University of Chicago Legal Forum

Volume 2020 *12/01/2020* Article 7

2020

The First Amendment as a Procrustean Bed?: On How and Why Bright Line First Amendment Tests Can Stifle the Scope and Vibrancy of Democratic Deliberation

Ronald J. Krotoszynski Jr.

The First Amendment as a Procrustean Bed?: On How and Why Bright Line First Amendment Tests Can Stifle the Scope and Vibrancy of Democratic Deliberation

Ronald J. Krotoszynski, Jr.[†]

I. INTRODUCTION

In Greek mythology, Procrustes was a notorious bandit who would abduct travelers and then offer them a rather macabre form of hospitality.[1] Procrustes would provide his "guests" with rich food and drink. When it came time for sleep, he would require his victims to "sleep" in a bed that he promised would provide a perfect fit. Procrustes achieved this perfect fit by stretching those too short to fit the bed or by lopping off the limbs of those who were too tall to fit it.[2] From this myth comes the concept of the "Procrustean Bed," which involves either ignoring relevant factors (lopping them off) or placing too much weight on considerations that do not adequately support an argument (stretching the truth, if you will).[3]

If, as First Amendment theorists, such as Alexander Meiklejohn, have argued with such persuasive force,[4] the freedom of speech is

[†] John S. Stone Chair, Professor of Law, and Director of Faculty Research, University of Alabama School of Law. With my thanks and appreciation to the editors of the University of Chicago Legal Forum for inviting me to participate in the What's the Harm?: The Future of the First Amendment symposium at the University of Chicago School of Law. I also wish to express my thanks to the other participants in the symposium for their helpful and constructive comments and suggestions on an earlier draft of this Essay. The usual disclaimer applies: any and all errors or omissions are the author's responsibility alone.

[1] THOMAS BULLFINCH, BULLFINCH'S MYTHOLOGY: THE AGE OF FABLE 136 (2019) (originally published 1800).

[2] *See id.*; *see also* NASSIM NICHOLAS TALEB, THE BED OF PROCRUSTES: PHILOSOPHICAL AND PRACTICAL APHORISMS xi-xii (2010) (noting that an alternative version of this myth exists in which Procrustes has not one, but two, beds that he uses to murder his victims, with the short bed for tall victims and the long bed for short victims).

[3] *See* TALEB, *supra* note 2, at xii & xii n.*.

[4] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948) ("The principle of the freedom of speech springs from the necessities of the program of self-government."); *see also* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 119

essential to the project of democratic self-government,[5] the federal courts should not value predictability and consistency of results over the inclusiveness and vibrancy of the political marketplace of ideas. First Amendment doctrine must not become a Procrustean bed. Instead, the constitutional tests used to frame and decide First Amendment cases must be sufficiently open-ended to permit judges to take all relevant factors and considerations into account.

To be sure, consistency of outcomes across the run of cases presenting similar facts constitutes an important virtue—not a vice—in the adjudication of constitutional rights because it promotes the appearance of fairness. In First Amendment cases, however, consistency and the appearance of fairness cannot serve as the only relevant values that judges take into consideration. Instead, First Amendment rules should advance, rather than impede, the process of democratic deliberation.[6]

Unfortunately, a great deal of contemporary First Amendment law arguably resembles a Procrustean bed. This is because in its search for tests that will yield consistent outcomes on a predictable basis, the Supreme Court has adopted a great many doctrinal tests that either disregard relevant factors or place undue weight on factors that, although relevant, should not be deemed controlling. Free speech cases will *always* fit the tests—even if the tests themselves fail reliably to advance and secure core First Amendment values (such as facilitating, on a wide-spread basis, the ability of ordinary citizens to participate actively in the process of democratic deliberation).

