Brooklyn Law Review

Volume 87
Issue 1 *SYMPOSIUM: THE ROBERTS COURT AND FREE SPEECH*

Article 3

12-30-2021

INTRODUCTORY REMARKS: The Roberts Court and the First Amendment: An Introduction

Geoffrey R. Stone

INTRODUCTORY REMARKS

The Roberts Court and the First Amendment

AN INTRODUCTION

Geoffrey R. Stone[†]

The following essay is adapted from Geoffrey R. Stone's introductory remarks presented at The Roberts Court and Free Speech Symposium hosted by Brooklyn Law Review on Friday, April 9, 2021, and his 2008 article, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century.*[1]

What I would like to do in my introductory remarks is to offer a very brief history of the evolution of First Amendment jurisprudence leading up to the Roberts Court.[2] My goal is to lay the foundation for the discussion to follow. With this background in mind, it will be easier to evaluate how the Roberts Court has changed our First Amendment jurisprudence. As I hope to show, by 2005, when Roberts joined the Court, we had an astonishingly rich, multi-faceted, and often maddeningly complex free speech jurisprudence. Specifically, I will try to identify the judgments made by the Supreme Court over the preceding eighty-five years that most fundamentally shaped the framework of our pre-Roberts Court First Amendment doctrine.

The first fundamental judgment the pre-Roberts Court made in giving meaning to the First Amendment was to reject three strongly advocated approaches to interpreting that Amendment. The first of these approaches, championed by Justice Hugo Black, insisted that the First Amendment is an

---

† Edward H. Levi Distinguished Service Professor, The University of Chicago.

1 Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273 (2008).

2 The "Roberts Court" refers to the period in which Justice John Roberts has presided over the Supreme Court as chief justice. Chief Justice John Roberts was nominated for the position by President George W. Bush in 2005 and remained as chief justice through the publication of these introductory remarks. *See Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/46FU-4784].

absolute—that is, "no law" means "no law."[3] Ultimately, the Court rejected this approach because the broad range of issues posed by the First Amendment proved too varied and too complex to be governed sensibly by a simple absolute protection-versus-no-protection dichotomy.[4] In short, although "Congress shall make no law . . . abridging the freedom of speech, or of the press,"[5] the challenge is to define what we mean by the "freedom of speech" and the "freedom of the press" that may not be abridged.

Second, the Court rejected ad hoc balancing as a general approach to First Amendment interpretation. Under this approach, the Court's task would be to weigh the benefits of restricting speech against the benefits of protecting speech in each case in order to decide whether the challenged restriction is reasonable.[6] In theory, this approach seems sensible, but in practice it proved unworkable. It turns out to be incredibly difficult to identify and assess all of the many factors that should go into this judgment on a case-by-case basis. As a result, the application of ad hoc balancing would produce a highly uncertain, unpredictable, and fact-dependent set of outcomes that would leave speakers, police officers, prosecutors, jurors, and judges in a state of constant uncertainty. Thus, although this approach arguably sought to ask the right question, it attempted to do so in a manner that proved fatally unpredictable.[7]

The third approach the Court rejected in the years before the Roberts Court was the notion that a single standard of review should govern all First Amendment cases. Whether that

---

[3] *See* Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874, 879 (1960) (arguing that "[t]he phrase 'Congress shall make no law' is composed of plain words, easily understood" and that the language is "absolute"); HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 43–63 (1968); Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 914–16 (1963); Konigsberg v. State Bar of Cal., 366 U.S. 36, 60–62 (1961) (Black, J., dissenting). *See generally* Hugo Black & Edmund Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1969).

[4] For examples of cases that strained Justice Black's "absolutist" approach, see *Adderley v. Florida*, 389 U.S. 39, 40–48 (1966) (Black, J., majority opinion), rejecting the First Amendment right to speak on public property; *Cohen v. California*, 403 U.S. 15, 27–28 (1971) (Black, J., dissenting), disagreeing with the holding that states cannot constitutionally prohibit the use of the word "fuck" in public; and *Tinker v. Des Moines Indep. Cmty. School District*, 393 U.S. 503, 515–26 (1969) (Black, J., dissenting), disagreeing with the holding that students have a right to free speech.

[5] U.S. CONST. amend. I.

[6] *See* Laurent B. Franz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729, 729–30 (1963).

