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The First Amendment on the Tracks: Should Justice Breyer Be at the Switch?

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Article

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Every participant at this symposium is familiar with the doctrinal disorder that is First Amendment jurisprudence. Each of us has struggled to make sense of the myriad views about the Amendment's objectives and the ultimate ends that it serves or ought to serve. Each of us has tried to understand the doctrines and to make them cohere, even as we have watched them proliferate. And as the opinions multiplied and the number of issues on which the Justices agreed seemed constantly to diminish, each of us must have wondered whether it made any sense at all to talk or think about what "the Court" had decided with respect to this or that controversy.

I doubt that I am the only participant who has observed with feelings disturbingly akin to despair as First Amendment theories have multiplied, the case law has become ever more chaotic, and consensus on fundamental issues has remained elusive both on and off the Court. Yet, despite the doctrinal and scholarly cacophony, I would argue that, until quite recently, it has been possible to identify several consistent aspects of First Amendment jurisprudence and to articulate plausible rationales for them. In brief, they are as follows: First, the cases embodied a negative conception of the Amendment. First Amendment doctrine provided a shield that protected individuals from government, not a sword that enabled them to prod it into action. Second, the cases offered more protection from regulation for some categories of speech, and no protection at all for others. Despite protestations implying the contrary,[1] the decisions

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1. "But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

embodied an implicit hierarchy of value. Political speech received the most protection,[2] for example; commercial speech received somewhat less;[3] fighting words,[4] child pornography,[5] and obscenity[6] supposedly received none at all; and entire speech-regulating regimes—contract law, trade secret law, antitrust law, for example—remained "totally untouched."[7] Third, much First Amendment doctrine could be explained as an effort to invalidate laws and official actions that betrayed a high risk of having been motivated by the desire to punish unpopular points of view, to control or manipulate public debate, or to shield incumbent officeholders from criticism or challenge. In other words, First Amendment doctrine has been much less concerned with the effects of speech regulation—on speakers' ability to communicate or listeners' ability to obtain information—than with illicit government purposes. Fourth, the distinction between content-based and content-neutral or non-speech-related laws of general applicability served as the trigger for the level of scrutiny that the Court would apply.

That it is possible to discern these consistent features of First Amendment doctrine does not mean that they reflect ei-

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2. *See, e.g.*, Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) ("[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."); Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the] Amendment was to protect the free discussion of governmental affairs.").

3. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 n.24 (1976) (noting "commonsense differences" between commercial and other forms of speech which justify a different, and lower, level of protection for the former).

4. According to the opinion in *Chaplinsky v. New Hampshire*:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

5. "There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment." New York v. Ferber, 458 U.S. 747, 764 (1982).

6. "We hold that obscenity is not within the area of constitutionally protected speech or press." Roth v. United States, 354 U.S. 476, 485 (1957).

7. "Although the First Amendment refers to freedom of 'speech,' much speech remains totally untouched by it." Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1765 (2004).

ther a normative or a theoretical consensus. Indeed, criticism and calls for rethinking aspects of the doctrine, or for expanding its reach into previously unclaimed areas, relentlessly emerge both from individual Justices and from members of the legal academy. It is not often, however, that a sitting Justice undertakes to propose—and to write opinions that attempt to implement—a fundamental transformation of the Court's approach. Justice Stephen Breyer has announced his conviction that such a transformation ought to take place. He has sketched the underlying rationale of the transformation he advocates and outlined its contours,[8] and he has deployed it in opinions.[9]

In brief, Justice Breyer thinks existing doctrine is inadequate to realize his particular constitutional vision, principally because it "puts too much weight on language, history, tradition, and precedent."[10] Regarding the consistent features of First Amendment doctrine identified above, he rejects the negative conception of the Amendment. Instead, he contends that the doctrine sometimes empowers government to enact legislation that restricts the speech of some citizens to "sustain democratic self-government" and "achieve a workable democracy."[11] He has voted to sustain legislation motivated by a government purpose to manipulate public debate because the government defended the manipulation as an effort to "protect the integrity of the political process."[12] He concluded that the legislature possessed a comparative institutional advantage and therefore accepted the government's description of a statute's purpose at face value.[13] Finally, Justice Breyer does not think the distinction between content-based and content-neutral regulations should dictate the level of scrutiny the Court

8. Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245 (2002).

9. *See, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194 (2003); Bartnicki v. Vopper, 532 U.S. 514 (2001); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997).

10. *See* Breyer, *supra* note 8, at 247.

11. *Id.* at 253.

12. *See id.*; *see also Nixon*, 528 U.S. at 401 (Breyer, J., concurring) ("[R]estrictions upon the amount any one individual can contribute to a particular candidate seek to protect the integrity of the electoral process—the means through which a free society democratically translates political speech into concrete governmental action.").

13. *See Nixon*, 528 U.S. at 403 (Breyer, J., concurring) ("I agree that the legislature understands the problem—the threat to electoral integrity, the need for democratization—better than do we.").

should apply.[14] Although Justice Breyer has claimed that his approach to constitutional interpretation generally, and to First Amendment issues in particular, would "lead judges to consider the constitutionality of statutes with a certain modesty,"[15] the fact is that his approach represents a sweeping departure from settled First Amendment doctrine and practice.

Whether the Court should embark on the course Justice Breyer describes is a question that raises many issues that are well beyond the scope of this symposium. Justice Breyer's approach would have immense systemic ramifications well beyond its implications for the First Amendment. A preliminary assessment of some of those implications is, however, timely and relevant, and this Article undertakes that task. This Article does not claim to occupy the high terrain of First Amendment theory; rather it stays close to the ground occupied by doctrine and judicial methodology. It summarizes Justice Breyer's approach as he outlined it in his 2001 Madison Lecture at New York University Law School,[16] and further looks at several opinions in cases both before and after that lecture in which he applied it.

Close analysis of opinions can be a tedious business, one that at best risks inducing boredom, and at worst might be considered trivial or even irrelevant since legal realists have induced in all of us a pervasive distrust of the authenticity of the articulated rationale of any judicial opinion. Of course, any single opinion is but one data point, which is hardly conclusive evidence that an effort to provoke a seismic doctrinal or methodological shift has been mounted. One cannot get a sense of the forest from looking at just one or even a few trees, which is likely why so many commentators ordinarily tend to eschew case parsing. I have chosen not to eschew it, however, because I think something of a devil lurks in the details of the opinions I will describe.

Justice Breyer has unambiguously announced his intention to reshape First Amendment doctrine. The particular opinions

14. In his *Bartnicki* concurrence, for example, Justice Breyer would have not used the strict scrutiny standard but would instead have looked at the statute's "balance between their speech-restricting and speech-enhancing consequences" which is a matter of "proper fit." *Bartnicki*, 532 U.S. at 536. In his *American Library Ass'n* concurrence, he rejected strict scrutiny as "too limiting and rigid." *Am. Library Ass'n*, 539 U.S. at 217 (Breyer, J., concurring).

15. *See* Breyer, *supra* note 8, at 250.

16. *See id.* at 245.

examined in this Article exemplify the approach he would have the Court take. The moves he makes in them—the rationales he offers, the precedents he cites or distinguishes or the ones he simply ignores, the decision-making methodology he outlines, and the rhetoric he invokes—are all moves that, were they to become the norm, would cast First Amendment jurisprudence adrift from its core of settled meaning and discard settled practices of First Amendment decision making.[17] Whether one views it with alarm or equanimity, however, Justice Breyer's willingness to depart from settled doctrine and practice is noteworthy. The stakes are high, and before endorsing Justice Breyer's approach, it behooves us to identify what doing so would entail.

I. THE CONSISTENCIES

Before turning to the opinions, a somewhat fuller account is needed of the consistent aspects and interrelated rationales of First Amendment jurisprudence that I discern in the cases. This will clarify how different is the course that the Court has been pursuing, albeit somewhat erratically, from the journey upon which Justice Breyer would have it embark.

A. FREEDOM FROM: A NEGATIVE CONCEPTION OF THE FIRST AMENDMENT

First, the decided cases have consistently embodied a negative conception of the First Amendment, one that reflects the concern of the Founders not "that government might do too lit-

17. Perhaps the normative implications of this fact are not troubling. Perhaps it is normatively appropriate to view the First Amendment, as Justice Breyer apparently does, as "intrinsically, fundamentally, or even just largely an artifact of a Constitution that is itself a common-law document," Frederick Schauer, *First Amendment Opportunism*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 175, 197 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002), one that neither guides nor constrains the Court's power. Perhaps there is no reason to try "to make sense of the idea of the First Amendment and free speech apart from what the courts have made of it," *id.*, and perhaps, therefore, we should consider the courts to be quite free to remake what they have made of it from time to time, as the spirit moves them and their ideas about it and the world change. But perhaps the First Amendment is law that ought to be understood as antecedent to and thus binding upon the decisions of the judges who apply it, law whose core is tolerably if not perfectly well-reflected in the doctrines and practices from which Justice Breyer would detach it. If this is so, then Justice Breyer's approach has considerably less normative appeal.

tle for the people but that it might do too much to them."[18] The negative conception means two things. First, it means that the Amendment is a shield, not a sword. It gives citizens neither positive rights against government[19] nor affirmative claims to government resources. Second, it means that the Amendment limits government's power rather than enlarging it.

