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An Essay in Honor of Robert Sedler: Fierce Champion of Free Speech

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**AN ESSAY IN HONOR OF ROBERT SEDLER:
FIERCE CHAMPION OF FREE SPEECH**

BY JOEL M. GORA[†]

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It is an honor and a privilege to participate in this celebration of the professional career of Professor Robert A. Sedler.

I. A GREAT LAWYER

There are two excellent reasons for honoring Professor Sedler.

First, in our lifetimes, few individuals have combined so completely his insights and contributions as a scholar and his talents and dedication as a lawyer in pursuit of such a worthy cause as protecting and extending the sphere of freedom of speech. I first met Bob Sedler when I was a brand-new, barely-minted, young ACLU lawyer. He was one of a small but stalwart band of volunteer lawyers who took on some of the ACLU's most challenging cases, often in some of the most daunting venues. Bob was teaching at the University of Kentucky College of Law when a prosecution for subversive advocacy—a rare charge of sedition—was brought against two activists who were working as community organizers in the hills of Kentucky. Bob answered the call and represented the ACLU as a friend of the court in the case.¹ He helped win that case, as he would so many others in the years since, and helped forge the First Amendment principle that the more challenging the advocacy, the more it warranted and demanded constitutional protection. His work and his scholarship are living embodiments of another equally vital First Amendment principle: that its protections must be universal and indivisible, as available to the advocates on the right as to those on the

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1. *McSurely v. Ratliff*, 282 F. Supp. 848 (E.D. Ky. 1967).

left, and always to those whose speech is offensive, provocative, and critical of the existing order and conventional wisdom. In so doing, he and his work embody the classic understanding of the core premise of the First Amendment, expressed so well by Justice Oliver Wendell Holmes, that this great protection does not just mean “free thought for those who agree with us but freedom for the thought that we hate.”²

When Professor Sedler started his remarkable career as an advocate and a teacher, the term “public interest law” had not even been coined yet, and the phrase “pro bono publico” was still gathering dust in some copy of *Black’s Law Dictionary*. But, he embodied those noble concepts to the “nth” degree. What was so particularly inspiring to me, and to many other young lawyers in the ACLU’s stable at the time, was Professor Sedler’s special combination of academic excellence and lawyerly accomplishment. In one person, theory met practice and the classroom met the courtroom in the most compelling and impacting fashion. It was a heady combination, and so many of us followed a similar path because of his exceptional example.

II. A GREAT SCHOLAR.

Second, we honor Professor Sedler for the powerful contribution that he has consistently made to our understanding of the First Amendment—such as how to apply it and how to make it a living reality. The scholarly endeavor that brings us together in the pages of *The Wayne Law Review* is an embodiment of Professor Sedler’s twin domains: scholarship and litigation. As he did two decades earlier, Professor Sedler has recently presented us with another sweeping survey of the current condition of First Amendment law and a unique perspective on the duality of that law. The duality is his concept that the contours and contexts of the “Law of the First Amendment,” as it is applied to real cases by real courts, is different from the more theoretical constructs one finds in First Amendment academic jurisprudence. In his explanation, “the Law of the First Amendment is the body of concepts, principles, specific doctrines, and precedents in particular areas of First Amendment activity that has emerged from the collectivity of the Supreme Court’s cases over a long period of time.”³ And in his estimation, that body of law is a coherent

2. *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

3. Robert A. Sedler, *The “Law of the First Amendment” Revisited*, 58 WAYNE L. REV. 1003, 1021 (2013) (citing Robert A. Sedler, *The First Amendment in Litigation: The “Law of the First Amendment,”* 48 WASH. & LEE L. REV. 457, 458 (1991) (internal quotation marks omitted)).

work product that “has resulted in a very high degree of constitutional protection for freedom of expression in this Nation.”⁴

With that framework, and using his 1991 article⁵ as a baseline, Professor Sedler launches a new, comprehensive, and almost encyclopedic review of the intervening two decades of the “Law of the First Amendment” and concludes that “the Court has increased the protection afforded to First Amendment rights and has resisted attempts to diminish that protection.”⁶