[7] On ad hoc balancing, see LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 583–84 (1978); and ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 93–97 (2d ed., Yale Univ. Press 1968) (1962). *Compare* Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1963) (supporting the Court's balancing test approach), *with* Franz, *supra* note 6 (criticizing the Court's use of balancing test). *See generally* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (on ad hoc balancing).

standard is set at a high level of justification, such as clear and present danger, strict scrutiny, or necessary to promote a compelling government interest, or at a low level of justification, such as reasonableness or rational basis review, it became readily apparent that a one-size-fits-all standard would not do the trick. Applied in a consistent manner, any single standard would inevitably dictate implausible results, sometimes insufficiently protective of free speech, sometimes insufficiently respectful of competing government interests.[8] Thus, the Court concluded that there is no single test that can apply to all cases.

Now, when I say that these standards would dictate results that would be unacceptably over- or underprotective of free speech, what I am obviously assuming is that there is some set of results that most reasonable people—including the justices of the Supreme Court—would properly regard as clearly "right" or clearly "wrong." And that, of course, assumes that we have some intuitive sense of what the First Amendment sensibly means. What I am suggesting, in other words, is that First Amendment doctrine was built backwards—not from theory to doctrine to results, but from intuited results to doctrine, with only passing attention to theory. This is an important point, for it suggests that First Amendment doctrine as we know it today is largely the product of practical experience rather than philosophical reasoning.

While the pre-Roberts Court was in the process of rejecting these three proposed approaches to First Amendment interpretation, it learned several practical lessons about the workings of what Professor Thomas Emerson once called "the system of freedom of expression"—lessons that played a critical role in shaping its First Amendment jurisprudence.[9]

The first practical lesson the Court learned about was the "chilling effect."[10] That is, people are easily deterred, or chilled, from exercising their freedom of speech, even when that speech is fully protected by the First Amendment.[11] This is so because the individual speaker usually gains very little personally from signing a petition, marching in a demonstration, handing out leaflets, or posting on a blog. Put simply, except in the most unusual circumstances, whether any particular individual speaks or not is unlikely to have any appreciable impact on the world. Thus, if the individual knows that he might go to jail for

---

[8] *See* TRIBE, *supra* note 7, at 583–84.

[9] *See generally* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970) (discussing the role and importance of free expression in a democratic society).

[10] *See id.* at 158 (quoting Dombrowsi v. Pfister, 380 U.S. 479, 482, 487, 491 (1965)).

[11] *See id.*

speaking out, he will often forego his right to speak. This makes perfect sense on an individual level. But, if many individuals make this same decision, then, in the words of Professor Alexander Meiklejohn, the net effect will often be to mutilate "*the thinking process of the community*."[12] Recognition of this "chilling effect," and of the consequent power of the government to use intimidation to silence its critics and to dominate and manipulate public debate, was a critical insight in shaping the pre-Roberts Court free speech doctrine.[13]

Second, the Court learned about what we might call the "pretext effect."[14] In other words, the Court learned that government officials will often defend their restrictions of speech on grounds quite different from their real motivations for the suppression.[15] Often, the actual grounds are to silence their critics and to suppress ideas they do not like.[16] The pretext effect is not unique to the realm of free speech, but it is especially potent in this context because public officials will often be sorely tempted to silence dissent in order to insulate themselves from criticism and preserve their own authority.

Of course, the very idea of the pretext effect turns on what we mean by legitimate and illegitimate reasons for restricting speech. The Court recognized that the First Amendment forbids government officials from suppressing particular ideas because such officials do not want citizens to accept those ideas in the political process. This principle, which was first clearly stated by the Supreme Court in 1919 in Justice Oliver Wendell Holmes's dissenting opinion in *Abrams v. United States*,[17] is central to contemporary First Amendment doctrine. It rests at the very core of the pretext effect's strong suspicion of any government regulation of speech that is consistent with such an impermissible motive.[18]

---

[12] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (Kennikat Press 1972) (1948); *id.* at 24–27.

[13] On chilling effect, see *Lamont v. Postmaster General*, 381 U.S. 301, 306–07 (1965); *New York Times Company v. Sullivan*, 376 U.S. 254, 300 (1964) (Goldberg, J., concurring in judgment); and *Bartnicki v. Vopper*, 532 U.S. 514, 541 (2001) (Rehnquist, C.J., dissenting). *See also* Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539 (1950).

[14] On the pretext effect and improper motivation, see generally Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 415 (1996).

[15] *See id.*

[16] *See id.*

[17] Abrams v. United States, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

[18] *See* Kagan, *supra* note 14, at 414.