The public forum doctrine is the only significant exception to the consistent view that the Amendment does not give citizens affirmative claims to government's resources. This doctrine grants citizens the right of access for speech to streets and parks which have "time out of mind . . . been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[20] Despite the well-entrenched nature of the public forum doctrine, its First Amendment roots are surprisingly obscure. Moreover, litigants and academic commentators have not succeeded in persuading the Court to grant First Amendment rights of access to other publicly owned property,[21] despite their arguments that doing so would enhance both the quality and quantity of public debate.[22]

The single exception to the negative conception as a limit on, rather than an enhancement of, government power is *Red Lion Broadcasting Co. v. FCC*.[23] In *Red Lion*, the Court sustained, as applied to broadcasters, the FCC-promulgated fairness doctrine and its personal attack rules. The rhetoric of Justice White's majority opinion seemed to endorse the view that the First Amendment empowers government to regulate speech to enhance the quality of public debate. It did this despite the

18. Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.), *cert. denied*, 465 U.S. 1049 (1984), *quoted in* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864 (1986).

19. Pell v. Procunier, 417 U.S. 817 (1974) (holding that the Amendment does not impose an affirmative duty on the government to make sources of information available to journalists that are not available to the general public); Saxbe v. Wash. Post Co., 417 U.S. 843 (1974) (same).

20. Hague v. CIO, 307 U.S. 496, 515 (1939).

21. *See generally* Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79 (describing the uncertainty of the Court's position on the issue in light of the contradictory holdings in recent cases).

22. *See, e.g.*, Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233 (claiming that Court decisions threatened expressive liberty contained in the First Amendment); Note, *The Public Forum: Minimum Access, Equal Access and the First Amendment*, 28 STAN. L. REV. 117 (1975) (advocating an expansive "public forum" concept of speech).

23. 395 U.S. 367 (1969).

absence of discernible criteria with which to evaluate the effects of the regulations. Thus the questions remained of how the government was to determine whether the regulations were successful at protecting the right of the "public to receive suitable access to social, political, esthetic, moral, and other ideas,"[24] and whether they actually served their "goal of producing an informed public."[25]

The conception of the First Amendment as empowering government to regulate speech in the name of fairness or of a more informed public debate gained no traction in cases that arose outside the context of broadcast regulation. Moreover, in that context, the result in *Red Lion* itself came to be justified by spectrum scarcity, not as a vindication of the rights of viewers and listeners or as an enhancement of their freedom.[26] Indeed, when confronted with the print analogue of the personal attack rules—a Florida statute requiring newspapers to offer reply space to candidates whose opponents the papers endorsed—the Court, without even citing *Red Lion*, unequivocally rejected it.[27] The point is that *Red Lion* has had virtually no impact on First Amendment doctrine outside of broadcast regulation.

Surprisingly, however, *Red Lion* is often invoked by commentators who assert that the First Amendment empowers government to regulate the media to "promote . . . a well-functioning democratic regime."[28] Cass Sunstein, for example, has asserted that far from being an isolated example that arose in a unique context, *Red Lion* represents the culmination of a "free speech tradition" focused on public deliberation and toleration of "governmental efforts to encourage diverse views and

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24. *Id.* at 390.

25. *Id.* at 392. In fact, the FCC eventually concluded, and in *Syracuse Peace Council v. FCC*, 867 F.2d 654, 659 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990), the D.C. Circuit Court sustained the conclusion that

> the fairness doctrine in operation disserves both the public's right to diverse sources of information and the broadcaster's interest in free expression. Its chilling effect thwarts its intended purpose, and it results in excessive and unnecessary government intervention into the editorial processes of broadcast journalists.

Id.

26. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637 (1994) (suggesting that the holding in *Red Lion* "rests upon the unique physical limitations of the broadcast medium").

27. Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

28. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 178 (1999).

attention to public issues."[29] In the legal academy, there is considerable support for the view that the First Amendment does not so much guarantee freedom from government as it implements values such as democratic deliberation and political equality. On this view, it becomes intelligible to say that there can be First Amendment interests on both sides of a controversy about a regulation of speech.[30] Until Justice Breyer's arrival on the Court, however, no Justice had consistently championed these arguments, and the results of the cases make clear that the Court had rejected them.

B. A HIERARCHY OF PROTECTION, WITH POLITICAL SPEECH AT THE TOP

Before the Court's extension of First Amendment protection to commercial speech in 1976,[31] the overwhelming majority of First Amendment cases involved attempts to regulate speech that was in one way or another speech about government. These regulations generally concerned either speech specifically about candidates or officials, speech about issues on the public agenda, or speech generally criticizing our form of government and advocating its overthrow. As the Court noted in 1966, "there is practically universal agreement that a major purpose of [the] Amendment was to protect the free discussion of governmental affairs."[32] Three of the most canonical First Amendment cases—*Brandenburg v. Ohio*,[33] *New York Times v. Sullivan*,[34] and *Cohen v. California*[35]—involve political speech.[36] Together the cases embody several strategies, both doctrinal[37] and rhetorical,[38] that the Court has developed for

29. *Id.* at 176.

30. *See, e.g.*, CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987).

31. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

32. Mills v. Alabama, 384 U.S. 214, 218 (1966).

33. 395 U.S. 444 (1969).

34. 376 U.S. 254 (1964).

35. 403 U.S. 15 (1971).

36. *Brandenburg* involved a conviction under a criminal syndicalism statute which punished advocacy of crime or violence as a means of accomplishing political reform; *New York Times v. Sullivan* involved defamation of a public official, and the Court characterized the imposition of damages as the equivalent of punishment for seditious libel; and *Cohen* involved a crude statement of disaffection for American military policy.

37. *Brandenburg*, for example, fashioned the broad and deliberately overprotective rule that "the constitutional guarantees of free speech and free

protecting such speech. The Court has brought neither these strategies nor their rhetorical embellishments to bear on cases invalidating regulations of other kinds of speech, such as commercial speech or virtual child pornography. The implication of the famous *Mosley* dictum—"above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"[39]—is that all categories of speech are entitled to equivalent First Amendment protection. In case after case, however, the Court neither cited nor followed this dictum, thus contradicting that implication.[40] These results seem wise, for "[n]o sensible approach to first amendment questions can dispense with . . . [the] hierarchy"[41] of values that a broad rule

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press do not permit a State to forbid or proscribe advocacy of the use of force . . . except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447. *New York Times* fashioned a different, though similarly overprotective, rule that "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279.

38. In *New York Times*, Justice Brennan uttered one of the most cherished and frequently invoked rhetorical tributes to the First Amendment of modern times, namely his reference to "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." 376 U.S. at 270. Justice Harlan in *Cohen* issued a memorable rhetorical tribute:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

403 U.S. at 24.

39. *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

40. *See, e.g.*, City of Renton v. Playtime Theatres, 475 U.S. 41 (1986) (permitting locality to prohibit adult motion picture theatres, but not other theatres, from locating near residential zones, churches, or schools); FCC v. Pacifica Found., 438 U.S. 726 (1978) (sustaining FCC authority to channel to certain hours radio broadcast of sexually explicit speech (George Carlin's "Filthy Words" monologue), but not other speech); Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976) (permitting localities to exercise zoning powers so as to cluster movie theatres featuring adult content but not other theatres); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (permitting municipality to forbid political advertising but not other advertising on city buses).

41. Paul B. Stephan, III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 206 (1982).

that the First Amendment is neutral as between categories would reject, nor would it be sensible to see the equivalent First Amendment risk in every legislative regulation of the mere act of speaking. Treating all regulations of speech the same regardless of category also carries the significant and worrisome potential to purchase breadth of protection at the cost of depth and strength and to lessen the protection from regulations of "speech that matters." This is the one consistent aspect of First Amendment doctrine that Justice Breyer's approach would not reject.[42]

C. BAD MOTIVES

The Court has often celebrated the intrinsic value of speakers communicating or audiences receiving information. This is evident in the Court's frequent invocation of the importance of "uninhibited, robust, and wide-open" debate in *New York Times v. Sullivan*;[43] in the overbreadth doctrine, which invalidates laws that deter too much speech;[44] and in the Court's insistence, when engaging in strict scrutiny, that Congress choose the least restrictive means to achieve admittedly legitimate goals.[45] These features may suggest that the Court has crafted First Amendment law to maximize the *quantity* of public debate so that speakers could communicate more and listeners would have more to hear.[46] Neither the results of the cases nor the doctrines that the Court invokes, however, lend themselves to this explanation.[47] Instead, they support an in-

42. *See* Breyer, *supra* note 8, at 245.

43. 376 U.S. 254, 270 (1964).

44. Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973) ("[T]he First Amendment needs breathing space and . . . statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn.").

45. Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 755 (1996) (applying least restrictive means test to strike down sections of the Cable Television Consumer Protection and Competition Act); Sable Comms. of Calif., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

46. And sometimes, too, it has seemed as though the Court thought that it was important to protect speech "as such" from regulation, as though the "fortuitous presence of words"—in one of Frederick Schauer's felicitous phrases—itself created something like a presumption of constitutionality. Schauer, *supra* note 17, at 180.

