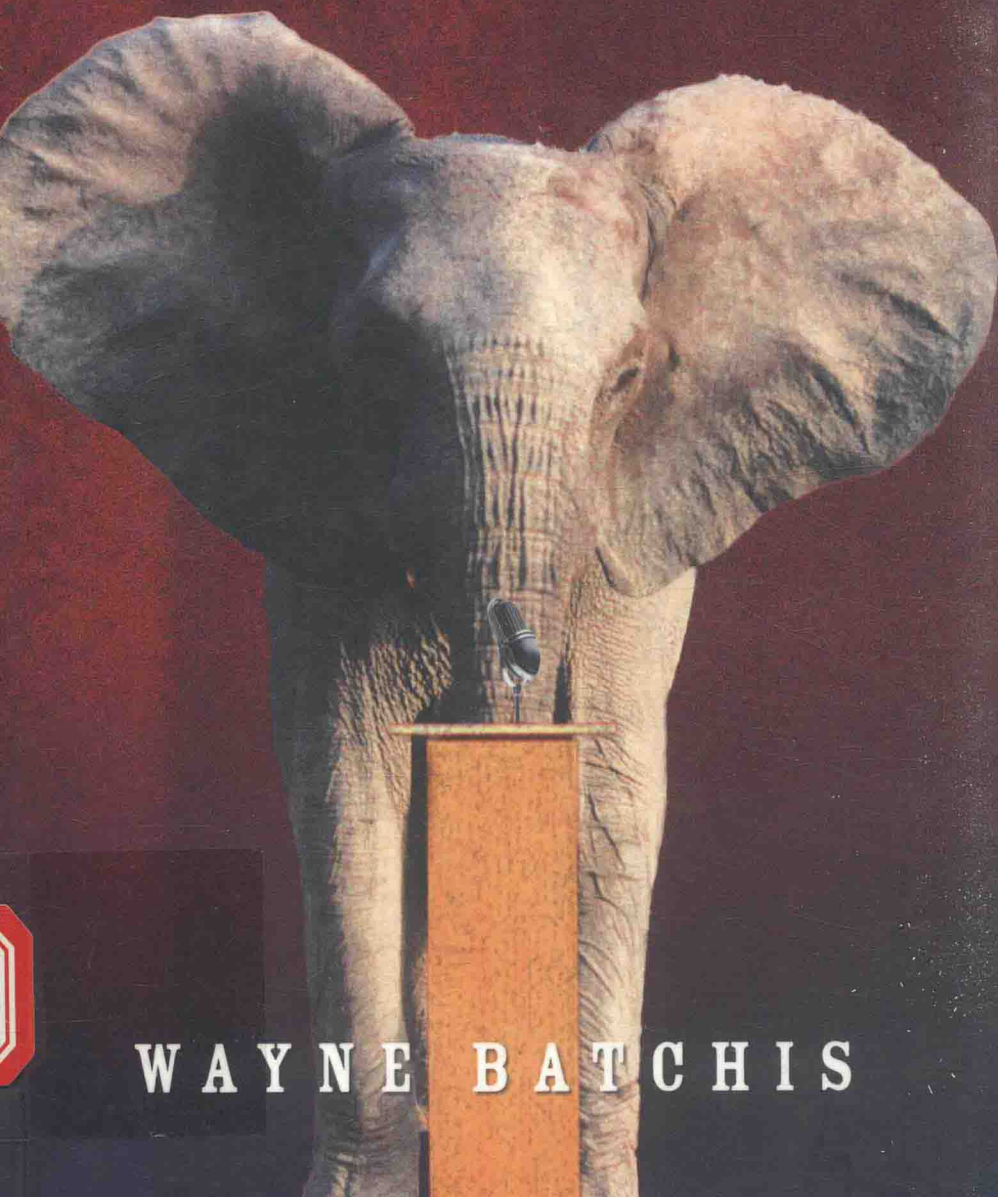
THE RIGHT'S FIRST AMENDMENT

THE POLITICS OF FREE SPEECH & THE RETURN OF CONSERVATIVE LIBERTARIANISM



WAYNE BATCHIS

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Preface

It doesn't take a political scientist to see that America is politically polarized. "Blue states" and "red states" have become the ubiquitous shorthand for a seemingly irreconcilable ideological gulf that has poisoned the well of collegiality, compromise, and accomplishment in Congress and in American politics generally. It likewise doesn't take a legal scholar to see that the U.S. Supreme Court has fed this intractable divide with repeated 5–4 decisions partitioned along sharp ideological lines. The media's obsessive focus on 5–4 opinions paints a portrait of judicial decision making that all too often resembles, not a rule of law, but a rule of raw, partisan majoritarianism.