Over time, the Roberts Court, and the Rehnquist Court before it, has worked assiduously to make First Amendment jurisprudence more predictable by rejecting doctrinal approaches that vest judges with broad discretion to select free speech winners and free speech losers. As explained below, salient examples include access to government property for speech activity, the speech rights of government employees, transborder speech, and the speech rights of students and teachers in the nation's public schools, colleges, and universities.[7] In these varied

(1993) (arguing that the "overriding goal" of the Free Speech Clause of the First Amendment should be "to reinvigorate processes of democratic deliberation, by ensuring greater attention to public issues and greater diversity of view[s]" and positing that "[t]he First Amendment should not stand as an obstacle to democratic efforts to accomplish these goals").

[5] SUNSTEIN, *supra* note 4, at 18 (arguing that "a well-functioning system of free expression" is essential to attaining "the central constitutional goal of creating a deliberative democracy"). According to Sunstein, maintaining the project of democratic self-government must include "an important deliberative feature" that provides voters with "new information and perspectives" so that "both collective and individual decisions can be shaped and improved." *Id.* at 19.

[6] MEIKLEJOHN, *supra* note 4, at 89–91. Professor Meiklejohn posits that "[t]he unabridged freedom of public discussion is the rock on which our government stands." *Id.* at 91.

[7] *See infra* text and accompanying notes 9 to 14, 44 to 49, 64 to 104.

and important contexts, the Supreme Court has, over time, reduced rather than expanded the scope of First Amendment rights.

In this Essay, I will argue that this approach is mistaken because safeguarding the process of democratic deliberation requires that some play in the joints exist. What is more, the use of bright line, categorical rules, rather than the open-ended balancing tests that the Warren Court, and to some extent the Burger Court, embraced, has a disparate impact on the ability of ordinary citizens to participate in the process of democratic deliberation. For ordinary citizens, possessed of average financial means, it has been getting harder over time, rather than easier, for them to speak their versions of truth to power.[8] Access to public property for speech activity provides a particularly telling, and egregious, example of this trend.

First, the Supreme Court has narrowly defined the scope of government property that must be presumptively available for speech activity (so-called "traditional public forums").[9] Second, even with respect to government property that constitutes a traditional public forum, the Supreme Court has deployed the time, place, and manner doctrine to convey broad discretion on the government to limit access to public property for speech activity.[10] The combination of these doctrinal threads leads to puzzling lower federal court decisions. For example, the U.S. Court of Appeals for the District of Columbia (bizarrely) held that the broad marble plaza in front of the Supreme Court, which is otherwise open to the public 24 hours a day, seven days a week, is not a public forum.[11] So too, it turns out, the government may close all access to the Jefferson Memorial for First Amendment activity.[12] Even in a large park, in the central core of a major American city (St. Louis, Missouri), extending for over a half-mile and comprising almost 100 acres, the government may severely restrict any and all speech activity—banishing it to a handful of small designated areas.[13] If democratic deliberation and engagement are essential to making elections meaningful, all of these decisions are deeply misguided.[14]

---

[8] RONALD J. KROTOSZYNSKI, JR., THE DISAPPEARING FIRST AMENDMENT 9–21 (2019).

[9] *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683 (1992) (holding that an airport concourse does not constitute a "public forum" and, accordingly, that the government may impose any "reasonable" speech regulations that restrict or prohibit speech activity within the concourse area—even though the particular airport concourses at issue, in New York City, otherwise functioned in many respects as de facto government-owned and operated shopping malls).

[10] *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 719–21, 725–30 (2000).

[11] Hodge v. Talkin, 799 F.3d 1145, 1150, 1165 (D.C. Cir. 2015).

[12] Oberwetter v. Hilliard, 639 F.3d 545, 552–54 (D.C. Cir. 2011).

[13] United States v. Kistner, 68 F.3d 218, 222 (8th Cir. 1995).

[14] KROTOSZYNSKI, *supra* note 8, at 22–26, 35–46.

