

## Constitutional Caution

Cass R. Sunstein

Cass.Sunstein@chicagounbound.edu

Follow this and additional works at: <http://chicagounbound.uchicago.edu/uclf>

---

### Recommended Citation

Sunstein, Cass R. () "Constitutional Caution," *University of Chicago Legal Forum*: Vol. 1996: Iss. 1, Article 11.

Available at: <http://chicagounbound.uchicago.edu/uclf/vol1996/iss1/11>

This Article is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in University of Chicago Legal Forum by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# Constitutional Caution

Cass R. Sunstein†

## I. GOVERNMENT FAILURE AND CONSTITUTIONAL FAILURE

Begin with a platitude: When government attempts to regulate the market, many things may go wrong. In the familiar litany, regulation may be counterproductive, producing outcomes that defeat the aspirations of well-meaning reformers. Or, regulation may be futile, as the market adapts to the relevant initiatives. Or, regulation may produce unanticipated harmful consequences. All of these results may follow from the regulators' incomplete understanding of the system into which they are attempting to intervene. This is not an argument that government should never intervene in markets. But it is certainly a reason for caution, for attempting to acquire a good deal of information, and for proceeding in an experimental, nondogmatic way.

It is less often recognized that constitutional law can have similar problems. Supreme Court decisions may be counterproductive. If it is understood as a case about gender equality, *Roe v Wade*<sup>1</sup> is a possible example since the Court's decision may well have damaged the effort to produce gender equality.<sup>2</sup> Or Supreme Court decisions may be futile. Sometimes Fourth Amendment decisions seem to have this feature; it is far from clear that police officers comply as a matter of course with Supreme Court pronouncements about Fourth Amendment requirements. Supreme Court decisions may also have harmful unanticipated consequences. This is true, for example, of many efforts in the area of judge-led social reform.<sup>3</sup>

---

† Karl N. Llewellyn Distinguished Service Professor of Jurisprudence, University of Chicago.

<sup>1</sup> 410 US 113 (1973).

<sup>2</sup> See Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 339-41 (University of Chicago Press, 1993); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 NC L Rev 373, 381-83 (1985).

<sup>3</sup> See Donald L. Horowitz, *The Courts and Social Policy* (Brookings Institution, 1977).

Justice Holmes's work on constitutional law was built largely on seeing the political process as a kind of market, subject, like other markets, to forces of supply and demand.<sup>4</sup> As a regulator of the political market, the Supreme Court may reach decisions that reflect ignorance of relevant factors. Because they interfere with the political market, Supreme Court decisions may also disturb some kind of social equilibrium. It is ironic but true that many people alert to the problems with government interference with economic markets are quite sanguine about Supreme Court interference with political markets.<sup>5</sup> This was true in the 1920s when constitutional law assumed center stage in debates over regulation of new and old markets.<sup>6</sup> It is true as the twenty-first century approaches, as constitutional law takes center stage in debates over new communications markets, prominently including the Internet.

In some areas, the Supreme Court, firmly aware of its own limitations and perhaps aware of the marketlike nature of politics, operates *casuistically*. It avoids broad rules. It is aware of underlying complexities of both fact and value. In the area of affirmative action, this has been the Court's preferred course.<sup>7</sup> The Court has avoided simple rules. Its decisions have been highly case specific. The democratic process has been given a lot of room to maneuver.

I suggest that this casuistical model makes sense for cyberspace.<sup>8</sup> This is so for two reasons. First, underlying values are in flux and not simple to sort out. There is, for example, a large debate over the regulation of pornography, especially pornography about and for children, on the Internet. There is also a large debate about the relationships among the Internet, children, and parental control.<sup>9</sup> It is also unclear that the Court's

---

<sup>4</sup> See Yosai Rogat, *The Judge as Spectator*, 31 U Chi L Rev 213 (1964).

<sup>5</sup> See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press, 1985). See also Bernard H. Siegan, *Economic Liberties and the Constitution* (University of Chicago Press, 1980).

<sup>6</sup> See Geoffrey R. Stone, et al, *Constitutional Law* 167 (Little Brown, 2d ed 1991).

<sup>7</sup> See Cass R. Sunstein, *Political Deliberation and the Supreme Court*, 84 Cal L Rev (forthcoming, July 1996); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, Harv L Rev (forthcoming, Nov 1996).

<sup>8</sup> As the Court concluded in *Denver Area Educational Telecommunications Consortium, Inc. v FCC*, 116 S Ct 2374 (1996), a decision reached after this essay was initially written.