47. *See* BeVier, *supra* note 21, at 102–12 (suggesting the various public forum theories utilized in the First Amendment debate generally ignore the problem of suppressing the quantity of free speech).

terpretation that regards the search for illicit government motives as the driving force behind nearly the whole body of First Amendment doctrine, especially insofar as it has to do with political speech. In other words, many of the cases can be explained as a first-order prohibition of restrictions on speech that bear evidence of having stemmed "from hostility [to the speaker's viewpoint], sympathy [for the majority's point of view], or self-interest [of government actors]."[48] This prohibition is backed, because illicit motives are so easy to disguise and so difficult to detect, by a body of second-order rules designed to flush them out.[49]

Understood from this perspective, First Amendment rules, which "use objective criteria, focusing on what a law includes and excludes, on what classifications it uses, on how it is written," can be seen as proxies for the direct inquiry into motive that the Court could not productively undertake.[50] Also, understood from this perspective, First Amendment doctrines and methodologies—such as strict scrutiny of content-based regulations—do not reflect the view that the Court has a systematic comparative advantage at making the policy determinations that must be made to evaluate either the importance of the government's interest or the precision of its chosen means. Instead, they reflect the kind of strategy that is necessary in this second-best world—a strategy for determining whether the

48. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 441–42 (1996).

49. *Id.* *See generally* FREDERICK SCHAUER, FREE SPEECH, A PHILOSOPHICAL INQUIRY 80–86 (1982) (discussing heightened danger of illicit motive as one factor to be considered in defense of greater protection for speech than for other forms of conduct); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 227–33 (1983) (discussing concern with illicit motive as a significant factor explaining the content-based/content-neutral distinction in First Amendment law); *cf.* Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1443–49 (1987) (explaining the worries that prompted the framers to protect speech and press had much to do with the desire to prevent speech regulations that were motivated by the personal interests of official regulators).

50. Kagan, *supra* note 48, at 441. Dean Kagan continues: "The principle is that the First Amendment bans . . . hostility, sympathy, or self-interest. The fact is that courts cannot enforce this ban directly." *Id.* at 441–42. It is because the Court could not productively undertake a direct inquiry into motive that the explanation of First Amendment doctrine as an effort to discern illicitly motivated legislation is persuasive *despite* the Court's insistence that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." United States v. O'Brien, 391 U.S. 367, 383 (1968).

government interests asserted in behalf of legislation are subterfuges for illicit government motives that would otherwise go undetected.[51]

The concern with bad governmental motives turns out to be of a piece with the negative, freedom from, conception of the First Amendment. Both are consistent with the view that representative democracy, with regularly scheduled elections in which citizens discuss candidates and policies and hold elected officials to account, is unthinkable unless citizens are free to criticize government and to express political views without fear of government retribution.[52] If we think about representative democracy in terms of an agency theory heuristic that regards citizens as principals and elected officials as their agents,[53] we can understand that achieving the central aspiration of representative democracy—"government of the people, by the people, and for the people"—is both dauntingly complex and profoundly challenging.[54] In a nutshell, the basic problem to be solved is that of "agency slippage," which occurs because

> the interests of the principals diverge from the interests of their agents . . . . The agents have an incentive to engage in self-dealing; the principals have an incentive to try to rein them in . . . .
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> . . . .

51. *Cf.* Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1 *passim* (1989) (discussing generally why we have a series of First Amendment rules that are not simply direct applications of the background principles or justifications for freedom of speech).

52. *Cf.* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 23 (1971) (noting that representative democracy is "a form of government that would be meaningless without freedom to discuss government and its policies").

53. As Steven Calabresi has pointed out, there are "a whole host of *non-contractual* agency relationships that exist in the political system." Steven G. Calabresi, *Political Parties as Mediating Institutions*, 61 U. CHI. L. REV. 1479, 1523 (1994). These include, in addition to the relationship of voters to elected officials, the agency relationship of the president to officials in the executive branch, the agency relationship of the leaders of the legislative and judicial branches to their subordinates, and the agency relationship between congressional committee chairmen and the executive branch officials whom they oversee and who are charged with responsibility of enforcing the legislation that Congress enacts. *Id.* at 1423–24.

54. For an application of agency cost theory to democratic government, see Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471 (1988).

> [T]he theory of constitutional, democratic governance must wrestle with the problem of agency costs just as corporations must wrestle with it.[55]

Regularly scheduled elections and public debate free from government manipulation or control are important means of preventing agency slippage: Elections are the formal mechanism by which citizens hold their representatives accountable,[56] and the political debate that the First Amendment protects is the forum for the exchange of facts and opinions about what candidates have done and will do if elected. Citizens decide how to vote based, not wholly, perhaps, but in some large measure, on the content of political debate. Collective action problems plague citizen principals' efforts to monitor their elected official agents.[57] Because these problems make effective citizen monitoring so problematic, it is all too easy for elected officials to shirk their duty to act in the interest of their constituent citizen principals and to pursue their own self-interest instead. Unfortunately, the risk that they will do so is deeply and systemically embedded in our complex modern democracy. We can never hope to eliminate it entirely; the best we can do is be alert to it, and try to reduce it.

Elected officials inevitably face the temptation to entrench themselves in power by manipulating public debate to discriminate against unpopular viewpoints or effectively suppress criticism of themselves;[58] the "ins have a way of wanting to make sure the outs stay out."[59] Common sense suggests that

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55. Calabresi, *supra* note 53, at 1525.

56. *See* Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627, 1646–49 (1999) (noting that, in large part because there are few legal means to ensure agent loyalty, elections are the principal means by which voters regulate their representatives' behavior); *see also* Gary C. Jacobson, *Campaign Finance and Democratic Control: Comments on Gottlieb and Lowenstein's Papers*, 18 HOFSTRA L. REV. 369, 370 (1989) (describing mechanism by which "competitive elections reduce the incidence of shirking" by agents).

57. *See* Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1274 (1994) (noting that "[i]ndividual voters have little incentive to acquire information about the behavior of [those who represent them]").

58. *See* Cass, *supra* note 49, at 1454 (noting that in the context of the general argument that the framers of the First Amendment were trying to prevent recurrence of problems that had already arisen, noting that they were familiar with—and wished to prevent—a system of press licensing because it had served as a "vehicle for self-interested suppression of criticism of public officials").

59. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL

the more successful they are at doing this, the more costly and difficult they will make it for citizens to monitor and hold them accountable when they shirk their duties. A central challenge of representative democracy is the need to minimize the opportunities for agency slippage. That elected officials are likely to yield to systematic temptations to regulate speech to their benefit exacerbates the difficulty of preventing agency slippage. These realities provide a key justification for embracing the negative conception of the First Amendment—for regarding the amendment as limiting, rather than enhancing, government power to regulate public debate and for crafting First Amendment doctrines that seek to detect the wolf of illicit motivation even when it wears the sheep's clothing of reform.

D. THE CONTENT-BASED/CONTENT-NEUTRAL DISTINCTION

For First Amendment cases that do not arise in a context in which the Amendment's distinct categorical rules apply, the Court determines the standard of review according to whether the law at issue is content based or content neutral. Although the decision of which standard to apply is not supposed to be a decision on the merits, the decision is of pivotal importance in First Amendment cases because it is almost always outcome-determinative.[60] Strict scrutiny is almost always "fatal in fact,"[61] while intermediate scrutiny has become the practical equivalent of lenient, rational basis review.[62] The application of the content-based/content-neutral test can yield problematic results,[63] but the standard for making the determination is

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REVIEW 106 (1980).

60. *But see* Burson v. Freeman, 504 U.S. 191, 198–211 (1992) (claiming to apply strict scrutiny but sustaining a Tennessee law establishing a campaign-free zone).

61. Gerald Gunther was the first to use this locution; he did so in the context of an analysis of "new" and "old" equal protection. *See* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

62. *See, e.g.*, Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 923–26 (1993) (suggesting that any speech protective force that there might have been in the review of incidental restrictions of speech has been "eviscerated" by recent cases); Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 WM. & MARY L. REV. 779, 788 (1985) (stating that the intermediate scrutiny that the Court gives to incidental restrictions on speech "has resembled rational basis review").

63. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 652 (1994)

well-settled in principle (if it is not oxymoronic to talk about standards "in principle"): "[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based,"[64] but "government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'"[65] The Court will sustain content-based laws only if they serve a compelling state interest using the least restrictive means. Content-neutral laws that do not regulate or punish expression on the basis of its ideas or its viewpoint, and that are not justified with reference to the content of speech, receive only intermediate scrutiny. In other words, even if a content-neutral law restricts expression as applied in a particular case, the Court will sustain the law if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[66]

The use of the content-based/content-neutral distinction as a trigger for the level of scrutiny is entrenched in First Amendment doctrine. Like everything else about First Amendment jurisprudence, it has its detractors.[67] Still, like the negative conception, the priority given to political speech, and the search for illicit government motives, the distinction has a discernible and defensible rationale.[68] Indeed, its justification builds upon the insights embodied in those consistent aspects of the doctrine. Laws aimed directly at the content of speech or at the expression of particular ideas or viewpoints warrant strict scrutiny because their very terms indicate that they are the product of deliberate legislative attempt to manipulate or distort debate.

(Kennedy, J.) (must-carry provisions content neutral); *id.* at 676 (O'Connor, J., dissenting) (must-carry provisions content based).

64. *Id.*

65. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (internal citation omitted).

66. United States v. O'Brien, 391 U.S. 367, 377 (1968).

67. *See, e.g.*, Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 655–63 (1991) (advocating strict scrutiny for content-neutral laws that have significant content-based effects).

68. The most thorough examination of the content-based/content-neutral distinction and its rationale remains Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

On their face, content-based laws suggest that they may have been motivated by government hostility to, or sympathy for, particular viewpoints or by the self-interest of incumbent government actors may have materialized. On the other hand, laws that do not aim at expression, treat all speech the same regardless of its content or its point of view, or advance government interests that do not turn on an expression's content or its point of view are "relatively poor tools for controlling public debate, and their very generality creates a substantial political check that prevents them from being unduly burdensome."[69] Because such laws do not carry a substantial risk of illicit motivation, the search for bad government motives provides scant justification for the Court to review strictly their asserted ends and chosen means. In addition, a commitment to strict scrutiny of such laws would entail frequent and intrusive judicial scrutiny of a large number of legislative actions,[70] scrutiny with no criteria to guide it since we lack a metric for judging whether asserted government interests are indeed "compelling," the chosen means adequately "narrow."