Professor Sedler argues that “the ‘Law of the First Amendment’ effectively supplants the analytical significance of the Court’s articulated standard of review” in a particular case.⁷ Instead of starting with the standard of review and then moving on to resolve the case in the way that the Court does, for example, in a due process or equal protection case, in the First Amendment context, “the Court applies the . . . principle, specific doctrine, or precedent,” and that determination triggers the appropriate level of review.⁸ The principle, specific doctrine, or precedent “controls the results, or at least sets the parameters for the resolution of the First Amendment question” at issue.⁹ When the Court applies strict scrutiny in First Amendment cases, it considers whether the government interest is compelling or whether the restriction is narrowly tailored *within the context* of its prior determination of which component of the “Law of the First Amendment” is appropriate for the question at issue in the case.¹⁰ Only then will it apply strict scrutiny to determine whether the law is constitutional or not.¹¹ This effectively means that the Court’s first question in a First Amendment case is which component of the “Law of the First Amendment” applies. The answer to this question, in turn, determines the level of review to apply to the case.

Sedler identifies only one “Law of the First Amendment” concept that falls within his theory, namely, the chilling effect concept.¹² He argues that this concept is “fundamental and pervasive” because First Amendment jurisprudence initially developed in response to government repression of unpopular ideas and dissent.¹³ The chilling effect is,

4. *Id.* at 1007 (citations omitted) (internal quotation marks omitted).

5. Robert A. Sedler, *The First Amendment in Litigation: The “Law of the First Amendment,”* 48 WASH. & LEE L. REV. 457 (1991).

6. Sedler, *supra* note 3, at 1009.

7. *Id.* at 1030.

8. *Id.*

9. *Id.* at 1084.

10. *Id.* at 1030-31.

11. *Id.*

12. Sedler, *supra* note 3, at 1031.

13. *Id.* at 1031.

therefore, the basis of a number of specific doctrines identified within the "Law of the First Amendment," such as the *New York Times* rule and the overbreadth doctrine.¹⁴ The possibility of a chilling effect on expression is an analytical basis for potentially invalidating any expressive regulation, which makes it pervasive throughout First Amendment litigation.¹⁵ Because it is applicable to any regulation, it is a concept that is considered before specific principles or doctrines.

If the chilling effect concept is not applicable, the next analytical step in Sedler's theory is to determine whether any specific principles that the Court has outlined with respect to the First Amendment apply to the facts of the case.¹⁶ These principles are the requirement of content-neutrality, the insistence on narrow specificity, the protection of offensive speech, and the "right to refrain from speaking."¹⁷ The chilling effect concept and these principles, in turn, are implemented by various doctrines, such as the overbreadth doctrine, the prior restraint doctrine, the "clear and present danger" rule, the *New York Times* rule, the commercial speech doctrine, the symbolic speech doctrine, and the public forum doctrine.¹⁸ Finally, if no concept, principle, or doctrine controls, the Court will look to precedent in particular areas of First Amendment activity in order to resolve the case.¹⁹

Professor Sedler concludes with the observation that these structures, which make up the "Law of the First Amendment," have remained stable and that they have produced even greater protection for speech, no matter how offensive, as a core principle of "the American way."²⁰ With this grand overview of the "Law of the First Amendment," Professor Sedler once again proves that he continues to be a commanding presence in the free speech field.

The occasion to review Professor Sedler's work inspired me to reflect on my own assessment of the "Law of the First Amendment" to see whether I could add any insights that might build upon his body of

14. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). See also *City of Houston v. Hill*, 482 U.S. 451, 455 (1987) (finding an ordinance that made it illegal to "oppose, molest, abuse or interrupt a police officer" while on duty unconstitutionally overbroad); *Gooding v. Wilson*, 405 U.S. 518, 519, 527-28 (1972) (finding a Georgia statute criminalizing the use of "opprobrious words or abusive language," which tended to cause a breach of the peace, unconstitutionally vague and overbroad); *Thornhill v. Alabama*, 310 U.S. 88, 101-06 (1940) (finding a statute prohibiting all picketing and loitering in front of a business overbroad on its face).

15. Sedler, *supra* note 3, at 1031.

16. *Id.* at 1032.

17. *Id.* at 1032-44.

18. See *id.* at 1045-68.

19. *Id.* at 1068.