The third practical lesson that the Court learned about is what we might call the "crisis" effect.[19] In times of crisis, real or imagined, citizens and government officials tend to panic, to grow desperately intolerant, and to rush headlong to suppress speech they can demonize as dangerous, subversive, disloyal, or unpatriotic.[20] Painful experiences with this "crisis effect," especially during World War I and the Cold War, led us to embrace what Professor Vincent Blasi has aptly termed a "pathological perspective" in crafting First Amendment doctrine.[21] That is, the pre-Roberts Court learned to structure First Amendment doctrine to anticipate and to guard against the worst of times.[22]

Returning to the question of standards of review, the pre-Roberts Court, having rejected absolutism, ad hoc balancing, and the quest for a unitary standard of review, divided First Amendment issues into a series of distinct problems. The Court had the hope of addressing each problem separately and with a specific standard that would be relatively predictable and easy to administer, would approximate the results of ad hoc balancing, and would guard against the chilling, pretext, and crisis effects mentioned previously.

The critical step in the development of the pre-Roberts Court's approach to standards of review was the Court's recognition of the content based versus content neutral distinction. Until roughly 1970, the Court did not clearly grasp that laws regulating the content of expression pose a different First Amendment issue than laws regulating expression without regard to content. The Court first articulated this concept in an otherwise uneventful 1970 decision, *Schacht v. United States*.[23] In *Schacht*, the Court held that a content-neutral law that banned more speech was less problematic under the First Amendment than a content-based law that banned less speech.[24]

The holding in *Schacht* was a pivotal insight, and the Court followed it up two years later with its decision in *Police Department of Chicago v. Mosley*.[25] There, the Court invalidated a Chicago ordinance that prohibited peaceful picketers, except peaceful labor picketers, from picketing near a school while the

---

[19] *See* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 450–51 (1985).

[20] *See id*.

[21] On the crisis effect and the pathological perspective, see GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 542–50 (2004). *See generally* Blasi, *supra* note 19.

[22] *See* Blasi, *supra* note 19, at 450–51; STONE, *supra* note 21, at 542–50.

[23] Schacht v. United States, 398 U.S. 58 (1970).

[24] *Id*. at 61–63.

[25] Police Dep't of the City of Chi. v. Mosley, 408 U.S. 92 (1972).

school was in session.[26] The Court assumed that a content-neutral ban on all picketing in such circumstances would be constitutional.[27] But, as in *Schacht*, the Court invalidated the seemingly less speech-restrictive content-based ban, explaining that because "[t]here is an 'equality of status in the field of ideas,' [the] government must afford all points of view an equal opportunity to be heard."[28] The Chicago ordinance, the Court declared, "'slip[s] from . . . neutrality . . . into a concern about content.' This is never permitted."[29] The Court added that, at the very least, such content-based regulations "must be carefully scrutinized."[30]

With *Schacht* and *Mosley*, the Court entered a new era in First Amendment jurisprudence. Ever since those decisions, the first question to be asked in any First Amendment case is whether the challenged regulation is content based or content neutral. For, the answer to this question dictates the terms of the constitutional inquiry. In brief, the rationale for analyzing content-based restrictions differently from content-neutral restrictions, and for being particularly suspicious of them, is that content-based restrictions are more likely to skew public debate for or against particular ideas and to be tainted by a constitutionally impermissible motivation. The Court's recognition of this distinction was a critical step in the evolution of pre-Roberts Court free speech jurisprudence.

Another important pre-Roberts Court development was the concept of low-value speech.[31] One obvious problem with a doctrine that presumptively holds all content-based restrictions unconstitutional is that there may be some types of content that do not merit such protection. Some speech might not sufficiently further the values and purposes of the First Amendment to warrant such extraordinary immunity from regulation. In part, this was what Justice Holmes was getting at with his famous false cry of fire example in *Schenck v. United States*.[32]

The Court first formally recognized the concept of low-value speech in its 1942 decision in *Chaplinsky v. New Hampshire*.[33] In

---

[26] *Id.* at 92–93.

[27] *Id.* at 98.

[28] *Id.* at 96 (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948)).

[29] *Id.* at 99 (first alteration in original) (footnote omitted).

[30] *Id.*

[31] As explained below, low-value speech includes threats, fighting words, false statements of fact, obscenity, and commercial advertising.