Of course laws that are content neutral in purpose are not, by virtue of that fact, content-neutral in effect.[71] They will inevitably and predictably have effects on the kind and amount of speech that occurs, although the exact nature and extent of such effects is unlikely to be either predictable ex ante or discernible ex post. In other words, content-neutral laws undeniably "affect what gets said, by whom, to whom, and with what effect."[72] All laws do. But not all laws carry the risk of having been motivated by hostility or favoritism toward particular points of view, or by an effort to manipulate debate or to protect incumbent politicians.

Precisely because the speech effects of content-neutral laws are difficult to discern ex post and unpredictable ex ante, they carry slight risk of having been illicitly motivated. It is the risk of illicit motivation, however, that justifies the Court's attempt in First Amendment cases to evaluate content-based statutes'

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69. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 676 (O'Connor, J., dissenting); *see also* Kagan, *supra* note 48, at 452, 496.

70. *See* Schauer, *supra* note 62, at 784 ("To be concerned significantly, in a constitutional sense, with incidental effects [of content-neutral laws] is to be committed to judicial scrutiny of an enormous range of government decisions.").

71. For a persuasive and thorough demonstration of this point, see Alexander, *supra* note 62, *passim*.

72. *Id.* at 929 (emphasis omitted).

ends and means, not some claim that the Court possesses the wisdom to assess the compellingness of the government's needs or that it has managed to identify constitutional criteria that would permit it to determine in the case of every law whether its effect on speech is "too substantial" to be tolerated.

Strict scrutiny of content-based laws is a proxy for the hunt for illicit government motives. It is best understood not as a claim of judicial omniscience but "as an evidentiary device that allows the government to disprove the implication of improper motive arising from the content-based terms of a law."[73] A proxy is needed because illicit motives are too easily disguised by pretextual purposes. Where there is little reason to suspect the presence of illicit motives, as there is with content-neutral laws, there is little justification for strict scrutiny.[74]

II. JUSTICE BREYER'S APPROACH: A DESCRIPTION

A. THE MADISON LECTURE

In his Madison Lecture at New York University Law School, Justice Breyer invoked the nineteenth-century French political philosopher Benjamin Constant, whose ideas about the people's right to "'an active and constant participation in collective power'"[75] he found persuasive and relevant to the interpretation of our Constitution today. Justice Breyer argued that "increased recognition of the Constitution's general democratic participatory objectives"[76]—a project he described as protecting "active liberty"[77]—can help courts "deal more effectively with a

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73. Kagan, *supra* note 48, at 453.

74. Parenthetically, there is reason to doubt that genuine First Amendment gains would be achieved by case-by-case strict scrutiny of the speech effects wrought by content-neutral laws. Such a practice would be costly but most laws would likely pass muster. *Id.* at 495. Moreover, the benefits of judicial review are subject to the law of diminishing returns. "[T]here comes a point at which the capacity to control government abuse diminishes, while the gains from controlling [it] are small. Then it is time to quit . . . . " Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5, 57 (1988).

75. *See* Breyer, *supra* note 8, at 246 (citing Benjamin Constant, *The Liberty of the Ancients Compared with That of the Moderns* (1819), *in* POLITICAL WRITINGS 309, 316 (Biancamaria Fontana trans. & ed., 1988)).

76. *See* Breyer, *supra* note 8, at 250.

77. *Id.* at 246. Breyer acknowledges that his concept of "active liberty" has much in common with Isaiah Berlin's conception of "positive liberty." *Id.* at 246 n.9; *see* Isaiah Berlin, *Two Concepts of Liberty, Inaugural Lecture Before the University of Oxford* (Oct. 31, 1958), *in* FOUR ESSAYS ON LIBERTY 118,

range of specific constitutional issues."[78] He discussed the implication of these ideas for general issues of constitutional interpretation and for several specific issues, including the First Amendment.

Justice Breyer's First Amendment discussion illustrated how his approach would work with regard to campaign finance restrictions and other First Amendment problems, such as economic and workplace regulation. Regarding campaign finance, he stated his unequivocal view that the goal of protecting active liberty "is not simply one of protecting the individual's 'negative' freedom from governmental restraint."[79] The Amendment "helps to sustain the democratic process" not simply by guaranteeing political freedom but by actively "encouraging the exchange of ideas needed to make sound electoral decisions and by encouraging an exchange of views among ordinary citizens necessary to their informed participation in the electoral process."[80] Campaign finance laws "further the latter objective."[81] Their lofty goal, he said, is

> to democratize the influence that money can bring to bear upon the electoral process, thereby building public confidence in that process, broadening the base of a candidate's meaningful financial support, and encouraging greater public participation.[82]

Justice Breyer exhibited no concerns about the possibility that campaign finance regulations might be motivated by less admirable ends, such as protecting incumbent officeholders from successful challenge.[83] Instead, he stated that the Court owed a large degree of deference to such regulations because they embody the legislature's answers regarding "empirical matters about which [it] is comparatively expert."[84] Justice Breyer insisted that there are important First Amendment interests on both sides of the debate about campaign finance regulation. He regards the First Amendment as both a source

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118–72 (1969).

78. *See* Breyer, *supra* note 8, at 250.

79. *Id.* at 252.

80. *Id.* at 253.

81. *Id.*

82. *Id.*

83. *See generally* Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045 (1985).

84. *See* Breyer, *supra* note 8, at 254. Justice Breyer failed to consider the ironic possibility that, if incumbent protection were in fact the motivation for the regulations, the legislators would indeed be the ones who would know best how to manipulate the regulation of political activity so as to accomplish it.

of and a limit on the power of legislatures to enact such laws, and for this reason would reject strict scrutiny of them in principle. A "First Amendment presumption hostile to government regulation [of campaign finance practices] . . . is . . . out of place."[85] Instead, the basic question that such regulations raise is

> one of proportionality. Do the statutes strike a reasonable balance between their electoral speech-restricting and speech-enhancing consequences? Or do they instead impose restrictions on that speech that are disproportionate when measured against their corresponding electoral and speech-related benefits, taking into account the kind, the importance, and the extent of those benefits, as well as the need for the restrictions in order to secure them?[86]

Turning to other kinds of First Amendment problems, where there are not First Amendment interests on both sides, Justice Breyer claimed that good reasons exist for the Court to make distinctions between categories of regulation. "[S]pecial, strong, pro-speech judicial presumptions"[87] should apply to laws restricting "speech that takes place in areas related to politics and policymaking by elected officials"[88] but not where "ordinary commercial or economic regulation is at issue."[89] Were "strong speech protection . . . applied to all governmental efforts to control speech,"[90] the public's ability to make "economic and social choices,"[91] especially with regard to workplace regulation, would be unduly limited. But the legislature is not "home free"[92] to enact commercial speech or other economic regulations at will. The Court must be alert to monitor any possibly untoward effects of laws affecting kinds of speech other than those related to politics and policymaking by elected officials.[93]

As is plain from this brief summary, Justice Breyer's approach to the First Amendment self-consciously and explicitly departs from the approach that contemporary First Amendment doctrines embody. It would not necessarily dictate that the Court overrule all of its past cases. It would, however, re-

85. *Id.* at 253.
86. *Id.*
87. *Id.* at 256.
88. *Id.*
89. *Id.*
90. *Id.* at 255.
91. *Id.*
92. *Id.* at 256.
93. *Id.*

quire the Court to reconsider them, and would sanction adhering only to those "precedents" with which, using his approach, the Justices found themselves in agreement.[94] It bears repeating that, with the single exception that he would continue to give—and would acknowledge that he was giving—primacy to political speech, Justice Breyer's approach would dictate the abandonment of the consistent features of First Amendment doctrine identified earlier. He rejects both the underlying rationales of these doctrinal regularities and the decision-making processes that they dictate. I turn now to see how the approach has worked in several opinions in which he has applied it.

B. THE OPINIONS

1. *Turner Broadcasting Systems v. FCC*

This section begins with three cases that arose shortly before the occasion of the Madison Lecture prompted Justice Breyer to crystallize his thoughts and articulate a rationale for his evolving approach. The first case is *Turner Broadcasting v. FCC* (*Turner II*),[95] in which the Court applied intermediate scrutiny to sustain the content-neutral "must-carry" provisions of the Cable TV Consumer Protection and Competition Act of 1992 (Cable Act).[96] *Turner II* is the first case in which Justice Breyer adumbrated his inclination to reject the negative conception of the First Amendment, and he had to go a bit out of his way to do so. The must-carry provisions required cable operators to dedicate some channels to local broadcast television stations.[97] Cable operators argued that the provisions violated the First Amendment because they required operators to carry speech they might otherwise choose to exclude. The Court rejected this challenge and repeated its description from *Turner I*

94. The scare quotes in text are prompted by Professor Schauer's insight that the way arguments from precedent usually work in law is to constrain decision makers to "give weight to a particular result regardless of whether that decisionmaker believes it to be correct and regardless of whether that decisionmaker believes it valuable in any way to rely on that previous result." Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576 (1987). In other words, the text implies that Justice Breyer really does not adhere to precedent as it is commonly understood in legal argument.

95. Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180 (1997).

96. *Id.* at 213–14.