Of course, the standard narrative holds that the First Amendment's scope of application has never been broader.[15] For example, Professor Kathleen Sullivan posits that the Roberts Court's strongly libertarian vision for the First Amendment "emphasizes that freedom of speech is a negative command that protects a system of speech, not individual speakers, and thus invalidates government interference with the background system of expression no matter whether a speaker is individual or collective, for-profit or nonprofit, powerful or marginal." From this vantage point, free speech has moved in a single direction—toward ever broader, arguably "*Lochnerian*"[16] protection of an ever-expanding array of human behaviors and activities.[17]

Professor Gregory Magarian expresses similar concerns.[18] Although straightforwardly acknowledging growth in the scope of the First Amendment's application over time,[19] Magarian argues that the Roberts Court has adopted a "managed speech" approach to the First Amendment, under which the Supreme Court routinely favors powerful corporate speakers and the government itself over marginalized speakers who seek to advance the causes of political minorities. He warns that "[m]anaged speech lets select government actors and powerful speakers manage the content and scope of public debate."[20] He suggests that, in an ideal world, the federal courts would "shift [their] center of First Amendment gravity from powerful and well-financed speakers to dissenters and outsider speakers."[21]

---

[15] Kathleen Sullivan, Comment, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 143–46, 155–63 (2010) (discussing the Roberts Court's libertarian gloss on the Free Speech Clause as a proscription against government efforts to control the marketplace of ideas by regulating either speakers or their messages).

[16] Lochner v. New York, 198 U.S. 45 (1905).

[17] For relevant critiques of this trend of interpreting and applying the First Amendment to protect and ever-broader spectrum of human activity, see Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015) and Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. MARY L. REV. 1613 (2015). However, not everyone agrees with the ever-expanding First Amendment thesis. *See, e.g.*, Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 723–34 (2011). Dean Chemerinsky argues that if one considers "the overall pattern of Roberts Courts rulings" on the First Amendment, it becomes crystal clear that the Roberts Courts "is not a free speech court." *Id.* at 734.

[18] *See* GREGORY P. MAGARIAN, MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT xiv–xxii, 235–53 (2017).

[19] *Id.* at xiii–xiv, 157–91.

[20] *Id.* at 242.

[21] *Id.* at 243; *see also* STEVEN F. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 128 (2000) (positing that "the First Amendment spotlights a different metaphor than the marketplace of ideas or the richness of public debate; instead, it supports the American ideal of protecting and supporting dissent by putting dissenters at the center of the First Amendment tradition"). Professor Shiffrin argues that marginalized dissenters, like flag burners, should enjoy the most robust First Amendment protection, whereas "business corporations and commercial speakers have less of a claim to be at the heart of the First Amendment then they would if the marketplace of ideas was our guiding metaphor." *Id.*

Concerns of this sort enjoy support with at least some current members of the Supreme Court. As decision after decision has expanded the First Amendment's scope of application to potentially invalidate laws involving, for example, commercial advertising practices involving credit card fees,[22] sitting Justices have warned against the federal courts *Lochner*izing via the First Amendment—and more specifically by continually expanding the amendment's scope of application over time. For example, Justice Stephen Breyer invoked the *Lochner* bugbear in his dissenting opinion in *Sorrell v. IMS Health, Inc.*[23]

In *Sorrell*, Justice Breyer vociferously objected to the invalidation of a Vermont personal data protection law that prohibited the sale of physicians' prescription data for marketing purposes.[24] He warned that the majority's application of strict scrutiny to the state law threatened to open a jurisprudential "Pandora's Box"[25] by "reawaken[ing] *Lochner*'s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue."[26]

In *Expressions Hair Design v. Schneiderman*, Breyer struck another cautionary note against the specter of using the First Amendment as a generic constitutional tool for undoing various and sundry government social and economic regulations. In a concurring opinion, he observed—quite accurately—that "virtually all government regulation affects speech" and "[h]uman relations take place through speech."[27] If this is so, then the First Amendment's scope of application could encompass "virtually all government regulation."[28]

The prospect of applying strict judicial scrutiny to virtually all government social and economic regulations does bear more than a passing resemblance to *Lochner*. To the extent that government regulations affect communications related to the sale of goods or services, the potential risk of *Lochner*izing is obvious.[29]

---

[22] Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017).