<sup>9</sup> See Robert A. Sirico, *Don't Censor The Internet*, Forbes 48 (July 29, 1996); James Coates, *Firms Can Clean Up By Blocking Web's Smut; Parents First Target of Censoring Software*, Chi Tribune 1, sec 4 (July 29, 1996); Zoe Lofgren, *Free For All: Parents Against Surfing*, Wash Post A17 (July 20, 1996) (op/ed piece).

free speech doctrine—founded on the categories of viewpoint-based, content-based, and content-neutral regulation—makes complete sense. If, for example, the government attempts to promote educational and public-affairs programming, it is acting on a content-discriminatory basis, but are its actions for that reason illegitimate?

The problem is not limited to values. On the underlying facts, things are changing very rapidly, and courts know relatively little; but the facts are crucial to the analysis. The new communications technologies in general are a good example. If cable television flourishes, will ordinary broadcasters be at risk in a way that threatens free programming?<sup>10</sup> Courts are not likely to be in a good position to answer this question. This was the key problem in the *Turner* case,<sup>11</sup> and while there is reason to think that interest-group pressures underlay the relevant statute, predictive issues are not, in general, well-suited to judicial resolution. In such circumstances the Court does best if it proceeds cautiously and with humility, allowing some room for political judgment and maneuvering in a setting that is in such flux.<sup>12</sup>

In the area of cyberspace, there is a related but more general issue. I believe that the First Amendment is sometimes playing substantially the same role with respect to the communications market as did the Fourteenth Amendment with respect to the labor market in the period from 1905 through 1936.<sup>13</sup> In that period, questions about minimum-wage and maximum-hour laws, or efforts to protect labor unions, were answered in significant part by asking: What does the Due Process Clause say on such questions?<sup>14</sup> In retrospect we can see that this was a bad way to proceed—that it would have been much better to dispense with lawyers and cases and to focus instead on underlying questions of fact and value, questions for which purely legal tools are inadequate. The problems of policy should be solved by people who understand problems of policy, not by lawyers skilled in reading Supreme Court opinions.

---

<sup>10</sup> See *Turner Broadcasting System, Inc. v FCC*, 512 US 622 (1994), reh'g denied 115 S Ct 30 (1994).

<sup>11</sup> *Id.* (holding that government may regulate cable operators with must-carry obligations provided such regulations do not suppress substantially more speech than necessary to make television broadcast viable).

<sup>12</sup> See Lawrence Lessig, *The Path of Cyberlaw*, 104 Yale L J 1743 (1995), suggesting an approach quite similar to what I am suggesting here. I am indebted to Professor Lessig for valuable discussion.

<sup>13</sup> Stone, et al, *Constitutional Law* at 786 (cited in note 6).

<sup>14</sup> *Id.*

To some extent, the same is true for cyberspace. Too often, hard questions are answered by consulting previous cases, as if the First Amendment, judicially understood, supplies the foundations for choosing regulatory policy for the emerging speech market. Of course the First Amendment has a good deal to say about legitimate regulatory strategies. Obviously, some such strategies would violate the First Amendment. But the relevant questions are first and foremost ones of policy rather than constitutional law; courts and judges would do well to remember this point.

## II. EXAMPLES OF POTENTIAL AREAS OF REGULATION

### A. Child Pornography, Obscenity, Parental Control

Consider a few examples. With the touch of a button, it is now possible to reach millions of people, whether or not they want to be reached. Libelous statements, commercial messages, hate speech, child pornography, threats—the cost of sending all of these to millions is very low. This simple fact may make it necessary to rethink constitutional categories. There has been particular concern recently about the free availability of sexually explicit materials on the Internet, especially in the context of materials soliciting, involving, or available to children.<sup>15</sup> Perhaps the government should be allowed to regulate not only child pornography, and not only obscenity, but a somewhat broader range of materials because of the distinctive interest in protecting children.<sup>16</sup> At least the Court's obscenity doctrine bears uncertainly on this question, and mechanical use of that doctrine may produce error. It is important to get a sense of the nature of the underlying problem before reaching confident conclusions.<sup>17</sup>

---

<sup>15</sup> The increasing attention being given to pornography on the Internet is evidenced by the fact that from Spring 1991 to January 24, 1994, Lexis-Nexis listed only 69 articles on this subject, as contrasted with 3,451 articles on this subject entered from January 24, 1994 to January 24, 1996.