97. The Court in *Turner I* had determined that the must-carry requirements were content neutral. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 655 (1994).

of the interests that the Cable Act allegedly advanced. The Court held that the Act sufficiently served

> three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.[98]

Justice Breyer concurred in the judgment and joined the Court's opinion "except insofar as [it] relies on an anticompetitive rationale."[99] He thought the Cable Act's objectives of preserving the benefits of free local television and promoting dissemination of information from a multiplicity of sources were alone sufficient to sustain it without regard to any competition-promoting purpose it might or might not serve.[100] Though he conceded that the must-carry provision "extracts a serious First Amendment price"[101] from the cable operators, he insisted that the government's interest in promoting dissemination from a wide variety of sources was an interest that the First Amendment empowered the government to pursue through regulation. To evaluate the must-carry provisions, the majority in *Turner II* used the *O'Brien*[102] test, which does not reflect the judgment that the reason intermediate scrutiny is appropriate is that there are First Amendment interests "on both sides." Justice Breyer claimed to agree that the Court had used the correct test.[103] In other words, he described himself as applying *O'Brien*. In fact, however, he articulated an inquiry quite different from *O'Brien*. He presaged the approach later outlined in his Madison Lecture:

> With important First Amendment interests on both sides of the equation, the key question becomes one of proper fit. That question . . . requires a reviewing court to determine both whether there are significantly less restrictive ways to achieve Congress' over-the-air programming objectives, and also to decide whether the statute, in its effort to achieve those objectives, strikes a reasonable balance between potentially speech-restricting and speech-enhancing consequences.[104]

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98. *Id.* at 662, *quoted in Turner II*, 520 U.S at 189.

99. *Turner II*, 520 U.S. at 225 (Breyer, J., concurring).

100. *Id.* at 225–26.

101. *Id.* at 226 (Breyer, J., concurring).

102. United States v. O'Brien, 391 U.S. 367, 377 (1968); *see also supra* note 66 and accompanying text.

103. *Turner II*, 520 U.S. at 225–26 (Breyer, J., concurring).

104. *Id.* at 227.

2. *Nixon v. Shrink Missouri Government PAC*

A second case decided before the Madison Lecture was *Nixon v. Shrink Missouri Government PAC*.[105] In *Nixon*, the Court relied on the authority of *Buckley v. Valeo* to sustain Missouri's stringent restrictions on contributions to candidates for state office.[106] Justice Breyer felt compelled to write a concurring opinion to "address the critical question of how the Court ought to review this kind of problem."[107] He insisted that the case was one in which "constitutionally protected interests lie on both sides of the legal equation."[108] This time, however, the First Amendment interest he thought the statute promoted was not the *Turner II* interest of facilitating public discussion and informed deliberation. Rather, the interests were "protect[ing] the integrity of the electoral process,"[109] and "encouraging the public participation and open discussion that the First Amendment itself presupposes."[110] He claimed to apply the *Buckley* analysis that the Court had consistently claimed to deploy[111] in campaign finance cases. Nevertheless, because he thought the First Amendment both empowered the government to restrict speech to protect the integrity of the democratic process and limited its authority to regulate speech, he insisted that strict scrutiny of the Missouri statute was inappropriate.[112]

In his *Nixon* concurrence, Justice Breyer outlined the proportionality approach that he later explicitly endorsed in his Madison Lecture. He insisted that this approach was "consistent with the approach this Court has taken in many complex First Amendment cases."[113] It is difficult to give this claim much credence since *any* case in the corpus of First Amendment jurisprudence might be deemed "complex," and none of the cases he cited as illustrating the approach the "Court has taken"—nor indeed any First Amendment case of which I am

105. 528 U.S. 377 (2000).

106. *See id.* at 382.

107. *Id.* at 400 (Breyer, J., concurring).

108. *Id.*

109. *Id.* at 401.

110. *Id.*

111. *See id.* at 401–05. Although the Court has consistently cited *Buckley*, it has applied it very inconsistently. *See* Lillian R. BeVier, McConnell v FEC: *Not Senator Buckley's First Amendment*, 3 ELECTION L.J. 127, 129–31 (2004).

112. *Nixon*, 528 U.S. at 401–02.

113. *Id.* at 404 (Breyer, J., concurring).

aware—contains any reference at all to "proportionality."[114] Further, of the cases he cited, only *Red Lion* came anywhere close to affirming that the "First Amendment permits the [government] to restrict the speech of some to enable the speech of others."[115] In particular, he insisted that *Red Lion* was consistent with *Buckley*, although this required him to read *Buckley* in a rather odd way. He recognized that *Buckley* itself reflected a presumption against the constitutionality of such restrictions,[116] but he asserted that its unequivocal rejection of "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others"[117] simply could not "be taken literally."[118]

His explanation later in the opinion of his assertion that *Buckley* "might be interpreted as embodying sufficient flexibility for the problem at hand"[119] makes it clear that he was, at best, stretching the concept of interpretation to the breaking point. *Buckley*, he claimed, "seems to leave the political branches broad authority to enact laws regulating contributions" of soft money.[120] Until *McConnell v. FEC*,[121] however,

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114. Justice Breyer cited a hodgepodge of cases in support of his assertion that "where a law significantly implicates competing constitutionally protected interests in complex ways—the Court has closely scrutinized the statute's impact on those interests, but refrained from employing a simple test." *Id.* at 402. For example, he cited *Frisby v. Schultz*, 487 U.S. 474 (1988), and claimed that in it the Court "balanc[ed] the rights of privacy and expression." *See Nixon*, 528 U.S. at 403 (Breyer, J., concurring). In *Frisby*, however, the Court explicitly described itself as applying its customary standard of review to the content-neutral regulation of speech in a traditional public forum that was at issue in that case. *Frisby*, 487 U.S. at 481 (explaining that the State may enforce time, place, and manner regulations, "which are content-neutral, are narrowly tailored, and leave open ample alternative channels of communication") (citations omitted). For another example, he cited *Rowan v. Post Office Department*, 397 U.S. 728 (1970), again claiming that it balanced the rights of privacy and expression. *See Nixon*, 528 U.S. at 403 (Breyer, J., concurring). *Rowan*, however, is more easily explained as an affirmation of a more categorical principle, to the effect that "[n]othing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit." *Rowan*, 397 U.S. at 737. Certainly the Court thought of itself as deciding in categorical terms, for it explicitly said that it "categorically reject[ed] the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another." *Id.* at 738.

115. *Nixon*, 528 U.S. at 403 (Breyer, J., concurring).

116. *Id.* at 401–02.

117. Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).

118. *Nixon*, 528 U.S. at 402 (Breyer, J., concurring).

119. *Id.* at 404.

120. *Id.*

there was a substantial amount of controversy about precisely that issue.[122] Further, although he noted that *Buckley* upheld public financing laws,[123] Justice Breyer failed to note that the law at issue in *Buckley* did not *require* presidential candidates to accept public financing but merely permitted the government to make candidates choose between accepting public money and foregoing private funding or foregoing public funding.

Justice Breyer's concluding paragraph, however, betrayed his fundamental disagreement with *Buckley*. He stated that, if he were wrong about *Buckley*, that is if *Buckley* "denies the political branches sufficient leeway to enact comprehensive solutions to the problems posed by campaign finance . . . I believe the Constitution would require us to reconsider [it]."[124] Although Justice Breyer suggested that concern over campaign finance laws might arise were there evidence that the *effect* of the contribution limits was to "insulate . . . legislators from effective electoral challenge."[125] Apparently, he saw no reason to think that the statute embodied such a systemic risk of the legislature's having harbored an incumbent protective motive that strict scrutiny might have been warranted.

3. *Bartnicki v. Vopper*

Next consider the 2001 case *Bartnicki v. Vopper*.[126] State and federal wiretap statutes make wiretapping by both law enforcement officials and private individuals illegal. To deter it, the statutes provide civil and criminal penalties against any person, whether or not implicated in the interception, who discloses the contents of a conversation knowing that it was illegally intercepted. The latter provision was at issue in *Bartnicki*. A radio talk show host disclosed the contents of the tape of an illegally intercepted conversation.[127] He knew that the conversation had been illegally intercepted but had not himself

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121. 540 U.S. 93 (2003).

122. For a summary of arguments that *Buckley* required strict scrutiny of soft money contributions, see BeVier, *supra* note 83.

123. *See Nixon*, 528 U.S. at 404 (Breyer, J., concurring).

124. *Id.* at 405.

125. *Id.* at 404.

126. 532 U.S. 514 (2001). In his Madison Lecture, Justice Breyer discussed *Bartnicki* not in the context of his First Amendment discussion but rather in the context of a discussion of "current threats to the protection of privacy." Breyer, *supra* note 8, at 261.

127. *See Bartnicki*, 532 U.S. at 519.

participated in the interception.[128] As permitted by provisions of both the federal and applicable state statutes, the two participants in the conversation sued the radio host for damages based on the disclosure.[129] In an opinion by Justice Stevens, the Court held that the statutory provisions providing for damages for the disclosure were unconstitutional as applied.[130] Justice Breyer wrote a concurring opinion.