20. *Id.* at 1086.

work. In that regard, I offer two commentaries on Professor Sedler's trenchant views of these issues, one positive, one sobering. The positive theme is an effort to augment or perhaps expand upon Professor Sedler's analysis that the concern with the chilling effect is the core concept of the Court's First Amendment decisions by identifying a related concept that may be at work in a central fashion as well. The sobering thesis is my assertion that there is a disconnect between the Law of the First Amendment as enunciated and articulated by the courts and the reality of the treatment of free speech in everyday life. While the Supreme Court is doing an exceptional job in establishing and extending free speech rights in the law, in everyday life, an ongoing war against free speech is waged on an almost daily basis. Therefore, what is protected in theory is denigrated in practice.

III. BEYOND THE CHILLING EFFECT

In my reading of the canonical Supreme Court cases of the last fifty years, I see a slightly different underlying theme that informs some of the most significant cases of the era. That theme or concept is resistance to government censorship of speech and the concomitant celebration that the core purpose of the First Amendment is to let the people, not the government, decide what they want to say and hear. It is a libertarian, anti-paternalistic theme that cuts across disparate subject areas of speech restriction, whether the speech in question is profound, prosaic, or profane. In one sense, this anti-censorship theme is sounded in Professor Sedler's construct in his discussion of the marketplace of ideas and its key role in grounding the principle of content-neutrality.²¹ But I detect in the Court's strong presumption against censorship an autonomy theory referencing the individual as well.

For example, a classic expression of this concept is found in the famous 1971 case of *Cohen v. California*,²² in which the Court ruled that the "F-word" could not be censored from public display.²³ In reaching that conclusion, the Court observed,

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 area of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use

21. Sedler, *supra* note 3, at 1020 (citing *U.S. v. Alvarez*, 132 S. Ct. 2537 (2012)).

22. 403 U.S. 15 (1971).

23. *Id.* at 16, 26.

of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.²⁴

“Indeed, we think it is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.”²⁵ The Court also recognized the Orwellian understanding that if you can control words, you can control the ideas they express, rejecting “the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.”²⁶

A few years later, in its landmark campaign finance ruling in *Buckley v. Valeo*,²⁷ the Court rejected, in no uncertain terms, the argument that government could determine how much political speech “We the People” could have:

The First Amendment denies government the power to determine that spending to promote one’s political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign.²⁸

A generation later, in its more recent landmark ruling in the *Citizens United*²⁹ case, involving the free speech rights of business corporations, non-profit corporations, and labor unions, the Court reiterated the theme that the government cannot be allowed to censor or control the speech we can hear:

24. *Id.* at 24.

25. *Id.* at 25.

26. *Id.* at 26.

27. 424 U.S. 1 (1976) (per curiam).

28. *Id.* at 57. That same year, the Court applied similar principles in giving commercial speech significant First Amendment protection on the ground that the choice between permitting “highly paternalistic” government control of speech or letting people have the information and make up their own minds was a choice already made by the First Amendment in rejecting censorship. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

29. *Citizens United v. FEC*, 558 U.S. 310 (2010).

The censorship we now confront is vast in its reach. . . . By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. . . . Factions should be checked by permitting them all to speak . . . and by entrusting the people to judge what is true and what is false. . . . When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.³⁰

From the era of *Buckley* and *Cohen* forward, the anti-censorship theme has sounded in a wide variety of settings. It prompted the courts to restrain a largely Jewish community from preventing a group of Nazis from marching through their town and causing great offense and emotional distress.³¹ Those who defended the free speech rights of the Nazis also defended the rights of civil rights demonstrators and anti-war protestors a decade earlier who were met with similar government efforts to restrain their often offensive, provocative, or hostile speech. Similar themes motivated the Court to protect the right of protestors to burn the American flag to express their condemnation of the actions of the government under that flag: "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 that principle even where our flag has been involved."³² Further, "[t]he First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas."³³ In reaching that conclusion, the Court reached back to an older case which had protected the right of Jehovah's Witness children to refuse to salute the American flag: "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

30. *Id.* at 354-56.

31. *Smith v. Collin*, 578 F.2d 1197, 1203 (7th Cir. 1978).

32. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (citations omitted).