[23] Sorrell v. IMS Health, Inc., 564 U.S. 552, 585–86, 591–92, 602–03 (2011) (Breyer, J., dissenting).

[24] *See id.* at 587–91, 602–03.

[25] *Id.* at 602.

[26] *Id.* at 603. For a thoughtful critique of the majority's decision and First Amendment analysis in *Sorrell*, see Ashutosh Bhagwat, Sorrell v. IMS Health*: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 856, 870–80 (2012).

[27] *Expressions Hair Design*, 137 S. Ct. at 1152 (Breyer, J., concurring).

[28] *Id.*

[29] *See generally* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004). Professor Schauer observes that although "[t]here have been many important disagreements about what rules should apply when a law or practice infringes upon the First Amendment," that "far fewer disagreements [have arisen] about whether, as a threshold matter, the First Amendment is even implicated at all." *Id.* at 1766. The problem is a serious one because despite occasional consideration of the First Amendment's proper scope of application, more often than not, "the boundary disputes have been

More than a little irony exists in this trend; conservative judges who regularly warn about the dangers of judicial overreach in cases raising substantive due process[30] or equal protection[31] claims have no difficulty exercising judicial review in a maximalist way to enforce the Free Speech Clause of the First Amendment. It is far from self-evident why women, sexual minorities,[32] and would-be school children[33] should have to rely on voluntary self-restraint by state legislatures or the Congress, whereas would-be corporate speakers enjoy the active and eager protection of the federal courts. If judicial modesty is appropriate in safeguarding minorities' (however defined) fundamental rights, shouldn't the same deferential approach apply when Consolidated Edison[34] or Hobby Lobby[35] appear at bar to invoke the First Amendment?

At least arguably, the Supreme Court should be more deferential to democratically-elected legislatures seeking to regulate subjects such as corporate campaign expenditures[36] or to provide public support to seriously underfunded candidates for public office running against self-

---

invisible." *Id.* at 1768.

[30] Lawrence v. Texas, 539 U.S. 558, 603–04 (2003) (Scalia, J., dissenting) (observing that "I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means," arguing that LGBTQ persons should seek protection of their fundamental rights from the state legislatures and not from the courts, and concluding that the courts should "leav[e] regulation of this matter to the people").

[31] United States v. Virginia, 518 U.S. 515, 569–70 (1996) (Scalia, J., dissenting) (rejecting an equal protection challenge to VMI's official policy of categorically excluding women from matriculating based on their gender because states traditionally maintained all-male, single-sex institutions, observing that "[t]he all-male constitution of VMI comes squarely within such a governing tradition," and objecting that "change is forced upon Virginia, and reversion to single-sex education is prohibited nationwide, not by democratic processes but by order of this Court").

[32] Obergefell v. Hodges, 576 U.S. 644, 686–88 (2015) (Roberts, C.J., dissenting) (arguing that the federal courts should not extend marriage rights to sexual minorities because "this Court is not a legislature," positing that "[w]hether same-sex marriage is a good idea should be of no concern to us," and concluding that "in our democratic republic, that decision should rest with the people acting through their elected representatives"). *But cf.* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (opining that if a state or federal law abridges or denies a fundamental right or reflects "prejudice against discrete and insular minorities," the normal presumptions of constitutionality should not apply and instead the Constitution mandates a "more searching judicial inquiry"). How Chief Justice Roberts manages to reconcile his dissenting opinion in *Obergefell*, which would commit sexual minorities to the tender mercies of the Mississippi or Alabama state legislatures, with the central meaning and import of footnote 4 of *Carolene Products* is something of a mystery.

[33] Plyler v. Doe, 457 U.S. 202, 242 (1982) (Burger, C.J., dissenting) (opining that "[w]ere it our business to set the Nation's social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education," positing that "it would be folly—and wrong—to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language," but nevertheless concluding that "[w]e trespass on the assigned function of the political branches under our structure of limited and separated powers when we assume a policymaking role as the Court does today").