This narrative, although simplified for public consumption, is not completely lacking in merit. Today, ideological alignment on the Court is correlated with the political party of the president who appointed the justice to an unprecedented historical extent.[1] There is unquestionably a relationship between ideology and Supreme Court decision making, and many political scientists applaud this acknowledgment; indeed, many have actively focused the public eye on this relationship.[2]

I have a background in two traditions. I am both a political scientist and a legal scholar. I believe there is much more to the story. I believe that legal interpretation matters—and it matters in a way that is inherently distinct from politics. Law and politics, in other words, should be understood as neither purely dichotomous nor nihilistically conflated. The balance lies somewhere in between; and in my view, there is perhaps no better illustration of this messy

truth than in the politics and jurisprudence of free speech—consecrated in the very first of America's twenty-seven constitutional amendments.

Why the First Amendment? Free speech is enraging. It is degrading. It is frightening and shocking. Free speech means having one's most cherished beliefs dragged through the proverbial mud. It means that self-esteem, cultural pride, and national honor will be trampled; deeply held social norms will be callously flouted. For the political right and left, free speech is an open-ended and empowering tool for one's ideological adversaries. It is also—for good reason—a freedom that is among the most sacred and zealously guarded keystones of America's civic religion.

In the abstract, free speech is lionized. In practical, everyday life, it can manifest as ugly, painful, humiliating, and arguably damaging to American security and democracy. One might presume, then, that freedom of speech—with its profound ability to either aid or wound "both" political camps—would be an example of an ideologically neutral constitutional principle that is truly above politics. This, however, is not the case. Particular constitutional rights can be favored or disfavored by the right or left respectively at different periods in political history—and the First Amendment is no exception.

This study explores the interplay between political ideology and constitutional principle. The relationship, as I try to convey, is not a simple one. It is rife with nuance. It is the kind of nuance that might make purists—if such purists indeed exist—in both the "law is law" camp and the "law is politics" camp moderately uncomfortable. I believe that such discomfort is entirely healthy. The line between constitutional principle and ideology is both blurry and essential to the framers' design. In my view, denying the relationship between political ideology and constitutional interpretation would be naïve; but, even worse, denying there is an important and very real distinction between the two would be a democratic (with a small "d") suicide pact.

The story of this study is not neat and tidy. Many will eagerly poke holes in the broad conclusion that the political right in the United States has moved in a speech-protective direction, pointing to the many exceptions to this thesis, both on and off the Court. As I willingly concede, qualitative and quantitative assessments of the contemporary relationship between conservatism and free-speech values run the gamut. In part, this is due to the fact that the very meaning of "free speech" is contested. How can one be said to be pro–free speech if what one supports is, to one's detractors, not "speech" at all? Being pro–free speech might mean supporting a right to spend money, advertise Viagra, engage in

sexually explicit performance art, exclude homosexuals from an association, burn draft cards, or burn crosses—and many, on both sides of the political spectrum, simply deny that the First Amendment has any relationship to these actions. The *principle* of free speech, in other words, cannot be separated from the *meaning* of free speech. One man's freedom of speech may, to another, have nothing whatsoever to do with speech.

Furthermore, and perhaps even more confounding, what are we to make of a situation where two purported free-speech interests are pitted *against each other*? Is the advocate for a dissenting shareholder's free-speech right *not* to be forced to speak any less pro–free speech than the advocate of unlimited corporate spending on campaign speech that disregards such shareholder dissent? How about the shopping mall owner who seeks to exercise her First Amendment right to convey a message of unbridled free-market capitalism by excluding Occupy Wall Street protestors, who themselves seek to freely express their views on mall property? Who gets to claim the prize? Who gets the gold medal for free-speech advocacy? To what extent might one's answer turn on one's political worldview?