[32] Schenck v. United States, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

[33] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

Chaplinsky, the Court declared that "[t]here are certain well-defined and narrowly limited classes of speech" that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[34] Over the years, the pre-Roberts Court came to characterize several categories of speech as "low value," including threats, fighting words, false statements of fact, obscenity, and commercial advertising. Following *Chaplinsky*, the Court has held that because these categories of expression do not further core First Amendment values, they can be restricted without meeting the usual standards of First Amendment review.[35]

Originally, the Court treated "low-value" speech as completely unprotected by the First Amendment. Restrictions of such speech therefore received essentially no First Amendment scrutiny.[36] Since *New York Times Company v. Sullivan*[37] in 1964, however, the Court has increasingly abandoned the idea that regulations of low-value speech are immune from First Amendment review. Beginning with *Sullivan*, the Court has recognized that restrictions of even low-value speech can pose significant dangers to free expression.

In some instances, illustrated by the false statements of fact at issue in *Sullivan*, low-value speech may itself have no First Amendment value, but regulations of such speech may have spillover or chilling effects on speech with important First Amendment value. The threat of liability for false statements of fact, for example, may chill speakers from making even true statements. As the Court recognized in *Sullivan*, regulations of low-value speech must take such effects into account in order to pass constitutional muster.[38] In other instances, even low-value speech may have some First Amendment value. This is illustrated by the Court's 1976 decision in *Virginia Pharmacy*,[39] which held that although commercial advertising may be of only low First Amendment

---

[34] *Id.* at 571–72.

[35] *See id.* at 572 (fighting words); Gitlow v. New York, 268 U.S. 652, 667 (1925) (express incitement); Roth v. United States, 354 U.S. 476, 485 (1957) (obscenity); Watts v. United States, 394 U.S. 705, 707–08 (1969) (threats); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (false statements of fact); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771–72 (1976) (commercial advertising); Virginia v. Black, 538 U.S. 343, 359 (2003) (threats).

[36] *See* Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 1 (1960).

[37] N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[38] *Id.* at 278.

[39] *Va. State Bd. of Pharmacy*, 425 U.S. 748.

value, it nonetheless serves a useful informational purpose and must therefore be accorded significant, if not full, First Amendment protection.

Using these two considerations regarding the First Amendment value of low-value speech, the pre-Roberts Court developed what Professor Melville Nimmer usefully described as a process of categorical balancing with respect to these low-value categories.[40] The Court attempted to fine-tune the degree of constitutional protection accorded to each category based upon its relative First Amendment value and the risk of chilling valuable expression.[41]

Another important pre-Roberts Court development also involves content-based regulation but relates to what might be described as the "special circumstances" exception to the strong constitutional presumption against content-based regulation. The key problem is that, even apart from low-value speech, an almost absolute presumption against content regulation often turns out to be too speech protective. There are some circumstances, in other words, in which such a presumption would demand too great a sacrifice of competing government interests without sufficiently serving important First Amendment values. Alas, there is a long list of such "special circumstances," ranging from regulations of speech by government employees, to regulations of speech on public property, to regulations of speech by students, soldiers, and prisoners, to regulations of the government's own speech, and to regulations that compel individuals to disclose information to the government.[42]

In theory, of course, it would be possible to apply the strict presumption against content-based regulation in all of the aforementioned situations. But, as the Court came to recognize, this would sometimes produce unwise and even foolish results. Consider a high school mathematics teacher who asserts a First Amendment right to preach Marxist doctrine instead of the Pythagorean Theorem in her mathematics classroom. Or an IRS employee who claims a First Amendment right to post confidential tax returns on the internet. Or a taxpayer who

---

[40] Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 942–43 (1968).

[41] *Id.*

[42] *See, e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991) (government speech); Perry Educators' Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37 (1983) (public property); Jones v. N.C. Prisoners' Lab. Union, 433 U.S. 119 (1977) (prisoners); Parker v. Levy, 417 U.S. 733 (1974) (soldiers); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (students); Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (public employees); Gibson v. Fla. Legis. Investigation Comm., 372 U.S. 539 (1963) (compelled disclosure).

claims that the government cannot constitutionally create a library or museum dedicated only to science or American history. All of these examples regulate speech on the basis of content, none involve low-value speech, and none pose the sort of clear and imminent danger of grave harm that might otherwise be sufficient to justify a content-based restriction of speech. Must we, then, hold all of these regulations unconstitutional? Examples such as these caused the Court to rethink the scope of the strong presumption against content-based restrictions. More specifically, they prompted the pre-Roberts Court to rethink two facets of that doctrine.

