging the freedom of speech, or of the press; and how fairly and accurately do they make that decision?
VI. THE FUTURE OF THE FIRST AMENDMENT: MEETING CHALLENGES WITH COURAGE

How will we meet such free expression challenges as "genuinely dangerous" speech leading to "terrorist violence," and the other challenges Lewis identifies? Freedom for the Thought That We Hate concludes with Lewis calling for both civic and judicial courage. Even in a country with constitutional guarantees of freedom, something more is needed to resist fear and its manipulators," Lewis writes, and "[t]hat is courage." Only such courage, he argues, "will preserve a free society in an age of international threats and of governments ready to use them to advance their own power." The courage required in a free society," he explains, "is not alone of those who believe in change, but of journalists and other shapers of opinion." He calls on the press to continue exercising their important "checking value," which involves "pointing to, and correcting, abuses of official power." This value "has become crucial," Lewis notes, "as the imperial pretensions of the executive branch of government have grown ever greater." He states that:

When President George W. Bush took the United States to war in Iraq on false premises, and then secretly ordered the wiretapping of Americans in violation of law and claimed the right to torture detainees, Congress seemed unable or unwilling to per-

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173 In his book, Lewis examines other First Amendment challenges, especially when "freedom of expression [is] in tension with other important interests," such as "the effort to square freedom of the press with protection of the right to a fair trial," "the effort to limit the corrupting effect of financing political campaigns," and balancing free expression against maintaining personal privacy and the "right to be let alone." LEWIS, supra note 1, at 68–69, 80, 169, 177. In his C-SPAN Interview, Lewis also touches upon American corporations using the First Amendment to advance their own commercial interests, for example, by relying on First Amendment arguments to deregulate the media and telecommunications industries. See C-SPAN Interview, supra note 17. However, he does not challenge their right to do so, noting that under the First Amendment "that's the game," and that corporate reliance on free speech arguments to achieve greater media deregulation and ownership consolidation, at least for liberal media critics like Lewis, may just be a more recent example of "freedom for the thought that we hate." Id. Lewis also discussed whether the First Amendment can continue to advance in America in our current culture so "trivialized by and fixated on entertainment, celebrity, and amusing ourselves to death." Id.; see, e.g., NEIL POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS (1985). In the C-SPAN Interview, Lewis said this is a "profound question," but he remains optimistic the First Amendment will prosper, as long as we continue to think and read and debate, and recall the examples of legal giants like Holmes and Brandeis who teach us that "words can still make a difference." C-SPAN Interview, supra note 17. "We shouldn't surrender to the idea that it's hopeless." Id.

174 LEWIS, supra note 1, at 186, 188.
175 Id. at 128.
176 Id. at 188.
177 Id. at 187.
178 Id. at 186.
179 Id.
form the checking role that Madison and the other framers of the Constitution had envisaged. It was the press that eventually penetrated the secrecy and exposed the abuses.  

As for judicial courage, Lewis believes that at least beginning in the twentieth century, "[m]any of the great advances in the quality—the decency—of American society were initiated by judges: on racial justice, on respect for the equal humanity of women and homosexuals, on freedom of speech itself." And each of these steps "exposed judges to bitter words and, sometimes, physical danger." But this "judicial boldness—of courage," and the legal decisions it produced, "made the country what it is."

The question remains what the future holds for the First Amendment. One cannot help but wonder whether it is safe in view of the current 5-4 conservative majority of the Roberts Court which has started to overturn Court precedents. Despite the Court "revers[ing] itself more often lately than in earlier years," Lewis thinks the First Amendment and its legal progeny are in no similar danger of reversal. Since the "ascendancy of the First Amendment" over the past eighty years, beginning with Near v. Minnesota in 1931, the Supreme