<sup>16</sup> See S 314, 104th Cong, 1st Sess (Jan 30, 1995) in 141 Cong Rec S 1953 (Feb 1, 1995). Popularly known as the Communications Decency Act of 1995, was introduced by Senator Jim Exon (D-Neb) in the United States Senate and enacted into law January 31, 1996 as the Communications Decency Act of 1996. Pub L No 104-104, 110 Stat 133 (1996), amending 47 USC § 223. Its definition of "harm to children," goes beyond obscenity to include, for example, materials that contain "indecent or nudity." *Id.*, amending 47 USC § 223(a)(1)(A)(ii). This provision extends far beyond current law. Portions of the Communications Decency Act of 1996 were declared unconstitutional in *ACLU v Reno*, 929 F Supp 824 (ED Pa 1996) and in *Shea v Reno*, 930 F Supp 916 (SD NY 1996). In my view these decisions were correct. See notes 61-63 and accompanying text.

<sup>17</sup> A narrow, and in my view correct, decision is *Denver Area Educational Telecommunications Consortium, Inc. v FCC*, 116 S Ct 2374, 2390 (1996) (upholding a grant of

Related issues are raised by the use of the Internet to circulate libelous, threatening, or sexually violent material about an identifiable person. It may well be that the easy transmission of such material to millions of people will justify deference to reasonable legislative judgments.<sup>18</sup>

Suppose that the government intends to assist parental control by allowing families to "block" certain material and to prevent it from entering the home. This idea would bear an obvious resemblance to the controversial "v-chip" proposal that was recently enacted by Congress.<sup>19</sup> Through this enactment, Congress is requiring new televisions to be equipped with technology enabling parents to block certain programming. The requirement may substantially affect programming because of anticipated parental blocking; but this by itself is not constitutionally decisive. The existence of such an effect resulting from anticipated viewer behavior is part of a well-functioning market. Proposals of this sort would facilitate parental control, but would not involve federal content regulation; they would not involve direct governmental control or censorship of the speech market.<sup>20</sup> Because they are noncensorial and facilitative, courts should treat them more leniently.

The only serious questions include selectivity and bias: Is the government facilitating the exclusion of material of which the government disapproves? If so, the fact that no direct regulation is involved is not enough; impermissible selectivity would be objectionable by itself. Certainly it would be troublesome if the government enabled people to screen out material of a certain, governmentally disapproved content; imagine a governmentally mandated "Democrat chip" or "Gingrich chip" or "liberal chip." But the "v-chip" is best seen as lacking this feature. It would discriminate on the basis of content, not on the basis of view-

---

permission to exclude "indecent" programming).

<sup>18</sup> But see *United States v Baker*, 890 F Supp 1375 (1995). In that case, the defendants sent sexually explicit e-mail to one another which contained the graphic description of the torture, rape, and murder of a classmate of one of the defendants. The government charged the defendants with transmitting threats to injure or kidnap another. The court dismissed the charges, finding that the descriptions contained in the e-mail were fiction and did not constitute a "true threat" under the statute.

<sup>19</sup> Pub L No 104-104, 110 Stat at 141-42 amending 47 USC § 223 (cited in note 16). See Newton N. Minow and Craig L. Lamay, *Abandoned in the Wasteland* (Hill and Wang, 1994).

<sup>20</sup> See *Denver Area*, 116 S Ct at 2390, which is strong support for the validity of the v-chip, especially insofar as it upholds § 10(a) of the Cable Television Consumer Protection and Competition Act of 1992, § 10(a), Pub L No 102-385, 106 Stat 1486, codified at 47 USC § 532(h) (1994).

point. For this reason it should probably be upheld, at least on an appropriate factual record demonstrating that the government is attempting to combat harm rather than content or viewpoint.<sup>21</sup> What I am emphasizing here is that preexisting categories do not give clear guidance and that it is best for the courts to proceed in a cautious manner.

## B. Violence and the Internet

Let me turn now to a question that has received considerable public attention and that particularly shows the need for a degree of judicial caution in using the First Amendment: the question of violent speech on the Internet.<sup>22</sup> Applying ordinary standards, constitutional lawyers may well believe that this is a simple issue, settled by *Brandenburg v Ohio*.<sup>23</sup> But things are more complex.