[34] Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980).

[35] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[36] *But cf.* Citizens United v. FEC, 558 U.S. 310 (2010).

funding millionaires with virtually unlimited campaign war chests.[37] Whatever the merits of these arguments, we tend to see aggressive use of the power of judicial review in cases where a government seeks to regulate private speech. The Supreme Court has shown little, if any, reticence to "say what the law is" in this context.[38]

From this vantage point, free speech claims, of any and all stripes, will receive a sympathetic hearing—and favorable treatment—at the Supreme Court.[39] In many important contexts, this predictive judgment holds true. First Amendment doctrinal rules against content-, viewpoint-, and speaker-based discrimination have never been more robustly defined and applied.[40] Speech designed to inflict serious emotional harm enjoys generous constitutional protection because the First Amendment "protect[s] even hurtful speech on public issues to ensure that we do not stifle public debate."[41] Even intentionally false speech, absent a showing of specific harm, enjoys strong constitutional protection.[42] Thus, the First Amendment has been something of a growth stock during the Roberts and Rehnquist Courts.[43]

On the other hand, in several important areas, expressive freedoms have actually been contracting, rather than expanding, over time. For those seeking to use government property to speak,[44] government employees who seek to speak out about matters of public concern,[45] persons engaged in news gathering and reporting,[46] students and faculty at the

---

[37] *But cf.* Arizona Free Enter. Club v. Bennett, 564 U.S. 721 (2011); Davis v. FEC, 554 U.S. 724 (2008).

[38] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

[39] *See* Ronald L.K. Collins, *Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 412–13 (2012) (arguing that Supreme Court has afforded "near absolute protection to expression" and positing that the Roberts Court "has re-conceptualized the way we think about certain free speech issues").

[40] *See, e.g.*, Nat'l Instit. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018); Reed v. Town of Gilbert, 576 U.S. 155 (2015); McCullen v. Coakley, 573 U.S. 464 (2014); Brown v. Entm't. Merchs. Ass'n, 564 U.S. 786 (2011); Sorrell v. IMS Health, Inc., 564 U.S. 552 (2011); United States v. Stevens, 559 U.S. 460 (2010).

[41] *See* Snyder v. Phelps, 562 U.S. 443, 460–61 (2011); *see also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 54–56 (1988) (holding that intentionally outrageous, offensive parody, designed to inflict emotional damage on the subject, enjoys robust First Amendment protection because imposing civil liability for outrageous parodies "has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression").

[42] United States v. Alvarez, 567 U.S. 709 (2012).

[43] *But cf.* Chemerinsky, *supra* note 17, at 725–34 (arguing that the Roberts Court has been inconsistent in enforcing core First Amendment values).

[44] Pleasant Grove v. Summum, 555 U.S. 460, 464–68 (2009); Hodge v. Talkin, 799 F. 3d 1145, 1159–62 (D.C. Cir. 2015); Oberwetter v. Hilliard, 639 F. 3d 545, 552–54 (D.C. Cir. 2011).

[45] Garcetti v. Ceballos, 547 U.S. 410, 419 (2006).

[46] Animal League Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018); *see also* Alan K. Chen

nation's public schools, colleges, and universities,[47] and persons and organizations engaged in transborder speech activities,[48] free speech rights have been declining, rather than expanding, in the contemporary United States.[49]

Some very capable First Amendment scholars, including, as noted earlier, Kathleen Sullivan and Gregory Magarian,[50] have made precisely this argument, positing that the contemporary Supreme Court simply favors wealthy would-be speakers over less well-off would-be speakers who require some kind of government assistance in order to speak.[51] In other words, the Supreme Court has adopted a form of social Darwinism that reposes broad, if not unlimited, faith in private speech markets. Private individuals, organizations, and even publicly-traded corporations—not the government—will structure, if not control, the political marketplace of ideas.[52] However, could an alternative thesis provide a better account for the Justices' behavior under Chief Justices John G. Roberts, Jr. and William H. Rehnquist?