33. *Id.* at 418.

faith therein.”³⁴ For similar reasons, when a city tried to punish only some kinds of provocative racial or ethnic epithets but not others, the Court found impermissible censorship of ideas that the government did not like.³⁵ Likewise, when the government tried to censor the Internet to protect younger people from access to some forms of sexual content, the Court condemned that paternalism as well.³⁶

Moreover, as Professor Sedler has so carefully demonstrated, in recent years, the Court has been just as protective of speech and hostile to censorship as in the past, perhaps even more so. Indeed, the Roberts Court has had a series of quite stunning pro-free speech decisions, many of them sounding the same anti-censorship themes as earlier speech-protective courts.³⁷ Perhaps its most well-known and widely disputed decision, the *Citizens United* case, was steeped in the notion that in the political arena, “We the People,” not the government, decide what to say and what to hear, and from which individuals and groups.³⁸ Just as the government does not get to decide what can be said and heard, it does not get to decide who can speak. To cede to government broad power to decide who will speak grants to government the power to decide what shall be said and heard.

In other cases, the current Court has taken a similarly stern stand against government censorship of ideas or images. On two occasions, for example, the Court has refused to apply certain traditional speech-limiting doctrines in a way that would uphold restrictions on certain forms of speech and has insistently declined to create new “non-speech” categories to accommodate such restrictions.³⁹ In the first of the cases, *United States v. Stevens*, the respondent Stevens challenged Congress’s attempt to outlaw the depiction of an especially grisly form of animal cruelty, so-called “crush videos.”⁴⁰ The government strongly argued that this particular content, like child pornography, should be viewed as outside the pale of First Amendment protection and relegated to plenary prohibition on the ground that the value of the speech was well outweighed by its social costs.⁴¹ The Court’s response was clear and insistent:

34. *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

35. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

36. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 849 (1997).

37. See Ronald K.L. Collins, *Exceptional Freedom—The Roberts Court, The First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409 (2013).

38. See generally *Citizens United v. FEC*, 558 U.S. 310 (2010).

39. See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011); *United States v. Stevens*, 130 S. Ct. 1577 (2010).

40. *Stevens*, 130 S. Ct. at 1583.

41. *Id.* at 1585.

The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits, and declaring that those limits may be passed at pleasure."⁴²

A similar approach was taken when California passed a law restricting the sale of violent video games to minors under age eighteen. As in the animal cruelty depiction case, in *Brown v. Entertainment Merchants Association*,⁴³ the Court made it clear that protecting children was not a sufficient justification for censorship: "No doubt a State possesses legitimate power to protect children from harm . . . but that does not include a free-floating power to restrict the ideas to which children may be exposed."⁴⁴ Nor was disgust with the content of the games a valid basis for restricting or censoring expression.⁴⁵ The very fact that the messages of violence and assault in the games were so extreme, and the corresponding desire to suppress those messages so great, was precisely the reason why the California law posed such a grave danger: The Court was concerned that "the *ideas* expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may [have been] the real reason for governmental proscription."⁴⁶ For that reason, the Court applied the extremely strict scrutiny that government efforts at censorship demand:

Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. . . . The State must specifically identify an "actual problem" in need of solving . . . and the curtailment of free speech must be actually necessary to the solution. . . . That is a

42. *Id.* at 1585 (citing *Marbury v. Madison*, 5 U.S. 137, 178 (1803)).

43. *Brown*, 131 S. Ct. 2729.

44. *Id.* at 2736 (citations omitted).

45. *Id.* at 2738 (citation omitted).

46. *Id.* (emphasis in original).

demanding standard. “It is rare that a regulation restricting speech because of its content will ever be permissible.”⁴⁷

Perhaps the most impressive example of the current Court’s commitment to the anti-censorship theme was the case involving extremely hurtful, offensive, outrageous, and abusive speech targeted at the family of a deceased soldier.⁴⁸ Rejecting jury damages awarded against a fringe church, which often chose to demonstrate outside of the funerals of soldiers with the bizarre claim that dead soldiers were punishment for America’s sin of tolerating homosexuality, the Court made it crystal-clear that the “sticks and stones” wisdom of the playground was embodied in the First Amendment as well:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.⁴⁹

In a similar vein, the Court also rejected congressional efforts to punish those who diminish and dishonor the stature of military medals and honors by lying about having received them.⁵⁰ In this case, the defendant went straight to the top and repeatedly lied about having won the Congressional Medal of Honor.⁵¹ In *United States v. Alvarez*,⁵² the Court struck down the Stolen Valor Act, reasoning that the First Amendment could not tolerate a general exception from its protection for knowingly false speech:

The Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace. Though few might find respondent’s statements anything but contemptible, his right to make those

47. *Id.* (citations omitted) (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 818, 822-23 (2000); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992)).

48. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

49. *Id.* at 1220.

50. *United States v. Alvarez*, 132 S. Ct. 2537, 2545-46 (2012) (plurality opinion).

51. *Id.* at 2542.

52. *Id.* at 2537.

statements is protected by the Constitution's guarantee of freedom of speech and expression.⁵³

The Court continues admirably to lead the way in protecting free speech, well ahead of the public on most of these issues. Its decisions have strongly insisted that government censorship be rejected, that no new categories of "non-speech" be recognized, and that the people, not the government, get to decide what they want to say and how they want to say it. Indeed, these anti-censorship themes were sounded by none other than President Barack Obama in a speech at the United Nations weeks after excerpts from a perceived anti-Islamic video helped to spark riots and disturbances across the Middle East:

Here in the United States, countless publications provoke offense. Like me, the majority of Americans are Christian, and yet we do not ban blasphemy against our most sacred beliefs. As president of our country, and Commander-in-Chief of our military, I accept that people are going to call me awful things every day, and I will always defend their right to do so.

Americans have fought and died around the globe to protect the right of all people to express their views, even views that we profoundly disagree with. We do so not because we support hateful speech, but because our founders understood that without such protections, the capacity of each individual to express their

53. *Id.* at 2551. The Court also sounded an autonomy theme in that case: "Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person." *Id.* at 2550. One also sees the anti-censorship theme in three campaign finance cases far less well-known than *Citizens United*, but in each of which the Court rejected what it saw as governmental efforts to restrain or manipulate political speech. See *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Davis v. FEC*, 554 U.S. 724 (2008); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

The Roberts Court's First Amendment record is not spotless, however. In *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724 (2010), it upheld restrictions on those who provide "material support" for groups labeled as terrorist organizations, even if the support is for the lawful activities of such groups. See generally Joel M. Gora, *The First Amendment . . . United*, 27 GA. ST. U. L. REV. 935, 985-87 (2011) (considering the tension between *Holder's* rejection of a First Amendment claim and the honoring, in *Citizens United*, of such claim). Similarly, in *John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2819 (2010), the Court gave short shrift to claims that opponents of same sex marriage would be harassed if their identities were made public, thus inviting the use of strategic harassment against people or entities who advocated that position. See, e.g., John Fund, *The New Blacklist*, NAT'L REVIEW (Oct. 12, 2012), <http://www.nationalreview.com/articles/330097/new-blacklist-john-fund>.

own views and practice their own faith may be threatened. We do so because in a diverse society, efforts to restrict speech can quickly become a tool to silence critics and oppress minorities.

We do so because given the power of faith in our lives, and the passion that religious differences can inflame, the strongest weapon against hateful speech is not repression; it is more speech—the voices of tolerance that rally against bigotry and blasphemy, and lift up the values of understanding and mutual respect.⁵⁴

IV. THE DISCONNECT BETWEEN LAW AND LIFE

Unfortunately, around the world, free speech is on the decline and governments are rushing in to outlaw “hate speech.”⁵⁵ Even in America, there is a woeful disconnect between the law and life. Rights declared in clarion tones from the pages of the United States Reports often seem to fall on deaf ears in everyday life. The “anti-bullying” movement seems to be only the most recent incarnation of the same censorship concerns.⁵⁶ There never seems to be a paucity of arguments against free speech and in favor of its limitation.⁵⁷

There is a deep and distressing divide between our free speech rights on paper and in the real world. Speech that, according to the courts, is protected from punishment or suppression under the First Amendment is nonetheless subject to a barrage of public or private sanctions and deprivations that create the proverbial chilling effect. This causes

54. President Barack Obama, Remarks to the United Nations General Assembly (Sept. 25, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-un-general-assembly>. As noted above, the current Supreme Court shares the President’s expressed opposition to censorship and has invalidated almost all of the speech restrictions to come before it in recent years. See, e.g., *Alvarez*, 132 S. Ct. 2537; *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729 (2011); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *Citizens United v. FEC*, 558 U.S. 310 (2010); *United States v. Stevens*, 130 S. Ct. 1577 (2010).