The controversy arose last spring when talk-show host G. Gordon Liddy, speaking on the radio to millions of people, explained how to shoot agents of the Bureau of Alcohol, Tobacco, and Firearms: "Head shots, head shots. . . . Kill the sons of bitches."<sup>24</sup> Later he said, "[s]hoot twice to the belly and if that does not work, shoot to the groin area."<sup>25</sup> On March 23, the full text of the *Terrorist's Handbook* was posted on the Internet, including instructions on how to make a bomb (the same bomb, as it happens, that was used in Oklahoma City).<sup>26</sup> By the time of the Oklahoma bombing on April 19, three more people had posted bomb-making instructions, which could also be found on the Internet in the *Anarchist's Cookbook*.<sup>27</sup> On the National Rifle Association's Internet "Bullet 'N' Board," someone calling himself "Warmaster" explained how to make bombs using baby-food jars.<sup>28</sup> Warmaster wrote, "These simple, powerful bombs

---

<sup>21</sup> *Denver Area*, 116 S Ct at 2385-87.

<sup>22</sup> See Cass R. Sunstein, *Is Violent Speech a Right?*, *American Prospect* 34-35 (Summer 1995).

<sup>23</sup> 395 US 444, 449 (1969) (holding that the First and Fourteenth Amendment condemn a statute which purports to punish mere advocacy and to forbid assembly with others merely to advocate the described type of action).

<sup>24</sup> See James Coates and Mike Dorning, *On the Internet, Extremists Spread Hate with Every Keystroke*, *Chi Tribune* 1-14 (Apr 26, 1995); Cass R. Sunstein, *What To Do With G. Gordon Liddy: Is Violent Speech a Right?*, *Current* 21 (Nov 1995).

<sup>25</sup> *Id.*

<sup>26</sup> Sunstein, *Current* at 21 (cited in note 24); *Lawless*, *The Economist* S15 (July 1, 1995).

<sup>27</sup> Sunstein, *Current* at 21 (cited in note 24).

<sup>28</sup> *Id.*; Guy Gugliotta, *NRA, Backers Have Focused in on ATF; Gun Group's Ad Charg-*

are not very well known even though all the materials can be easily obtained by anyone (including minors).<sup>29</sup> After the Oklahoma bombing, an anonymous notice was posted to dozens of Usenet news groups listing all the materials in the Oklahoma City bomb, explaining why the bomb allegedly did not fully explode and exploring how to improve future bombs.<sup>30</sup>

Fifty hate groups are reported to be communicating on the Internet, sometimes about conspiracies and (by now this will come as no surprise) formulas for making bombs.<sup>31</sup> On shortwave radio, people talk about bizarre United Nations plots and urge that "the American people ought to go there bodily, rip down the United Nations building and kick those bastards right off our soil."<sup>32</sup> In fact, last year Rush Limbaugh, who does not advocate violence, said to his audience, "The second violent American revolution is just about, I got my fingers about a fourth of an inch apart, is just about that far away. Because these people are sick and tired of a bunch of bureaucrats in Washington driving into town and telling them what they can and can't do."<sup>33</sup>

In the wake of the Oklahoma City bombing, a national debate has erupted about speech over the Internet counseling violence or inciting hatred of public officials.<sup>34</sup> Of course it is unclear whether such speech has had a causal role in any act of bombing. But new technologies, and particularly the Internet, have put the problem of incitement into sharp relief. It is likely, perhaps inevitable, that hateful and violent messages carried over the airwaves and the Internet will someday be responsible

es 'Rogue Agency' With Misconduct, Abuse and 'Contempt for Civil Rights', Wash Post A16 (April 26, 1995). See also Mark Sauer and Jim Okerblom, *Patriotism or Paranoia?*, San Diego Union-Tribune E1, E4 (May 4, 1995).

<sup>29</sup> Sauer & Okerblom, San Diego Union-Tribune at E4 (cited in note 28).

<sup>30</sup> Sunstein, Current at 21 (cited in note 24); See also Steve Marlowe, *Cops Get Copies of Napalm Recipe; Kids Had Formula on Computer Disk*, The Record A1 (Apr 20, 1995); Matthew Mosk, *Bomb Manual Ready, Waiting*, The Record NJ1 (May 5, 1995).

<sup>31</sup> Joseph P. Shapiro, *Extremism in America: An epidemic of fear and loathing*, US News & World Report 37, 39 (May 8, 1995). See also Nathaniel Sheppard, Jr., *Hate Groups Embrace Cyberspace as Weapon*, Chi Tribune 1-1 (Dec 12, 1995).

<sup>32</sup> *All Things Considered: Hate Groups Use Short Wave to Rant, Rave and Recruit*, (National Public Radio, May 4, 1995) (transcript of show 1837, segment 7, on file at the Legal Forum office).