Truly understanding the relationship between constitutional interpretation and political ideology—particularly with regard to the First Amendment—demands so much more than a mere crunching of judicial voting data, a favorite pastime of many political scientists. And it also quite clearly calls for looking far beyond the pure doctrinal analysis found in court opinions, a central focus of many legal scholars. In short, it's complicated. The relationship is nonetheless a real one—one with very real implications for American society and indeed for democracy itself.

. . .

In the recent past, a robust freedom of speech has been understood to be a core value of contemporary liberalism—and perceived to be antithetical to modern conservatism. Being aggressively pro–free speech was as comfortably associated with American political liberalism as being pro-choice, pro–affirmative action, or pro–gun control. Particularly during the heyday of the Warren Court, opinions protecting the right to freely express controversial, distasteful, or ostensibly immoral ideas were derided by conservatives and hailed by liberals. Contemporary liberalism seemed to consistently stand on the side of the First Amendment, even when the short-term costs were perceived to be relatively high. Political and jurisprudential conservatives, in contrast, saw a

First Amendment that was less of an absolute—a guarantee that could be balanced more comfortably against the democratic needs of civility and morality in some areas or evaded entirely in others.

With little notice, this political dynamic has been shaken to the core. Today, a critical mass of conservatives both on and off the Supreme Court are much more willing than they have been in the past to agree with their liberal counterparts that speech is deserving of First Amendment protection. In many instances, political liberals find themselves on the opposite end of the spectrum, advocating a narrower First Amendment. At the same time, the First Amendment has become an affirmative tool for advancing mainstream conservative policy objectives. A conservative legal movement has gained influence and has increasingly advocated a First Amendment approach to combating what it characterizes as liberal political correctness on college campuses. Conservatives on the Court have used the First Amendment to ensure greater corporate representation in American politics by allowing unlimited corporate spending on campaign speech. The Court has advanced conservative moral views—and curtailed minority representation—by utilizing the First Amendment's nontextual "right of the association" to strike down laws aimed at preventing organizations such as the Boy Scouts from discriminating against homosexuals.

Constitutional principles do not live in political isolation; politicians, pundits, commentators, and ideologically inclined scholars have adopted entrenched, passionate, and influential positions on constitutional meaning. This study brings together a close examination of the evolving political and ideological perspective on free speech with a fine-grained analysis of the shifting doctrinal and jurisprudential approach taken by the conservative members of the Supreme Court. On the political side, I anchor the study in an examination of the preeminent conservative publication, *National Review*. Its sixty-year history tells the story of modern American conservatism and reveals a fascinating shift in the way political conservatives have come to view the expressive rights guaranteed in the First Amendment. I show how the constitutional freedom of speech now carries a much more complex and nuanced political identity. In the process, I explore the ways in which this has, or has not, translated into doctrinal change on the Court.

Once acknowledged, these broader jurisprudential and political trends raise important questions. Does this shift represent a genuine and principled change in conservative philosophy regarding the role of the First Amendment in representative democracy? In the alternative, might we explain this trend, at least

in part, as a results-oriented political expedient? How do ideologically inspired goals affect legal doctrine, and vice versa? And perhaps most importantly, what do these changes suggest for the future of First Amendment interpretation?

As with any project this size, I have by necessity made hard choices as to its scope. This is not a treatise on the First Amendment, and economy required that many important and interesting First Amendment cases simply could not be discussed while others receive only brief treatment. This is also primarily a book about ideas. There is a rich backstory to the intriguing interplay of ideology and doctrine on and off the Court: the world of conservative legal advocacy. The rise of the conservative legal movement is a fascinating and consequential tale, one deserving of its own book-length treatment. And indeed, there have been a number of excellent scholarly books on the subject in recent years. I tread only lightly on this subject.