The majority's impulse to protect the disclosure in *Bartnicki* obviously stemmed from the tape's content, for it revealed the plaintiffs to have been contemplating an alarming course of action. The plaintiffs were teachers' union officials, and their conversation was about strategy for their ongoing salary negotiations with the school board, which were apparently not going well from their point of view.[131] The tape revealed one saying, "If they're not gonna move for three percent, we're gonna have to go to their, their homes . . . To blow off their front porches, we'll have to do some work on some of those guys. (PAUSES). Really, uh, really and truthfully because this is, you know, this is bad news . . . ."[132]

Nevertheless, the decision to protect the disclosure does not represent either the application or the natural progression of the relevant First Amendment doctrines. The wiretap statutes were content-neutral laws of general application. Their purpose was, without question, solely to protect the privacy of telephone communications; no one doubted it. No reason existed to suspect the legitimacy or sincerity of the motives of the legislature that had enacted the statutes. Thus, the statutes' application to the disclosures in *Bartnicki* should have been subjected to intermediate scrutiny, not to the strict scrutiny that the Court actually employed. Had this been done, they would surely have passed First Amendment muster.

Justice Stevens's opinion for the Court requires extended analysis, though that is not my present task. Suffice it to note that, although Justice Stevens acknowledged their content neutrality, he described the disclosure provisions as "regulation[s] of pure speech."[133] He then proceeded to review them as though the First Amendment protects from regulation words for their

128. *Id.* at 517–18.
129. *Id.* at 519.
130. *Id.* at 535.
131. *Id.* at 518.
132. *Id.* at 518–19 (citations omitted).
133. *See id.* at 526.

own sake, without regard to whether their regulation risks singling out particular speakers or particular points of view, or has the systematic potential to distort debate or to protect incumbent politicians from challenge. Employing strict scrutiny, Justice Stevens concluded that the defendants' receipt of the illegally intercepted communication was not itself unlawful[134] and the government could not empirically support its asserted interest in drying up the market for illegally intercepted communications. Moreover, he held that, while strong, the government's interest in protecting private communications from the chilling effect of the fear of disclosure was not strong enough to prevail against "the interest in publishing matters of public importance."[135]

Justice Breyer's concurring opinion claimed to join the Court's opinion. Similar to his *Turner II* and *Nixon* concurrences, however, his *Bartnicki* concurrence articulated a wholly different rationale and described the holding in different language from that of the opinion he claimed to join. Justice Breyer characterized the Court's holding as "narrow" and limited to "the specific circumstances present here," namely

> (1) the radio broadcasters acted lawfully (up to the time of final public disclosure); and (2) the information publicized involved a matter of unusual public concern, namely a threat of potential physical harm to others.[136]

Justice Breyer wrote his concurring opinion, he said, to explain why he thought that the Court's holding did not imply a "significantly broader constitutional immunity for the media."[137]

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134. The statute did not actually punish receipt of illegally intercepted communication, though it did punish disclosure of communications knowing they had been illegally intercepted. As Chief Justice Rehnquist noted in dissent, "the law against interceptions, which the Court agrees is valid, would be utterly ineffectual without these antidisclosure provisions." *Id.* at 551 (Rehnquist, J., dissenting).

135. *Id.* at 534.

136. *Id.* at 535–36 (Breyer, J., concurring). Justice Stevens had not thought it was the threat of potential physical harm that rendered the information a matter of "unusual public concern." *Id.* at 536. Rather, he thought what mattered was that "[t]he months of negotiations over the proper level of compensation for teachers at the Wyoming Valley West High School were unquestionably a matter of public interest, and respondents were clearly engaged in debate about that concern." *Id.* at 535.

137. *Id.* at 536 (Breyer, J., concurring). An interesting aspect about Breyer's opinion in *Bartnicki* is its several references to the "media." *See, e.g.*, *id.* at 537–38, 540. This stands in contrast to Justice Stevens's insistence that in answering the question whether the application of the wiretap statutes violates the First Amendment in *Bartnicki* "we draw no distinction between the

Justice Breyer apparently read the wiretap statutes as an exercise of the First Amendment's grant of power to the government, because he said the statutes served a First Amendment interest in "fostering private speech."[138] Accordingly, he insisted that *Bartnicki* implicated "competing constitutional concerns,"[139] namely publication by "the media," on the one hand, and personal privacy and the interest in fostering private speech on the other. This reading embodied his rejection of the negative conception of the First Amendment and his concomitant embrace of the view that the Amendment empowers government to "enhance private speech," which is what he said the statutes at issue in *Bartnicki* did.[140] In addition, his concurrence provided him with another occasion to claim that, when there are competing First Amendment interests "on both sides of the equation, the key question becomes one of proper fit."[141] The issue then becomes

> whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences. Or do they instead impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits, taking into account the kind, the importance, and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits?[142]

Assessing the factors he thought belonged in the scales, Justice Breyer concluded that, although the wiretap statutes in general had to be "tolerate[d],"[143] as applied in *Bartnicki*, the balance they struck was not reasonable. He appeared to harbor no suspicion that either the wiretap statutes themselves or their application in *Bartnicki* had been, or carried the risk of having been, motivated by illicit government motives. He simply concluded that when weighing what he thought were the relevant factors in the scales he supplied, the statute struck the wrong balance.[144]

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media respondents and Yocum," the nonmedia respondent. *Id.* at 525 n.8.

138. *Id.* at 536 (Breyer, J., concurring).

139. *Id.*

140. *Id.* at 537.

141. *Id.* at 536 (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 227 (1997) (Breyer, J., concurring)).

142. *Id.*

143. *Id.* at 537–38.

144. In his Madison Lecture, Justice Breyer described *Bartnicki* as exemplifying a kind of problem—the protection of privacy—and a kind of democratic process that "suggests a need for judicial . . . modesty." Breyer, *supra* note 8, at 263.

A look at the factors that led Justice Breyer to his conclusion, and at how he went about assessing them, makes clear that the process he envisions for resolving cases with First Amendment interests on both sides entails a series of highly idiosyncratic determinations about the nature and weight of the statute's speech-restricting and speech-enhancing effects. One aspect of his evaluation is particularly surprising in view of the fact that the test he advocates specifically purports to be about consequences:[145] his assessment of the balance struck by the wiretap statute included no effort to assess the ex ante effects that the ex post decision not to punish the *Bartnicki* disclosures would have on the interest in fostering private speech that he insisted the statutes served.

The first factor Justice Breyer weighed was that "the broadcasters here engaged in no unlawful activity other than the ultimate publication of the information another had previously obtained."[146] In other words, they engaged in no unlawful activity *other than the unlawful activity in which they engaged.* Second, he put in the balance the fact that "the speakers had little or no *legitimate* interest in maintaining the privacy of the particular conversation."[147]

The final factor that Justice Breyer weighed, and that lent support to his conclusion that the statutes could not constitutionally apply to the facts before him, was that the speakers were "limited public figures"[148] who had a "lesser interest in privacy than an individual engaged in purely private affairs."[149] The implicit premise of this assertion is that public figures, and presumably also public officials, forfeit some of the protection of the wiretap statutes simply by virtue of being involved in pub-

145. *See id.* at 246–47 ("[M]y discussion will illustrate an approach to constitutional interpretation that places considerable weight upon consequences—consequences valued in terms of basic constitutional purposes.").

146. *See Bartnicki*, 532 U.S. at 538 (Breyer, J., concurring). The statutes, however, embodied the legislative judgment that the expectation of privacy of electronic communication is *always* legitimate unless the eavesdroppers follow statutorily prescribed procedures. Justice Breyer cited authorities suggesting that contexts exist in which there might be a privilege to report "threats to public safety," but these authorities provide scant support for his reading of the wiretap statute to incorporate such a privilege. *Id.* at 539.

147. *Id.* at 539. Note here that Justice Breyer referred not to the fact that the conversation was about a matter of public interest—the fact that Justice Stevens thought mattered—but rather to the fact that it raised a concern for the safety of others.

148. *Id.*

149. *Id.*

lic controversies and talking about them with one another over the telephone. It is difficult to imagine why this is sound as a policy matter, or how such a result could be regarded as a benefit of the decision to privilege the disclosure of the *Bartnicki* conversation. The public's significant interest in public officials speaking candidly and forthrightly with one another would be ill served by making their phone conversations more vulnerable to interception and disclosure than those of private citizens.

4. *United States v. American Library Association*

Finally, consider *United States v. American Library Ass'n*, decided in 2003, after the Madison Lecture.[150] In this case, Justice Breyer again wrote a concurring opinion that reflected a rationale different from the plurality's, although this time he did not purport to "join" the plurality opinion. In *American Library Ass'n*, the Court sustained provisions of the Children's Internet Protection Act (CIPA) that required public libraries receiving federal funds to install software filters to block obscenity, child pornography, or other sexually explicit material harmful to minors. To alleviate the phenomenon of overblocking—the filters wrongly block material and the technology does not exist to make them perfectly accurate—CIPA permitted libraries to disable them for patrons who needed access for "bona fide research or other lawful purposes."[151]

In terms of existing doctrine, *American Library Ass'n* ought to have been an easy case.[152] Framed as an issue about the limits of congressional spending power, it was governed by *South Dakota v. Dole*.[153] In *Dole*, the Court held that while Article I did not limit Congress's ability to pursue national objectives through conditional grants of federal funds, Congress could not use its spending power to "induce the States to engage in activities that would themselves be unconstitutional."[154] Applying this limitation of congressional power to the statute at issue in *American Library Ass'n*, the Court held that since Internet access in public libraries was neither a traditional nor a designated public forum, libraries could decide on their own to install filtering software without violating the First Amendment,

150. 539 U.S. 194 (2003).

151. *Id.* at 201 (quoting 20 U.S.C. § 9134(f)(3); 47 U.S.C. § 254(h)(6)(D)).