<sup>33</sup> Robert Wright, *Did Newt Do It?*, The New Republic 4, 45 (May 15, 1995).

<sup>34</sup> See Eric Lichtblau & Jim Newton, *Internet Blamed for Steep Rise in Bomb Reports*, LA Times B1 (June 27, 1996); Debra Gersh Hernandez, *Mayhem Online*, Editor & Publisher 34 (June 24, 1995); Charles V. Zehren, *The Debate to Limit Cyberhate*, Newsday A7 (May 12, 1995); Kelly Owen, *Hate Speech on Internet Called Protected by Constitution*, LA Times A17 (May 12, 1995).



for acts of violence. This is simply a statement of probability. The questions raised for constitutional lawyers are these: Is that probability grounds for restricting such speech? Would restrictions on speech advocating violence or showing how to engage in violent acts be acceptable under the First Amendment? And how do preexisting categories bear on the current issue?

1. *The clear and present danger doctrine and its evolution.*

It should go without saying that recent events should not be a pretext for allowing the government to control political dissent, including extremist speech and legitimate hyperbole (a large and important category). But the new and unanswered question has to do with the constitutionality of restrictions on speech that expressly advocates illegal, murderous violence in messages to mass audiences. For most of American history, the courts held that no one has a right to advocate violations of the law.<sup>35</sup> They ruled that advocacy of crime is wholly outside of the First Amendment—akin to a criminal attempt and punishable as such.<sup>36</sup> Indeed, many of the judges revered as the strongest champions of free speech believed that express advocacy of crime was punishable. Judge Learned Hand, in his great 1917 opinion in *Masses Publishing Co. v Patten*,<sup>37</sup> established himself as a true hero of free speech when he said that even dangerous dissident speech was generally protected against government regulation. But Hand himself agreed that government could regulate any speaker who would “counsel or advise a man” to commit an unlawful act.<sup>38</sup>

In the same period the Supreme Court concluded that government could punish all speech, including advocacy of illegality, that had a “tendency” to produce illegality.<sup>39</sup> Justices Holmes and Brandeis, the dissenters from this conclusion, took a different approach, saying that speech could be subjected to regulation only if it was likely to produce imminent harm;<sup>40</sup> thus they origi-

---

<sup>35</sup> See Geoffrey R. Stone, et al, *Constitutional Law* 1025 (Little Brown, 2d ed 1991) (cited in note 6). See also *Masses Publishing Co. v Patten*, 244 F 535 (SD NY 1917), rev'd, 246 F 24 (2d Cir 1917).

<sup>36</sup> Stone, et al, *Constitutional Law* at 1031 (cited in note 6); *Masses Publishing*, 244 F at 540.

<sup>37</sup> *Masses Publishing*, 244 F at 539.

<sup>38</sup> *Id* at 540.

<sup>39</sup> See Stone, et al, *Constitutional Law* at 1031 (cited in note 6).

<sup>40</sup> See *Abrams v United States*, 250 US 616 (1919) (Holmes and Brandeis dissenting); *Whitney v California*, 274 US 357 (1927) (Brandeis and Holmes concurring). But see *Brandenburg v Ohio*, 395 US 444 (1969) (overruling *Whitney*).

nated the famous "clear and present danger" test.<sup>41</sup> But even Holmes and Brandeis suggested that the government could punish speakers who had the explicit intention of encouraging crime.<sup>42</sup>

For many years thereafter, the Supreme Court tried to distinguish between speech that was meant as a contribution to democratic deliberation and speech that was designed to encourage illegality.<sup>43</sup> The former was protected; the latter was not. In 1951 the Court concluded in *Dennis v United States*<sup>44</sup> that a danger need not be so "clear and present" if the ultimate harm was very grave.<sup>45</sup> The break in the doctrine did not come until the Court's 1969 decision in *Brandenburg v Ohio*.<sup>46</sup> There the Court said the government could not take action against a member of the Ku Klux Klan, who said, among other things, "[W]e're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revenge taken."<sup>47</sup> The speaker did not explicitly advocate illegal acts or illegal violence. But in its decision, the Court announced a broad principle, ruling that the right to free speech does "not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>48</sup>

Offering extraordinarily broad protection to political dissent, the Court required the government to meet three different criteria to regulate speech.<sup>49</sup> First, the speaker must promote not just any lawless action but "imminent" lawless action.<sup>50</sup> Second, the imminent lawless action must be "likely" to occur.<sup>51</sup> Third, the speaker must intend to produce imminent lawless action.<sup>52</sup>

---

<sup>41</sup> *Abrams*, 250 US at 627 (Holmes dissenting); *Whitney*, 274 US at 373 (Brandeis concurring).