Such an account does exist and consists of precisely this: the Roberts and Rehnquist Courts consistently have abjured First Amendment doctrinal tests that vest judges with broad discretionary authority to vindicate, or reject, free speech claims on a case-by-case basis. Rather than a laissez-faire *Lochnerian* approach, the modern Supreme Court has sought to wring out virtually all discretion from the adjudication of First Amendment claims by adopting and applying bright line, categorical rules that strictly limit the ability of judges to select free speech winners and free speech losers. By way of contrast, the Warren Court,[53] and to some extent, the Burger Court as well,[54] both developed and deployed open-ended tests that required trial courts and appellate courts alike to balance free speech claims against the government's claims of managerial necessity.

& Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1439–40, 1466–71 (2015).

[47] Morse v. Frederick, 551 U.S. 393 (2007).

[48] Holder v. Humanitarian Law Project, 561 U.S. 1, 33–40 (2010); *see also* Ronald J. Krotoszynski, Jr., *Transborder Speech*, 94 NOTRE DAME L. REV. 473 (2018).

[49] KROTOSZYNSKI, *supra* note 8, at 18, 215–18, 223–25 (2019).

[50] *See supra* text and accompanying notes 15 to 21.

[51] *Id.*

[52] Citizens United v. FEC, 558 U.S. 310, 339–42 (2010); *see also* OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996).

[53] *See, e.g.*, Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969); Brown v. Louisiana, 383 U.S. 131 (1966).

[54] Houchins v. KQED, 438 U.S. 1, 16–18 (1978) (Stewart, J., concurring); Branzburg v. Hayes, 438 U.S. 665, 709–10 (1972) (Powell, J., concurring); Flower v. United States, 407 U.S. 197 (1972) (per curiam).

Balancing tests can give rise to an appearance of content, viewpoint, or even speaker discrimination because reasonable jurists can and will reach conflicting results in cases featuring very similar facts.[55] Bright line rules, by way of contrast, will produce consistent and predictable results in such cases. Consistent results in cases presenting similar facts is certainly desirable—but so is "uninhibited, robust, and wide-open"[56] public debate about government officials, candidates for public office, public figures, and matters of public concern.[57]

Free speech rules that require judges to exercise discretion will produce free speech winners and losers who have similar, if not identical, constitutional claims. But, this approach, which was a hallmark of the free speech jurisprudence of the Warren Court,[58] has the virtue of broadly facilitating the democratic discourse essential to making elections an effective means of securing government accountability.[59] Balancing tests usually will protect more speech than categorical tests that almost always favor the government in circumstances where a would-be speaker is seeking the government's assistance in order to speak; in such circumstances, a bright line rule will almost invariably favor the government's legitimate managerial interests.[60]

Accordingly, and drawing on the title of this symposium—"What's the Harm?: The Future of the First Amendment"—the "harm" of First Amendment bright line rules is a less vibrant, open, and inclusive marketplace of political ideas. This harm also constitutes a cost that the Roberts Court needs to address more directly and forthrightly when it jettisons balancing tests in favor of categorical free speech rules in contexts where doing so protects fewer speakers and less speech.

An important caveat at the outset: it would be mistaken to posit that First Amendment jurisprudence should not feature *any* bright line

---

[55] KROTOSZYNSKI, *supra* note 8, at 35–46.

[56] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (observing that the First Amendment exists to ensure that the public debate about public officials and matters of public concern is "uninhibited, robust, and wide-open").

[57] MEIKLEJOHN, *supra* note 4, at 22–27, 88–91.

[58] KROTOSZYNSKI, *supra* note 8, at 15–17.

[59] MEIKLEJOHN, *supra* note 4, at 88 (arguing that "if men are to be their own rulers" then "whatever truth may become available shall be placed at the disposal of all citizens of the community" and that the First Amendment's primary purpose "is to give every voting member of the body politic the fullest possible participation in the understanding of these problems with which the citizens of a self-governing society must deal").