First, situations like the above examples caused the Court to recognize that not all content-based restrictions are equally threatening to core First Amendment values. On closer inspection, the Court came to realize that regulations of viewpoint are much more dangerous to fundamental First Amendment values than other regulations of content, such as regulations of the subject matter of expression or of the use of profanity. Indeed, for many of the same reasons that content-based restrictions were seen as different from and more threatening than content-neutral restrictions, so too were viewpoint-based restrictions seen as different from and more threatening than other forms of content-based restrictions. That is, viewpoint-based restrictions are more likely to distort public debate in a politically biased manner and they are more likely to be motivated by hostility to particular points of view.[43]

Another major development in the pre-Roberts Court free speech jurisprudence concerns the other side of the content based versus content neutral divide. Why do we care about laws that do not regulate the content of speech? Consider a law that prohibits any billboard in a residential area. This law does not regulate the content of speech at all. One might therefore argue that it has nothing to do with the First Amendment. One might insist, in other words, that the First Amendment is about censorship and that censorship is about regulating content. Although this is a theoretically plausible approach, the pre-Roberts Court rightly rejected it.[44] But that poses further

---

[43] For illustrative decisions recognizing this distinction, see generally *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853 (1982); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995); *Perry*, 460 U.S. 37; *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986); and *Morse v. Frederick*, 551 U.S. 393 (2007).

[44] *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 491, 520–21 (1981) (plurality opinion) (holding that a billboard ordinance was invalid under the First and Fourteenth Amendment because it "reache[d] too far into the realm of protected

puzzles, for if content-neutral laws can violate the First Amendment, we need to know how and why they threaten First Amendment values.

To begin, it is important to note that content-neutral laws come in many shapes and sizes. They include, for example, laws prohibiting anyone to publish a newspaper, to hand out leaflets in a public park, to contribute money to elect political candidates, to discriminate on the basis of sexual orientation, to appear naked in public, or to knowingly destroy a draft card.[45] Some of these laws have a severe impact on the opportunities for free expression, whereas others have only a trivial impact. Clearly, a content-neutral law that has a severe impact on the opportunities for free expression should be more likely to be unconstitutional than a content-neutral law that has only a minor impact. Not surprisingly, that turned out to be a central concern of the pre-Roberts Court in assessing the constitutionality of such laws. A robust system of free expression assumes that individuals have ample opportunities to express their views, and content-neutral laws that significantly limit those opportunities should be more closely scrutinized for that reason.

In dealing with such laws, the pre-Roberts Court considered many possible factors, including: the restrictive impact of the law, the ability of speakers to shift to other means of expression, the substantiality of the state's interest, the ability of the state to achieve its interest in a less speech-restrictive manner, whether the speech involves the use of private property, whether the speech involves the use of government property, whether the means of expression has traditionally been allowed, whether the regulation has a disparate impact on certain points of view, whether there is a serious risk of impermissible motivation, and whether the law is a direct or incidental restriction of speech.[46] In short, the pre-Roberts Court came to analyze such laws with a form of ad hoc balancing.

Taking these principles into account, the pre-Roberts Court shaped most of our First Amendment jurisprudence. Given that these principles were adopted by many different justices with widely varying perspectives over many decades, it

---

speech" and stating "[t]here can be no question that a prohibition on the erection of billboards infringes freedom of speech").

[45] *See* Bartnicki v. Vopper, 532 U.S. 514 (2001); Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640 (1981); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995); City of Erie v. Pap's A.M., 120 S. Ct. 1382 (2000); United States v. O'Brien, 391 U.S. 367 (1968).

[46] *See Buckley*, 424 U.S. at 23–29 (1976); City of Ladue v. Gilleo, 512 U.S. 43, 45, 50, 54 (1994); Martin v. City of Struthers, 319 U.S. 141, 141–49 (1943).

is not surprising that there are inconsistencies, ambiguities, conundrums, and perplexities in the doctrine. On the other hand, by the early twentieth century, the Court, in my view, had for the most part built a sensible and reasonably effective set of principles for sorting First Amendment issues and for reaching reasonably sound and predictable outcomes.

And now, with that, we can turn to the Roberts Court. I should note that, when I say that, I am not implying anything one way or the other about the Roberts Court's First Amendment jurisprudence. I leave that to my colleagues.