<sup>42</sup> *Abrams*, 250 US at 627 (Holmes dissenting); *Whitney*, 274 US at 374 (Brandeis concurring).

<sup>43</sup> Stone, et al, *Constitutional Law* at 1070 (cited in note 6).

<sup>44</sup> 341 US 494 (1951).

<sup>45</sup> *Id* at 510-11.

<sup>46</sup> 395 US at 444.

<sup>47</sup> *Id* at 446.

<sup>48</sup> *Id* at 447.

<sup>49</sup> *Id*.

<sup>50</sup> *Brandenburg*, 395 US at 447.

<sup>51</sup> *Id*.

<sup>52</sup> *Id* (stating that the speech must be "directed to inciting or producing imminent lawless action").

The *Brandenburg* test borrows something from Hand and something from Holmes and produces a standard even more protective of speech than either of theirs.

2. *Old standards, new technology.*

Applied straightforwardly, the *Brandenburg* test seems to protect most speech that can be heard on the airwaves or found on the Internet. It suggests that there is no need for casuistry and that a simple rule can resolve all cases. And in general, the *Brandenburg* test makes a great deal of sense. Remarks like those quoted from Rush Limbaugh unquestionably qualify for protection; such remarks are not likely to incite imminent lawless action, and in any case they are not "directed to" producing such action. They should also qualify as legitimate hyperbole, a category recognized in a 1969 decision allowing a war protester to say, "If they ever make me carry a rifle the first man I want to get in my sights is L. B. J."<sup>53</sup> Even Liddy's irresponsible statements might receive protection insofar as they could be viewed as unlikely to produce imminent illegality. A high degree of protection and breathing space makes a great deal of sense whenever the speech at issue is political protest, which lies at the core of the First Amendment.

But there is some ambiguity in the *Brandenburg* test, especially in the context of modern technologies, and it is here that a high degree of judicial caution is appropriate. Suppose that an incendiary speech, expressly advocating illegal violence, is not likely to produce lawlessness in any particular listener or viewer. But suppose too that it is believed that of the millions of listeners, one or two, or ten, may well be provoked to act, and perhaps to imminent, illegal violence. Might the government ban advocacy of criminal violence in mass communications when it is reasonable to think that one person, or a few, will take action? *Brandenburg* offers a reasonable approach to the somewhat vague speech in question in that case, which was made in a setting where relatively few people were in earshot. But the case offers unclear guidance on the express advocacy of criminal violence via the airwaves or the Internet.

When messages advocating murderous violence are sent to large numbers of people, it is possible to think that the *Brandenburg* calculus changes: Government may well have the authority to stop speakers from expressly advocating the illegal

---

<sup>53</sup> *Watts v United States*, 394 US 705, 706 (1969).

use of force, at least if it is designed to kill people. The calculus changes when the risk of harm increases because of the sheer number of people exposed. Hence the requirement of causation might be loosened, at least for explicit advocacy of murder. There is little democratic value in protecting simple counsels of murder,<sup>54</sup> and the ordinary *Brandenburg* requirements might be loosened where the risks are great. Consider, for example, the fact that Congress has made it a crime to threaten to assassinate the President, and the Court has cast no doubt on that restriction of speech.<sup>55</sup> It would be a short step, not threatening legitimate public dissent, for the Federal Communications Commission to impose civil sanctions on those who expressly advocate illegal acts aimed at killing people. Courts might well conclude that the government may use its power over the airwaves to ensure that this sort of advocacy does not occur.

Of course, there are serious problems in drawing the line between counsels of violence that should be subject to regulation and those that should not. We might begin (and perhaps we should end) with restrictions on express advocacy of unlawful killing; this is the clearest case. I am not trying to draw conclusions so much as I am trying to suggest reasons for courts to be cautious in invoking the Constitution. In any case, we can now see that existing doctrine does not justify a simple conclusion. It was built on different factual circumstances; it was designed for what was, with respect to communications, a quite different world. The degree of danger from counsels of murder has increased with the rise of the Internet.