152. *See* Lillian R. BeVier, United States v. American Library Association*: Whither First Amendment Doctrine*, 2003 SUP. CT. REV. 163, 166.

153. 483 U.S. 203 (1987).

154. *Id.* at 210.

even if the software overblocked. The conclusion that libraries were not public forums reflected the plurality's conviction that "[t]o fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide to their patrons";[155] the First Amendment did not require the Court to second-guess libraries' decisions.

The troublesome fact in *American Library Ass'n*, of course, was that many public libraries would have exercised their discretion by not installing filters, and it was public libraries that challenged the statute. They argued that the filter installation requirement imposed an unconstitutional condition on receipt of federal funds and thus violated *their* constitutional rights, not the rights of their patrons. Assuming arguendo that public libraries have First Amendment rights despite being government entities, the plurality opinion dismissed the unconstitutional conditions argument on the merits citing *Rust v. Sullivan*.[156] The Court insisted that CIPA did not penalize libraries that did not install the blocking software; rather Congress had merely decided to refuse to subsidize their decision not to do so.[157]

The rationale of Justice Breyer's concurring opinion had almost nothing in common with the plurality's. Eschewing both strict scrutiny—"too limiting and rigid"[158]—and the genuine deference to the judgment of others that is implicit in rational basis review, Justice Breyer applied what he referred to as "a form of heightened scrutiny, examining the statutory requirements in question with special care."[159] He neglected to specify his views about either *South Dakota v. Dole* or the unconstitutional conditions doctrine and did not explain why he thought these precedents were irrelevant. Claiming to rely on cases that had emerged in different regulatory contexts and applied different doctrines from those that provided the plurality's analytical framework,[160] Justice Breyer said that CIPA should be

155. United States v. Am. Library Ass'n, 539 U.S. 204 (2003).

156. *See id.* at 211–12.

157. *See id.* at 212.

158. *Id.* at 217 (Breyer, J., concurring).

159. *Id.* at 216.

160. As examples of cases in which "complex, competing constitutional interests are potentially at issue or speech-related harm is potentially justified by unusually strong governmental interests . . . [where] [t]ypically the key question . . . is one of proper fit," *Id.* at 217. Justice Breyer cited *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989), a commercial speech case in which the Court was explicitly interpreting the *Central*

examined as, he claimed,

> the Court has examined speech-related restrictions in other contexts where circumstances call for heightened, but not 'strict' scrutiny—where, for example, complex, competing constitutional interests are potentially at issue or speech-related harm is potentially justified by unusually strong governmental interests. Typically the key question in such instances is one of proper fit.[161]

The rhetorical work performed by the use of "typically" in that last sentence was to imply that the decision-making process Justice Breyer envisioned was no different from the process that the Court had employed in the past. The process he went on to describe, however, was not one that the Court itself had ever deployed.[162] Instead, his methodology was almost identical to the one he had advocated for cases in which he had found First Amendment interests on both sides—*Bartnicki*,[163] *Turner*,[164] and *Nixon*[165]—and his Madison Lecture.[166] The process, he claimed, does not involve "balancing."[167] Rather, it "supplements [strict scrutiny] with an approach that is more flexible but nonetheless provides the legislature with less than ordinary leeway in light of the fact that constitutionally protected expression is at issue."[168] Applying his approach, he de-

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Hudson requirement that government restrictions on commercial speech must be no broader than necessary to make clear that this did not mean that the regulation must use the least restrictive means. *Id.* at 477. He also cited his own plurality opinion in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), a case that concerned provisions of the Cable TV Consumer Protection and Competition Act of 1992 regarding broadcast of sexually explicit programs; his partial concurrence in *Turner II*; and *Red Lion Broad. Co., Inc. v. FCC*, 395 U.S. 367 (1969), the case that sustained the fairness and personal attack rules as applied to the broadcast context.

161. *Am. Library Ass'n*, 539 U.S. at 217.

162. Justice Breyer stated:

> In [cases in which constitutionally protected expression is at issue] the Court has asked whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives. It has considered the legitimacy of the statute's objective, the extent to which the statute will tend to achieve that objective, whether there are other, less restrictive ways of achieving that objective, and ultimately whether the statute works speech-related harm that, in relation to that objective, is out of proportion.

Id. at 217–18.

163. 532 U.S. 514 (2001).

164. *Turner II*, 520 U.S. 180 (1997); *Turner I*, 512 U.S. 622 (1994).

165. 528 U.S. 377 (2000).

166. *See* Breyer, *supra* note 8, at 250.

167. *Am. Library Ass'n*, 539 U.S. at 218.

168. *Id.*

termined that CIPA satisfied the Constitution's demands. Although he voted to sustain the statute, it would be incorrect to characterize him as deferring to Congress's judgment. Instead, he simply agreed with it. Exercising his own judgment rather than letting Congress decide in any genuine sense, he voted to sustain the statute. Having compared the competing factors on his personal scale of value, *he* could "[n]ot say that any speech-related harm that the Act may cause is disproportionate when considered in relation to the Act's legitimate objectives."[169]

III. JUSTICE BREYER'S APPROACH: SOME ANXIOUS THOUGHTS

Justice Breyer claimed in his Madison Lecture that his focus upon active liberty "embodies an understanding of the judges' own expertise compared, for example, with that of a legislature."[170] He characterized himself as adopting an attitude of judicial modesty, as being beset by "doubt, caution, prudence, and concern—that state of not being 'too sure' of oneself,"[171] as embracing "traditional 'judicial restraint.'"[172] Commentators have taken his claims at face value. They describe his approach as "minimalist,"[173] "restrained,"[174] deferential to the judgments of other participants in public policy debates,[175] and reflective of the self-doubt of a Justice "who [is] not too sure [he is] right."[176] Indeed, the conventional wisdom seems to be that Justice Breyer entertains and commendably applies a "consistently modest view of judicial power."[177]

To test whether the conventional wisdom is correct—whether Justice Breyer can sustain the claim to judicial mod-

169. *Id.* at 220.

170. Breyer, *supra* note 8, at 250.

171. *Id.*

172. *Id.*

173. *See* Linda Greenhouse, *Between Certainty and Doubt: States of Mind on the Supreme Court Today*, 6 GREEN BAG 2D 241, 243 (2003) (contrasting the jurisprudence of Justice Breyer, whom she describes as a "Justice of minimalism," with that of Justice Scalia, a "Justice of maximalism").

174. Jeffrey Rosen, *Modest Proposal: Stephen Breyer Restrains Himself*, NEW REPUBLIC, Jan. 14, 2002, at 21 (describing the Madison Lecture as a powerful case for "liberal judicial restraint").

175. *Id.* (referring credulously to Justice Breyer's "insistence that courts should defer to Congress").

176. Greenhouse, *supra* note 173, at 6 (quoting SUNSTEIN, *supra* note 28, at 259).

177. Rosen, *supra* note 174, at 25.

esty which has won him considerable praise—we need a working definition of the term. Commentators and Justice Breyer tend to equate judicial modesty with minimalism, restraint, deference, and self-doubt. More particularly, they appear to regard two specific aspects of the Justice's decisions as evidence of his modesty, namely the decisions' narrowness—their refusal to be bound by past or to announce future bright-line rules[178]—and the fact that they would have upheld federal and state regulations more often than those of any other Justice.[179] The former exemplifies minimalism, the latter restraint, deference, and self-doubt.

There is a problem with concluding that, because a Justice often votes to sustain legislation or regulations, he is necessarily exhibiting *deference* to others' judgments. I suggest that deference to the judgment of another institution implies a genuine bowing to its perceived comparative institutional advantage at making particular kinds of decisions. Rational basis review is deferential in this sense. One who defers to another's judgment does not undertake a detailed reevaluation and reweighing of the factors that produced it. If this is correct, Justice Breyer's proportionality approach appears on its face to be the opposite of a genuine commitment to defer to other branches. In its own terms, the approach claims a judicial mandate not to accept but to reweigh legislatively drawn balances, and to assess independently the kind, importance, and extent of a statute's benefits and compare them to the need for the restrictions it imposes.

Perhaps in application the proportionality approach would result in the Court sustaining more statutes than, say, application of the compelling state interest test. This result, however, would eventuate not because the test tells the Court to *defer* to legislative judgments but because it permits it to *agree* with them. Moreover, at least in the First Amendment cases considered in this Article, Justice Breyer's opinions do not exhibit deference to others' judgments; rather, they disclose an instinct to reweigh them and no apparent hesitation about overturning them. In addition, the opinions' self-assured and confident tone tends to belie the Justice's claims that he is beset by self-doubt and uncertainty about the rightness of his judgments.

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178. *See* Greenhouse, *supra* note 173, at 248–50.

179. *See* Rosen, *supra* note 174, at 22; *see also* Eugene Volokh, *How the Justices Voted in Free Speech Cases*, 48 UCLA L. REV. 1191, 1193–95 (2001).

It is accurate to characterize Justice Breyer's approach as one that "leav[es] things undecided,"[180] and thus to call it minimalist in Cass Sunstein's use of that term. It "do[es] not foreclose subsequent decisions."[181] The inevitable consequence of the narrowness of Justice Breyer's decisions, however, and of their refusal to specify rules, is to preserve the Court's options for the future and thus to maximize its discretion and its power. In my view, this consequence renders problematic the implicit equation of minimalism with a modest view of judicial power. Consider what Justice Breyer's approach calls upon judges to do. It calls upon them to decide each case in the particular way they think the proportionality calculus might require; it gives them a mandate to assess in each case whether the particular statute at issue strikes a reasonable balance between speech-restricting and speech-enhancing consequences or whether it causes disproportionate harm to speech-related interests; and it assumes that judges possess the capacity to make this assessment accurately despite the absence of any objective criteria to guide them in doing so. The claim of judicial power and competence entailed in this approach, it seems to me, cannot accurately be labeled modest, nor does it seem particularly minimal.