The Introduction broaches the topic by taking a broad look at the relationship between conservatism and free speech over time—both on and off the high court. I then set the stage by exploring the earliest Supreme Court First Amendment decisions, most of which focused on the rights of communists and other dissident political minorities. Chapter 1 begins by exploring the concept of political conservatism. I look at the contents of the influential publication *National Review*, a longstanding barometer of mainstream conservative political thought, and assess its evolving view of free speech. In Chapter 2 I contemplate the contrasting approaches to understanding judicial decision making taken by political science and legal scholarship. I ask what it means to explore the First Amendment from a political perspective and why it is a useful and important exercise. I examine the lack of consensus, scholarly or otherwise, regarding the relationship between free-speech values and conservative politics and propose a new way forward—one that draws on both political science and legal models of judicial decision making.

In Chapters 3 and 4, I examine what I refer to as the political correctness backlash. In Chapter 3 I show how the conservative war on perceived political correctness, particularly on university campuses, would come to define the political landscape in the late 1980s and 1990s and would help *redefine* the conservative perspective on free speech and expression. I explore the popular anti-PC literature; the high-profile controversies at schools such as Yale, Dartmouth, and the University of Pennsylvania; and the speech-code policies that ultimately led to a conservative embrace of the First Amendment. Chapter 4 turns its attention to the judiciary's entrance into the political correctness debate,

examining a number of Supreme Court decisions in depth and looking to the legal mobilization the debate inspired.

Chapters 5 and 6 focus on another significant inspiration for the evolving conservative view on the First Amendment: the rise of free-market conservatism and commercial speech. Chapter 5 focuses on the 1970s and 1980s, a period in which the conservative perspective on free speech in the commercial context was in a state of flux and a time when the Supreme Court radically remade its commercial speech doctrine. Chapter 6 moves us into the present, showing how the conservative view on commercial speech has solidified and how even traditional conservatives who had been inclined to reject broad free-speech rights moved in a speech-protective direction.

Finally, in Chapter 7 I approach the topic from a different angle. This chapter is a case study in what can go wrong in First Amendment interpretation, particularly when ideology acts as an impetus for doctrinal change. I critically examine the freedom of associational speech, a doctrine that reached its apogee in the 2010 decision *Citizens United v. FEC*. The chapter closely traces the politically liberal roots of the Supreme Court's freedom of association jurisprudence and critiques the way it was ultimately utilized by conservatives in *Citizens United*.

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Introduction

The Right's First Amendment

In 1990 *National Review* published a piece by Robert Bork critically reviewing the Supreme Court's previous term. Bork's essay could not have better captured the transitional conservative tenor of the times. He positioned himself not in a manner that was consistently for or against broad free-speech rights, but instead as one who was willing to come to very different conclusions depending upon the issue at stake. He admonished the Court for its decision in *United States v. Eichman*, which, consistent with *Texas v. Johnson*, struck down a federal law protecting the American flag. According to Bork, the Court's majority failed to see that "no idea was being suppressed but merely a particularly offensive mode of expression."[1] Yet, at the same time that he brusquely dismissed the possibility that publicly desecrating a flag should constitute a protected form of expression, he rushed to condemn a Michigan campaign finance law that the Court upheld in *Austin v. Michigan Chamber of Commerce*, a law that to Bork "barred political speech, speech that is at the center of First Amendment protection."[2]

On the question of flag burning, Bork was playing the part of the moralistic conservative; on the issue of corporate speech, he cast himself as a libertarian conservative. On one hand, Bork told us that it should be permissible to prevent a "mode of expression" to make a political statement if it is "particularly offensive."[3] On the other hand, Bork asserted that legally prohibiting corporations from exerting influence over political campaigns was "flatly inconsistent with the idea, central to the First Amendment, that the right to speak is espe-

cially important when ideas expressed are not shared, or are even hated, by the majority."[4] In the campaign finance context, Bork bemoaned the *Austin* Court's holding "that government may act so that disfavored political views are disadvantaged in public debate," yet, just one page prior, he admonished the Court for doing the precise opposite: striking down a law that penalized a particular method (burning an American flag) of expressing a certain disfavored political view. Yes, different facts garner different results. However, as we shall see, this split personality on display in the pages of *National Review* was more than just an example of a case-by-case fact-intensive analysis by a respected conservative jurist and constitutional scholar: It was emblematic of a much broader splintering among political conservatives on First Amendment matters.