Authorizing the restriction of any speech, even counsels of violent crime, creates serious risks. It is unnecessary to emphasize that government often overreacts to short-term events, and the 1995 Oklahoma City tragedy, for example, should not be the occasion for an attack on extremist political dissent. Vigorous, even hateful, criticism of government is very much at the heart of the right to free speech. Certainly advocacy of law violation can

---

<sup>54</sup> The case might be different, however, if the counsel of violence is made part of an actual political argument. See *Cohen v California*, 403 US 15 (1971) (holding that a state could not, consistently with the First and Fourteenth Amendments, make wearing a jacket with the words "Fuck the Draft" a criminal offense).

<sup>55</sup> See *Watts*, 394 US at 707 (upholding the facial validity of a statute criminalizing threats of violence directed against the President because of the "overwhelm[ing] interest in protecting the safety of [the] Chief Executive and in allowing him to perform his duties without interference from threats of physical violence"). See also *R.A.V. v St. Paul*, 505 US 377 (1992) (stating "the Federal Government can criminalize only those threats of violence that are directed against the President").

be an appropriate part of democratic debate. As the example of Martin Luther King, Jr. testifies, there is an honorable tradition of civil disobedience. We should sharply distinguish, however, King's form of nonviolent civil disobedience from counsels or acts of murder. The principle condemning government regulation of political opinions, including the advocacy of illegal acts, need not be interpreted to bar the government from restricting advocacy of unlawful killing on the mass media. These are hard cases, and courts should be reluctant to conclude that the First Amendment forbids well-designed legislative initiatives.

### 3. *Bombs.*

Does the government have the power to limit speech containing instructions on how to build weapons of mass destruction? The *Brandenburg* test was designed mostly to protect unpopular points of view from government controls; it need not protect the publication of bomb manuals, at least if these manuals are being transmitted to millions of people. Instructions for building bombs are not a point of view, and if government wants to stop the mass dissemination of this material, it should probably be allowed to do so. A lower court so ruled in a 1979 case involving an article in *The Progressive* that described how to make a hydrogen bomb.<sup>56</sup> The court's argument is even stronger as applied to the speech on the Internet, where so many people can be reached so easily.<sup>57</sup> In such a case, the potential harm from the relevant materials is significantly increased. And bomb manuals, qua bomb manuals, do not deserve the highest degree of constitution-

---

<sup>56</sup> See *United States v Progressive, Inc.*, 467 F Supp 990 (WD Wis 1979), dismissed by 610 F2d 819 (7th Cir 1979) (unpublished order).

<sup>57</sup> It is worth observing here that the nation's leaders can do a good deal short of regulation. The President and other public officials should exercise their own rights of free speech to challenge hateful, incendiary speech. Although public officials could abuse these rights so as to chill legitimate protest, President Clinton's statements condemning hatred on the radio and on the Internet were entirely on the mark. Public disapproval may ultimately have a salutary effect (as it recently did in the case of violent television shows), even without the force of law.

In addition, private institutions, such as broadcasting stations, should think carefully about their own civic responsibilities. An owner of a station or a programming manager is under no constitutional obligation to air speakers who encourage illegal violence. Stations that deny airtime for such views do no harm to the First Amendment but on the contrary exercise their own rights, and in just the right way. In recent months, public and private concern about hate-mongering has encouraged some stations to cancel G. Gordon Liddy's show; this is not a threat to free speech but an exercise of civic duties. Similarly, private online networks, such as Prodigy and America Online, have not only a right but a moral obligation to discourage speech that expressly counsels illegal killing.

al protection. Regulation of instructions on how to commit terrorist acts does not place the government in a position where it does not belong.<sup>58</sup>

### III. QUALIFICATIONS

None of this suggests that the First Amendment has no role in cyberspace. I suggest that the Court should proceed confidently in three kinds of cases. The first involves those in which the government is discriminating on the basis of viewpoint. The prohibition on viewpoint discrimination is a natural inference from the First Amendment's ban on governmental favoritism. If the government regulates the Internet so as to preclude or prefer viewpoints of the government's liking, the First Amendment requires invalidation.

The second category includes cases in which government is regulating political speech. The heart of the First Amendment lies in democratic self-governance,<sup>59</sup> and when the government regulates political speech, there is special basis for suspicion. The only qualification is that courts should probably uphold viewpoint-neutral efforts to promote education and greater attention to public issues.<sup>60</sup>

Finally, courts should strike down palpably vague or overbroad statutes.<sup>61</sup> Nonpolitical speech may certainly be regu-

---

<sup>58</sup> *Progressive*, 467 F Supp at 990, however, involved a distinctive issue: an effort to show how easy it is to learn how to make a bomb.