55. See Jonathan Turley, *Shut Up and Play Nice: How the Western World is Limiting Free Speech*, WASH. POST, Oct. 12, 2012, http://articles.washingtonpost.com/2012-10-12/opinions/35499274_1_free-speech-defeat-jihad-muslim-man.

56. See, e.g., William Creeley, *New Anti-Bullying Initiatives Threaten Protected Speech, Infantilize College Students*, THE FIRE (Nov. 10, 2010), <http://thefire.org/article/12454.html>.

57. See, e.g., JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2012); MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993).

speakers to “steer far wider of the unlawful zone.”⁵⁸ The gap is most yawning with respect to speech labeled as racist, sexist, or homophobic, followed in close second by speech viewed as hostile to the Islamic religion. These restraints are enforced by public agencies and officials—and by private entities—in the context of education, employment, business, and commerce, as well as within the political sphere. The jurisprudential mantra is that the proper antidote to bad or offensive or ugly speech is “more speech.”⁵⁹ In real life, however, the antidote to speech that offends or disturbs others is to visit punishments and restraints, formal and informal, on those whose speech confounds the conventional wisdom or mainstream mandates.

One can hardly open a newspaper, turn on the television, or access the Internet on any given day and not find someone who is being fired, disciplined, boycotted, or being threatened with the like for speech that, if it ever were closely analyzed under operative Supreme Court precedents, would be found to be protected from punishment or restraint. In contrast to the highly speech-protective Court rulings, there is a vast system of public and private censorship in practice. Some of the new drivers of this current censorship are zero tolerance policies for speech which is not politically correct or which is offensive. Particularly in the digital age where speech can go viral in a minute and YouTube can capture and redistribute a momentary lapse forever, speakers are increasingly on their guard to avoid speaking in any manner that could even remotely be construed as offensive. Put another way, we have a new formula for repressing speech that the majority does not like: ZT (Zero Tolerance) + PC (Political Correctness) + UT (YouTube) = CE (Chilling Effect). Certain words or ideas have become taboo, heresy, blasphemy, or departures from accepted orthodoxy. Utter them in public, or even in private duly recorded, and be prepared to pay the price of such “protected” speech.⁶⁰

In the realm of education in the 1980s, hundreds, perhaps thousands, of colleges and universities installed so-called “speech codes” to prevent

58. *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

59. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“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.”).

60. *See, e.g.*, DAVID BERNSTEIN, *YOU CAN’T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS* (2004); JAMES WEINSTEIN, *HATE SPEECH, PORNOGRAPHY, AND RADICAL ATTACKS ON FREE SPEECH DOCTRINE* (1999). Paula Deen, the Southern celebrity television cook and food entrepreneur, was the most recent well-known person to learn that lesson, at the cost of her \$16 million food empire, which seems to be collapsing under the weight of corporate cancellation of contracts.

and punish speech viewed as “racist, sexist, or homophobic.” Despite a string of successful lawsuits against such speech codes, like the one Professor Sedler brought against the University of Michigan,⁶¹ colleges and universities still continue to maintain and try to enforce such codes, as the recent study by Greg Lukianoff powerfully demonstrates.⁶²

In more recent times, the work of speech codes has been replaced by “anti-bullying” restrictions. Bans against “bullying” are the new, popular, properly-framed and named way to combat offensive speech of a “racist, sexist, or homophobic” nature. Who can be in favor of bullying, of course? For understandable reasons, gay rights groups have been active in lobbying for these new restrictions. Legislatures have rushed to enact statutes against bullying. Yet, much of what is encompassed in the restrictions is old-fashioned, politically incorrect speech and offensive epithets. Anti-bullying bans make it possible to restrict the use of words like “faggot” or “fairy” together with words like “fatso.” And bullying bans have been imposed not just on face-to-face encounters, but on Internet speech as well.