This fracture would ultimately, and largely, heal—but the relationship between political conservatism and free-speech values would not look the same. Public polling on subversive advocacy confirms the shift in conservative sentiment. In the 1970s, only 51.8 percent of self-identified conservatives would have allowed a speech by a person who advocated doing away with elections and letting the military run the country.[5] The number jumped to 70.3 percent in the years from 2010 to 2014.[6] William F. Buckley and other moralistic conservatives of the Red Scare and Cold War era, deeply suspicious of free-speech proponents, would be replaced by a new generation of conservative libertarians who would harken back on First Amendment matters to a long-forgotten period of conservatism. In turn, moralistic conservatives would themselves come to appreciate the libertarian position on free expression, in many cases adopting it as their own. From the 1970s to 2010–2014, conservatives who would allow speech against churches and religion would jump from 62.6 to 77.2 percent.[7]

The Conservative and Liberal Justices: A Brief First Amendment Snapshot

Let's return to the 1970s, a time in the not-so-distant past when Supreme Court decisions helped cement the perception that jurisprudential conservatives largely rejected a broad reading of the First Amendment. In 1971, ideological dichotomy in First Amendment thinking was attested to by Robert Bork in a controversial *Indiana Law Journal* article that would come back to haunt him as a failed nominee to the U.S. Supreme Court sixteen years later. In *Miller v. California* and *Paris Adult Theatre v. Slaton*—landmark companion obscenity cases argued just a year after Bork penned his article—the Court split right down the middle, with the ideological divide much in evidence.

Richard Nixon had been elected president just a few years before these cases were considered. His election occurred at what would prove to be the final days of the liberal Warren Court, and it was readily apparent that this new conservative president saw it as his mission to alter the ideological tenor of the Court. As Nixon insider John Dean observed, "More than any other president since Franklin D. Roosevelt, [Nixon] worked hard to mold the Court to his personal liking . . . making conservative appointments."[8] Perhaps unsurprisingly, four of the five justices who comprised the majority opinion upholding the obscenity exception to the First Amendment were recent Nixon appointees: Warren Burger, William Rehnquist, Lewis Powell, and Harry Blackman. Three of the four dissenters were vestigial stalwarts from the liberal Warren Court: William Douglas, Thurgood Marshall, and William Brennan.

Granted, the majority opinion in *Miller* by no means went as far in circumscribing First Amendment protection as Robert Bork proposed in his 1971 article. Unlike Bork's view, which would have narrowly limited protected speech to overtly political expression, the majority in *Miller v. California* was clear that the First Amendment protected "serious literary, artistic" and "scientific expression."[9] Why the contrast between Bork's position and the view of the conservative wing of the Court? Perhaps this was simply a difference in *degree* of conservatism rather than *kind*. The Court, as a consequence of the Nixon appointments, was clearly moving in a rightward direction. However, jurisprudential philosophy—like ideology—operates on a continuum rather than being strictly dichotomous. So, one way of understanding the Court's obscenity decisions of the early 1970s is that the Court was emerging as conservative on certain First Amendment matters—yet it was still quite a bit *less* conservative than the philosophy articulated by Robert Bork.

However, this assessment may not tell the whole story. It is also important to note that Bork, *in his capacity as an academic* writing a scholarly article, had much greater latitude in outlining his ideal vision of legal doctrine. This is also true of a judge writing *outside* of the context of a formal case or controversy. Judges qua judges, at least in theory, are constrained by precedent. Thus, even a legal decision that lays out a new doctrinal test—as the Court did in *Miller*—will be informed by previous case law. By the time of *Miller* and *Paris Adult Theatre*, the Court's "obscenity" jurisprudence, as a categorical exception to First Amendment protection, was considerably confused.[10] These two companion cases offered a needed opportunity to clarify and perhaps even reformulate the Court's preexisting doctrine on the subject.[11] The