<sup>59</sup> See Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (Harper & Row, 1948); Cass R. Sunstein, *Democracy and the Problem of Free Speech* (Free Press, 1993).

<sup>60</sup> See Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 Yale L J 1757 (1995).

<sup>61</sup> For key cases on the overbreadth doctrine, see *Gooding v Wilson*, 405 US 518, 519 (1972) (holding a Georgia statute to be on its face unconstitutionally vague and overbroad in providing that any person using to another "opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor," when Georgia courts had held that the statute did not only apply to "fighting words"); *Broadrick v Oklahoma*, 413 US 601 (1973) (holding that an Oklahoma statute which prohibited any employee in the classified service from receiving or soliciting any assessment or contribution for any political organization or candidacy, did not set out sufficiently explicit standards, although it was not unconstitutionally vague or overbroad on its face); *City Council of the City of Los Angeles v Taxpayers for Vincent*, 466 US 789 (1984) (holding that an ordinance prohibiting posting of signs on public property was not unconstitutional as applied to expressive activities of a group of supporters of a political candidate); *Board of Airport Commissioners of the City of Los Angeles v Jews for Jesus, Inc.*, 482 US 569 (1987) (holding that a regulation banning all "First Amendment activities" within the airport's "Central Terminal Area" was facially unconstitutional under the overbreadth doctrine because no conceivable governmental interest could justify this absolute prohibition of

lated in a constitutionally unacceptable manner. Statutes that produce guessing games for regulated parties create an unacceptable risk. Congress should be expected to regulate with at least a reasonable degree of clarity.<sup>62</sup> Thus lower courts were correct to invalidate a vague and broad statute banning “indecent” speech on the Internet.<sup>63</sup>

### CONCLUSION

When values and institutions are in flux, it is appropriate for the Court to proceed casuistically and to avoid broad rulings. The constitutional issues raised by cyberspace will turn on issues that cannot be fully resolved in 1995, 1996, or even 1999. In some ways, the First Amendment is, with respect to modern communications markets, playing the same pernicious role as did the Due Process Clause in the early part of the twentieth century with respect to labor markets. Hard issues of value and fact—issues of policy in which policy analysts should play a large role—are displaced by reference to constitutional categories, some of them quite arcane, and some of them likely to be ill-suited to a good understanding of the underlying phenomena. In a period of rapid change and technological uncertainty, in which those schooled in law are likely to be ignorant, there is much room for tentative,

---

speech); *Brockett v Spokane Arcades, Inc.*, 472 US 491 (1985) (deferring to Court of Appeal’s conclusion that a Washington statute which included “lust” within its definition of “prurient” was unconstitutionally overbroad, but reversing the decision on the ground that the lower court should have partially invalidated the statute as to the portion including “lust” rather than entirely invalidating it). But see *New York v Ferber*, 458 US 747 (1982) (holding that a child pornography statute which prohibited “lewd exhibition of the genitals” was not overbroad).

For key cases on the vagueness doctrine, see *Connally v General Construction Co.*, 269 US 385, 391 (1926) (holding that a law is facially void if it is vague enough that people “of common intelligence must necessarily guess at its meaning and differ as to its application”); *Grayned v Rockford*, 408 US 104 (1972) (stating that it is a basic principle that a law which fails to clearly define the conduct it proscribes is unconstitutional); *Kolender v Lawson*, 461 US 352, 361 (1983) (holding that an antiloitering statute requiring people to carry identification and to account for their presence if questioned by a police officer was unconstitutionally vague because the law reached “a substantial amount of [protected First Amendment] conduct”).

<sup>62</sup> An example of a law that could (and should) be held to be overbroad is the Communications Decency Act of 1996. Pub L No 104-104, 110 Stat 133 (1996), amending 47 USC § 223 (cited in note 16). This Act makes *all* telecommunications providers doing business in the United States potentially liable for the content of *anything* sent over their networks including “indecent” or “filthy” speech. *Id.*, amending 47 USC § 223(a)(1)(A)(ii) (cited in note 16):

<sup>63</sup> *Shea v Reno*, 930 F Supp 916 (SD NY 1996) (holding that portions of the Communications Decency Act of 1996 were unconstitutionally overbroad); *ACLU v Reno*, 929 F Supp 824 (ED Pa 1996) (holding the same portions of the Act unconstitutional).

narrow judgments. In cyberspace, constitutional lawyers should be (at least relatively) cautious.