In the realm of employment, public or private, the mere utterance of an offensive epithet can endanger a job or other benefit. And the higher the official or employee within the hierarchy, the more likely it is for punishment to be imposed. While the courts have held that, in certain circumstances, the creation of an extremely “hostile environment” in the workplace through words or images can violate carefully-defined antidiscrimination rules,⁶³ in the world of zero tolerance, one utterance of an offensive epithet by an employee, or one act of tolerating that speech by a supervisor, can put a job or career in jeopardy. The clear lesson for the employee is not to say anything questionable or offensive, while for the supervisor it is not to tolerate anything questionable or offensive that comes to his attention. One recent example is the Rutgers University basketball coach who was forced to resign over videos showing him physically and verbally abusing players, including repeatedly telling them not to play “like fairies.”⁶⁴ The Rutgers University president is under fire for not firing the coach when the videos were first brought to his attention, and he publicly apologized to the LGBTQ community for

61. *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

62. See GREG LUKIANOFF, *UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE* (2012).

63. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

64. See, e.g., Michael Pearson & Brittany Brady, *Rutgers Coach Fired After Abusive Video Broadcast*, CNN (Apr. 4, 2013), <http://edition.cnn.com/2013/04/03/sport/rutgers-video-attack>.

not punishing the coach sooner for the “homophobic” remarks.⁶⁵ In another case, New York City firefighters and police officers participated in a racially derogatory float in a neighborhood parade while off-duty.⁶⁶ They were identified and fired.⁶⁷ Surprisingly, a federal appeals court upheld the dismissal, ruling, in effect, that off-duty racist speech by a uniformed public employee can result in punishment.⁶⁸ In more recent times, “racially questionable” Facebook comments by New York City police officers about not wanting to be assigned to patrol the West Indian American Day Parade resulted in disciplinary action by the Department, over the protests of the NYCLU.⁶⁹ It is not so much the number of such speech-penalizing episodes as it is the object lesson that they send to people everywhere: Keep your mouth shut. Do not say anything provocative, or anything offensive. If you do, you will face the consequences. As someone once said, the value of a Sword of Damocles is not that it falls, but that it hangs, in this case hanging over any employee who values his or her job.

In the realm of political advocacy, a similar discipline is enforced against those who oppose conventional wisdom. We are currently engaged in a great national debate over same-sex marriage and whether it should be legalized or constitutionalized. Yet with disturbing frequency, opponents of same-sex marriage have been targeted, harassed, and penalized, sometimes officially, for their perfectly lawful political views. Businesses and companies have been boycotted and threatened with financial consequences because they or people associated with them have opposed same sex-marriage. Government officials, including prominent big city mayors, have proudly threatened to deny government permits or licenses to companies whose officers or employees opposed same-sex marriage on the ground that such “bigotry” was not welcome in their

65. It is reminiscent of the firestorm that greeted prominent Talk Radio star Don Imus’ off-handed, racially-offensive remarks about some members of the Rutgers women’s basketball team. Despite repeated apologies, Imus was basically driven off the air for an extensive period of time for uttering a few offensive words. Paul Farhi, *Don Imus Gingerly Steps Back on Air*, WASH. POST, Dec. 4, 2007, <http://www.washingtonpost.com/wpdyn/content/article/2007/12/03/AR2007120300368.html>.

66. *Locurto v. Giuliani*, 447 F.3d 159, 164-65 (2d Cir. 2006).

67. *Id.* at 167-68.

68. *Id.* at 183.

69. See William Glaberson, *N.Y.C. Police Maligned Parade-goers on Facebook*, N.Y. TIMES, Dec. 5, 2011, <http://www.nytimes.com/2011/12/06/nyregion/on-facebook-nypd-officers-malign-west-indian-parade-goers.html>; John Del Signore, *Lawmakers Want Cops to Live in NYC After West Indian Day Parade Facebook Fiasco*, GOTHAMIST (Dec. 12, 2011), http://gothamist.com/2011/12/12/lawmakers_want_cops_to_reside_in_ny.php (quoting NYCLU Executive Director’s defense of police officers’ free speech rights).