180 Id.
181 Id. at 187.
182 Id.
183 Id. at 188.
184 See, e.g., Linda Greenhouse, Precedents Begin to Fall for Roberts Court, N.Y. Times, June 21, 2007, http://www.nytimes.com/2007/06/21/washington/21memo.html ("The question is not whether the Roberts court will overturn more precedents [beyond the two it overturned in the 2006–2007 Court term], but how often, by what standard and in what terms."); Barnes, supra note 97 ("[Wisconsin Right to Life] brought the fourth dissent read from the bench this year by a member of the court’s liberal wing, which is eager to draw attention to what it says is a majority too willing to jettison the court’s past rulings. ‘The court (and I think, the country) loses when important precedent is overruled without good reason, and there is no justification for departure from our usual rule of stare decisis here,’ Justice David H. Souter wrote for the other dissenters in the case, Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen G. Breyer."); Epps, supra note 99 (noting that the Wisconsin Right to Life and Morse decisions "provide an example of how the new justices, John Roberts and Samuel Alito, operate. Both proclaimed themselves respectful of precedent; and unlike Justices Antonin Scalia and Clarence Thomas, they did not go in for the wholesale overruling of precedents they dislike. Instead, ... they have chosen to narrowly interpret previous cases, until in the end there is almost nothing left of them. Think of it as a soothing way of diminishing liberal precedent, slice by tiny slice. But the direction is clear, and we should not be confused about where this court is taking us. ‘Reason by degrees submits to absurdity,’ Samuel Johnson once wrote, ‘as the eye is in time accommodated to darkness.’"); see also Charles Whitebread, The Conservative Kennedy Court—What a Difference a Single Justice Can Make: the 2006–2007 Term of the United States Supreme Court, 29 Whittier L. Rev. 1, 145 (2007) ("In what may signal a real shift to the right, the new Chief Justice led a robust and confident conservative majority that prevailed in nearly every significant decision this term. Without doubt, the Supreme Court is a far more conservative place today than two years ago. As ideological shifts go, the Court’s rightward tilt was not total, but it was demonstrable and decisive on ... free speech .... It remains to be seen if this clear trend continues and only Justice Anthony Kennedy can answer that question.").
Court, Lewis concludes, "has not changed its mind about the central importance of freedom of speech or of the press. The abortion decision, Roe v. Wade, has been whittled away; but New York Times v. Sullivan and other landmarks of free expression stand unchanged."\(^{185}\)

But is Lewis's faith in the courts to defend, and even advance, the First Amendment too optimistic, or even old fashioned? Some critics may think so;\(^{186}\) however, I do not. For Lewis is right, I believe, that with long tenures and "bound by their commissions to look beyond momentary partisan conflicts," judges "are in the best position to give voice to [our] deeper values."\(^{187}\)

And essential to these values are the free expression clauses of the First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press."\(^{188}\)

**VII. CONCLUSION**

Will these values and the landmark Supreme Court decisions embodying them continue to guide us? And will the courts continue to defend and enforce the fourteen words of the speech and press clauses of the First Amendment to our Constitution? Neither Tony Lewis nor anyone else can issue any guarantees. But if the First Amendment is not only to survive but also thrive in the rest of the twenty-first century and beyond, Lewis would no doubt urge judges


\(^{186}\) For a more critical view of Lewis's optimism, see Jeffrey Rosen, *Say What You Will*, N.Y. TIMES, Jan. 13, 2008, at 1 (Book Review). Rosen argues, "the rise of new technologies [like the Internet] suggests that the free speech battles of the future may . . . pit telecom corporations against private speakers, leaving judges on the sidelines," as the fight is over "open access rules of 'net neutrality' requiring telcos to make their services available to all speakers on equal terms." *Id.* Rosen believes this is a regulatory and policy issue more likely to be resolved by Congress and the FCC than by the courts. Rosen also asserts that the "heroic First Amendment tradition" that Lewis so eloquently presents in his latest book as well as represents in his entire journalism career "may seem like a noble vision from a distant era" in the face of the modern milieu where "everyone with a modem is a potential journalist," public discourse becomes "more brutal and invasive at the same time," and "less amenable to judicial oversight." *Id.*

\(^{187}\) LEWIS, *supra* note 1, at xii.

\(^{188}\) Chief Justice Roberts has also expressed his support for "an independent judiciary willing to protect unpopular speech through decisions enforcing the First Amendment." Tony Mauro, *Roberts: Strong Courts Essential for Free Speech*, FIRST AMENDMENT CTR., Sept. 20, 2007, www.firstamendmentcenter.org/news.aspx?id=19071 (reporting a speech by Roberts at Syracuse University dedicating a new building of the Newhouse School of Public Communications, which is "wrapped in the 45 words of the First Amendment, etched in glass"). "The First Amendment has become a powerful restraint on government only because of judicial rulings, Roberts suggested." *Id.* The Chief Justice also noted that "[t]here can be little doubt that the First Amendment would be the first victim should the independence of our judiciary be curtailed." *Id.*
to recall the bracing words of Justice Brandeis that "courage [is] the secret of liberty." And he would remind the rest of us to recall the equally stirring words of Justice Black that "to preserve democracy," we must all summon and display the "courage to be free."


190 Barenblatt v. United States, 360 U.S. 109, 162 (1959) (Black, J., dissenting), rh 'g denied, 361 U.S. 854 (1959); see also supra notes 72–75 and accompanying text.