In my view, judicial modesty "involves a serious effort to respect the boundaries on present action set by the past and the future."[182] In terms of this definition, Justice Breyer cannot claim to be a genuinely modest judge. He is certainly not deferential to past judicial decision makers. For one thing, his approach would almost completely remove "[the Court] from the confines of existing First Amendment doctrine."[183] Second, though he does not specify how much weight would be enough, he is explicit that he thinks the Court "places too much weight" on the boundaries set by the sources of authority to which the Court has looked in the past, such as "language, history, tradition and precedent."[184] Third, when he consults precedent, he is

180. *See* SUNSTEIN, *supra* note 28, at 3.

181. *Id.* at 4.

182. Paul B. Stephan, III, Judicial Modesty (2004) (unpublished manuscript, on file with the author).

183. Jerome A. Barron, *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer's New Balancing Approach*, 31 U. MICH J.L. REFORM 817, 828 (1998).

184. Breyer, *supra* note 8, at 247.

not scrupulous about describing earlier decisions or conscientiously joining issue with their implications.[185]

Justice Breyer's "willingness to throw out the past . . . implicitly licenses others to do the same."[186] Thus it has ominous systemic implications. The Supreme Court "cannot put aside the existing structure of doctrine"[187] and dispense at will with consulting the traditional sources of the Court's authority without "making clear that they and other judges can do so again, converting their office into raw judicial power."[188] This, however, is precisely what Justice Breyer does when he explicitly detaches himself and the Court from both the traditional sources of the Court's authority (because they place "too much weight upon language, history, tradition, and precedent"[189]) and from the confines of existing doctrine.

In its own terms, Justice Breyer's approach imposes virtually no constraint on the Court's future decision making either. His insistence that in future cases the *Court* must assess the kind, importance, and extent of a statute's benefits, as well as the need for the restrictions it imposes to determine whether its benefits are proportionate to its harms, is equivalent to a claim that the Court has essentially unbounded discretion and that it is well-nigh omniscient. Apart from invoking the vague, general, and undefined concepts of "participatory self-government" and "active liberty,"[190] Justice Breyer specifies no criteria and provides neither conceptual nor theoretical guidance for performing the task of evaluating the kind, importance, and extent of a statute's benefits or the "need" for its restrictions. Yet this is precisely the task that he must believe

185. *See supra* note 160 and accompanying text.

186. Stephan, *supra* note 182.

187. *Id.* It is, of course, not always either immodest or illegitimate for the Court to "put aside the existing structure of doctrine." Though the Court has said that special justification is needed to overrule constitutional precedent, Patterson v. McLean Credit Union, 491 U.S. 164, 171–75 (1989), it remains true that stare decisis is not an unwavering command. How the Court should proceed when it becomes convinced that a line of prior cases was wrongly decided is, however, a deeply puzzling question involving large theoretical issues and profound practical ones. The blithe assertion that the Court has placed "too much weight" on language, history, tradition, and precedent does little to resolve the puzzle. Indeed, it begs the most important and the most difficult question: How much is too much (and why)?

188. Stephan, *supra* note 182.

189. Breyer, *supra* note 8, at 247.

190. *Id.* at 252.

the Court—and each of its members—is capable of performing, and of performing well, in case after case, year after year.

If he were to try to specify criteria to guide the Court's judgment, Justice Breyer would be unable to do so, for none exist. There is no metric by which to determine whether "some lump of government interest 'weighs' more . . . than some chunk of free speech right,"[191] or some statute's benefits are in just the right proportion to the restrictions it imposes.[192] Insofar as it suggests that he possesses a recipe for determining the right ratio of burdens to benefits, Justice Breyer's language of proportionality "betrays a strange unreality . . . [and its] rhetoric is a disguise."[193] In fact, were his approach to become the Court's First Amendment methodology, it would portend the regular exercise of quite arbitrary judicial power.

Paul Gewirtz has suggested that "Justice Breyer's balancing and proportionality analysis has a refreshing candor and lucidity, and his very openness about the factors at work for him is a constraint on subjectivity."[194] This assessment, I think, mistakes Justice Breyer's elegance of exposition and his fluid, confident style for objectivity of judgment. It would be Justice Breyer, and he alone, who would decide for himself, by the light of his own values (and every other Justice who would alone decide for him- or herself by the light of his or her own values), what kinds of interests matter, what statutory benefits would be generated, how important and extensive they would be, and how great the need would be for a statute's restrictions—bound by no external constraint and no principle any more determinate than his personal assessment of the proportionality of benefits to burdens.

It is hard to see how "openness about the factors at work for him" can reduce the fundamental and intractable subjectivity of such an approach. This is especially true when one remembers that, were the Court to adopt Justice Breyer's ap-

191. Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 167–68.

192. For a thorough review of balancing (or any decision-making process that purports to weigh the value of a constitutional right against a governmental interest whose weight is determined on an undisclosed scale) and its implications for the role of the Court and the legitimacy of its decisions, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

193. *See* Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 788–89 (2001).

194. Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139, 197.

proach, all nine of the Justices would make their own subjective determination of the proportionality of statutes' benefits and burdens. Not only would no guarantee exist that the Justices would reach consensus, the more likely scenario is that there would be every bit as much—if not more—disagreement among the Justices as currently exists. What one Justice would regard as an acceptable proportion of burdens to benefits another would regard as far too lopsided, and so on and so on. Justice Breyer seems to assume that a Court using his approach would consistently reach results with which he agreed, but this outcome seems quite improbable, since his approach neither specifies criteria by which judgments are to be made nor does it include the requirement that only he gets to weigh and measure the benefits and burdens.

At this point, it is perhaps appropriate to briefly—albeit in a radically incomplete way—sketch a response to the likely argument that Justice Breyer's approach is no more "arbitrary" or "immodest," nor does it claim more discretion for the Court, than the present array of First Amendment doctrines. As we are all too well aware, "the current doctrinal cacophony creates remarkable leeway for choosing which doctrinal rule to apply as well as what result to reach."[195] The right question to ask about the current doctrinal cacophony, though, is not whether it perfectly restrains judicial arbitrariness but whether it does so to a greater and more reliable extent than would Justice Breyer's approach.

One thing that can be said about current doctrine that cannot be said about Justice Breyer's approach is that it "reflect[s] and crystallize[s our own country's] past experience."[196]

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195. *Id.*

196. *Id.* at 198. The bracketed reference in the quoted sentence is intended to draw attention to the fact that Justice Breyer's proposed proportionality approach deliberately invokes not only our own past experience but other democracies' present practices of judicial review. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 403 (2003) (acknowledging that the proportionality approach he advocates "is consistent with that of other constitutional courts facing similarly complex constitutional problems," and citing cases from the European Court of Human Rights and Canada). For a discussion of some of the issues raised when American courts rely on foreign sources to support their decisions on domestic questions, see J. Harvie Wilkinson III, *Debate: The Use of International Law in Judicial Decisions*, 27 HARV. J.L. & PUB. POL'Y. 423 (2004), noting that reliance of foreign precedents may compromise judicial decisions in the eyes of the American public and conflict with the history and structure of our own Constitution. Wilkinson's article also raises questions about which countries judges should look to, with regard to which issues.

Moreover, the doctrinal cacophony does not present the Justices with wholly unrestricted choices, for the range of doctrines that will apply in any given case is quite predictable and limited. In addition, present doctrine provides a framework within which lawyers advise their clients and craft their arguments. It specifies which facts are relevant, which arguments are likely persuasive, and the precedents for which attorneys and judges must account. It provides directions for the decisions of lower courts, though admittedly not as much as they would like.[197] Further, because of stare decisis, the expectation is that the Supreme Court will be bound by current doctrine too, at least until they overrule or otherwise weaken it.

As outlined in Part I, the cacophony that characterizes present doctrine obscures some important and reliable consistencies that in their turn reflect discernible, articulable, and defensible rationales. These consistent aspects of First Amendment jurisprudence, which Justice Breyer has, for the most part, explicitly disavowed, have the capacity to guide and constrain the Court to a far greater extent than would Justice Breyer's open-ended search for "proportionality."

I close this Article by invoking the image that provided the inspiration for its title. I trust you have been on a train sometime. The one I think of is the one heading out of Grand Central Station. When I emerge into the daylight and look out my window, I always find the jumble of tracks amazing, and a little scary—the way they seem to head in all directions and cross and recross one another. Eventually, of course, they always sort themselves out but I always wonder about how the switches work and who's in charge of them. I find myself hoping that whoever is in charge knows what he is doing—so that not only my train but all the others that will emerge from that station can get where we are supposed to be going. For me and all of the other passengers to get where they want to go, the person in charge has to pull just the right switch to set things on their right course. So I conclude with a question: If the First Amendment were on the tracks, and all nine Justices were deciding cases, each using Justice Breyer's approach, do you think you would have any idea where the Amendment would be headed? If so, are you certain that it would be headed in the direction that you think it ought to go?

197. Am. Jewish Congress v. City of Chicago, 827 F.2d 120, 128 (7th Cir. 1987) (Easterbrook, J., dissenting) (noting that decisions requiring multifactored analyses "give[ ] . . . judges of the inferior federal courts fits").