town.⁷⁰ Even the Supreme Court turned its back on the claim that people who signed a petition to put the question of rejecting same-sex marriage on the ballot deserved protection from disclosure when it held that their names could be publicly disclosed, despite the possible threat of harassment and reprisals.⁷¹

To be sure, people who take a stand, pro or con, on any issue open themselves up to often-vigorous criticism, and people can be urged to shun them. But when that criticism takes the form of concerted efforts to punish them financially for their views, let alone deny them governmental entitlements, then the threat to free speech cannot be ignored. Private censorship and the boycotting of unpopular speech or speakers may not be directly subject to the restraints that the First Amendment imposes on government, but private censorship can be the de facto equivalent of official suppression of unpopular views. Its chilling effect today is as potent as it was in the fearful atmosphere of the 1950s, when those labeled “subversives” were subjected to sanctions and to a censorship by their fellow citizens beyond even that which the Court would allow the government to practice. Those suspected of being disloyal or un-American were the subjects of boycotts of the same form that we see today—people refused to hire or do business with supposed subversives or those that subscribed to unconventional views. In today’s free speech environment, a United States senator can proudly urge a television network not to broadcast a sporting event because it is sponsored by the National Rifle Association. The implied and menacing threat is apparent.

If we look beyond our shores for a moment and take a global perspective, the actual condition of free speech is even more sobering.⁷² First, very few countries even give the formal protection to offensive speech that we do. In most countries, including those that share our traditions, so-called “hate speech” can be restricted. In other countries,

70. See Associated Press, *Boston Mayor Vows to Block Chick-Fil-A from Opening Restaurant After Anti-Gay Remarks*, HUFFINGTON POST (July 20, 2012), http://www.huffingtonpost.com/2012/07/20/chick-fil-a-gay_n_1689800.html; Hal Dardick, *Alderman to Chick-fil-A: No Deal*, CHICAGO TRIBUNE, July 25, 2012, http://articles.chicagotribune.com/2012-07-25/news/ct-met-chicago-chick-fil-a-20120725_1_1st-ward-gay-marriage-ward-alderman.

71. *John Doe No. 1 v. Reed*, 130 S. Ct. 2811 (2010). A popular Mexican restaurant in Los Angeles was almost boycotted out of business because a co-owner of the restaurant made a modest \$100 contribution to an anti-same-sex marriage ballot initiative. Alexandra Zavis et al., *Gay Marriage Backers Threaten Boycotts of Pro-Prop 8 Restaurants*, L.A. TIMES (Nov. 12, 2008, 6:48 AM), <http://latimesblogs.latimes.com/lanow/2008/11/gay-marriage-ba/comments/page/3/>. See also Fund, *supra* note 53.

72. See Turley, *supra* note 55.

anti-religious speech, especially anti-Islamic speech, can be subject to far greater penalties, official and unofficial, including death. Starting with the “fatwa” death sentence against author Salman Rushdie over thirty years ago and continuing with the riots that broke out throughout the Middle East in alleged response to an anti-Islamic video produced in Hollywood just months ago, there has been a real world legitimizing of the idea that those who speak out against Islam or its sacred features can be threatened with and subjected to the worst form of violence and repression. Indeed, after the murders of our diplomatic officials in Benghazi, our own leaders were suggesting that the murderous mob had been provoked by the notorious video, as though that was some kind of justification: If you are sufficiently offended by speech, “wounded” by an “attack” on your religion, violence against the speaker becomes permissible.

This is all certainly a far cry from the Voltarian comment, “I may disagree with what you say, but I will defend to the death your right to say it,” which has now been reversed to become, “If I disagree with what you say, I will do everything that I can to keep you from saying it, or punish you for doing so.” That is not what free speech is supposed to be all about. If we do not like speech, we are supposed to answer it, not censor it. Persuasion, not coercion, is our way. As Justice Holmes so wisely counseled almost a century ago, the ultimate purpose of the First Amendment is to accord “freedom for the thought that we hate.”⁷³

That is what the Supreme Court seems to have been telling us pretty clearly in recent years. That is what Professor Sedler has been telling us—as a scholar and as an advocate—for his entire career. If only we could live up to those ideals in everyday life.

73. *United States v. Schwimmer*, 279 U.S. 644, 655 (Holmes, J., dissenting).