Court had not directly addressed the contentious issue since 1957, when it determined that obscenity was "not within the protection intended for speech and press."[12] The doctrinal uncertainty after this point lay in finding an appropriate, workable, and consistent definition of obscenity. The Court's task, operating under the limiting principle of *stare decisis* and the canon of judicial decision making that circumscribed its role to the constitutional issue at hand, was to determine the nature and breadth of the unprotected category of obscenity—not to enlarge the unprotected class of speech well beyond obscenity as Bork would presumably have preferred. Thus, it is hard to even say that the majority opinion necessarily reflects a less-conservative (and more speech-protective) ideological perspective than the one promoted by Robert Bork. It could simply illuminate the distinction between judges, acting as judges, and other political actors.

The dissenting Justice Douglas—who was at the time the most liberal member of the Court[13]—remained consistent by simply maintaining his original objection to the very idea that "obscenity is not expression protected by the First Amendment."[14] Dissenting Justices Brennan, Stewart, and Marshall took a different approach, rejecting the majority's conclusions for more nuanced reasons. Brennan argued that the majority's holding could not "bring stability to this area of law without jeopardizing fundamental First Amendment values."[15] He explained that since first declaring obscenity unprotected, the Court had been "manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech."[16] Thus, to Brennan, there was something inherently unworkable about allowing a constitutional right to turn upon a nebulous and seemingly subjective concept such as obscenity.

Brennan's reversal from his prior position upholding the obscenity exception was guided by an acute sensitivity to free speech. To Brennan—who next to Douglas was the most liberal member of the Court that term[17]—the potential that obscenity restrictions might ultimately inhibit other speech was fatal. In contrast with Judge Bork, Brennan and his fellow dissenters presumed that literature—even the nonpolitical variety—must be protected by the First Amendment. These dissenters feared that the new doctrinal formulation, in part defining obscenity as material that lacks "serious literary value," would invite censorship of sexually oriented but socially valuable literature simply because some do not believe is it "serious" *enough*.[18] This is a concern that is consistent with the politically liberal ideal that elevates the freedom of, and

tolerance for, unpopular or eccentric individuals and ideas over the value of promoting more limited moral conceptions of community.

Unlike the dissenters, the five most conservative justices[19] felt comfortable excluding an entire category of expression—obscenity—from the ambit of the First Amendment. They relied upon philosophical concerns traditionally adopted by moralistic conservatism. The majority opinion in *Paris Adult Theatre v. Slaton* highlighted obscenity's "corrupting"[20] impact, stressed "the social interest in order and morality,"[21] and twice cited the prominent neoconservative Irving Kristol to support its conclusions.[22] They emphasized the centrality of *local* "tastes and attitudes" and tailored their doctrinal test to accommodate regional tradition over national "imposed uniformity."[23] Even in light of the literal command of the First Amendment, the traditionally conservative concerns of law and order and public morality were to override the claim that "individual 'free will' must govern."[24] They stressed that "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex."[25]

As this illustration suggests, forty years ago, both on and off the Court, the alignment between conservative political ideology and the First Amendment's protection of free speech and expression was relatively clear. As a general matter, conservatives were much less speech protective. For conservatives, concern for tradition, family, and morality trumped individual expressive freedom. As we shall discuss, social scientists who have studied the relationship between ideology and judging have consistently relied upon this assumption, repeatedly associating support for increased regulation of expression with conservatism.[26]

However, much would change in the ensuing decades. We need only look to the Court's most recent First Amendment decisions to get a taste of the striking transformation. In 2011, it was Justice Antonin Scalia, perhaps the most evocative political symbol of jurisprudential conservatism on today's Supreme Court, who wrote the majority opinion striking down a morality-imbued California law on First Amendment grounds.[27] The law prohibiting the sale or rental of violent video games was designed as an "aid to parental authority."[28] With little equivocation, Scalia explained that "[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar devices . . . and [t]hat suffices to confer First Amendment protection."[29] Scalia made a brief and loose concession to the view famously articulated by Robert Bork, admitting that "[t]he Free Speech Clause