[60] *See* Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 164–65 (1996). Professor Post observes that "[w]ithin managerial domains, the state organizes its resources so as to achieve specified ends" and that these governmental managerial domains are "necessary so that a democratic state can actually achieve objectives that have been democratically agreed upon." *Id.* at 164. For an extended discussion of the problems and difficulties of disentangling the government's legitimate managerial domains from the operation of the free and open democratic discourse essential to maintaining a system of self-government, see ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995).

rules. Bright line rules can and do play an important role in safeguarding the process of democratic deliberation from ham-fisted government efforts to censor or even simply reshape the political marketplace of ideas.[61] Even so, however, bright line rules are not enough.

The federal courts should work to create a bifurcated system of free speech jurisprudence that provides a floor, safeguarded by categorical rules that strictly limit the government's ability to engage in censorship of political speech (for example, the categorical First Amendment doctrinal rules against prior restraints, viewpoint discrimination, and content discrimination), and also a ceiling, that involves more open-ended free speech rules that permits courts to require the government to facilitate speech activity when it has the means to do so without undue inconvenience or disruption, but lacks the will to facilitate speech activity by ordinary citizens who require governmental assistance in order to participate in the process of democratic self-government.[62] This approach would establish and protect an important free speech baseline (the "floor" created by categorical rules) but also leave open the possibility of a broader and more vibrant political marketplace of ideas (via the "ceiling" created through the use of balancing tests that permit case-by-case, context sensitive, evaluations of efforts by would-be speakers to seek and obtain the government's assistance to facilitate their speech activity).

II. THE ROBERTS AND REHNQUIST COURTS EMBRACE CATEGORICAL RULES, NOT BALANCING TESTS, IN FIRST AMENDMENT CASES

In a variety of areas, the Warren and Burger Courts embraced open-ended balancing tests to frame and decide First Amendment cases, whereas the Rehnquist and Roberts Courts consistently adopted bright line, categorical rules. Examples include cases involving access to public property for speech activity, the speech rights of government employees, and the speech rights of students in the nation's public schools.[63] This section will demonstrate how the Warren Court broke

---

[61] *See* Vincent A. Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–56 (1985). Professor Blasi suggests that "[i]n crafting standards to govern specific areas of first amendment dispute, courts that adopt the pathological perspective should place a premium on confining the range of discretion left to future decisionmakers" and that "[c]onstitutional standards that are highly outcome-determinative of the cases to which they apply are thus to be preferred." *Id.* at 474.

[62] *See* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 260 (1961) (positing that "universal discussion is imperative" and lamenting "how inadequate, to the degree of non-existence, are our public provisions for active discussions among the members of our self-governing society"); *see also* CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA, ix (2017) (arguing that "[m]embers of a democratic public will not do well if they are unable to appreciate the views of their fellow citizens").

[63] *Compare* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509–11 (1969)

important new First Amendment ground by requiring the government to use its vast resources to support, rather than to impede, civic discourse. In all of these areas, however, the Warren Court found it essential to take the government's legitimate managerial necessities into account—and doing so required the adoption of open-ended balancing tests rather than categorical rules.

A. A Presumption of Access to Public Property for Speech Activity Versus the Public Forum Doctrine

The Warren Court, as well as the Burger Court, adopted a general presumption that government property otherwise suitable for expressive activity should be available for such activity—even if the property's principal purpose had nothing to do with exercising First Amendment rights. For example, a public library is not self-evidently a logical forum for collective, public protest activity, but the Warren Court held that civil rights protesters could engage in a silent protest in a racially segregated Louisiana public library.[64] The conclusion followed because the protest, which lasted around 15 minutes,[65] did not disrupt the library's regular operation.[66] On these facts, the Supreme Court invalidated breach of the peace convictions, essentially holding that the protesters possessed a First Amendment right to use the public library for their silent protest.[67]

The Burger Court also followed this general approach—by, for example, holding that the U.S. Army could not close Fort Sam Houston, a San Antonio, Texas military base, to leafletters who sought to promote

---

(vindicating public school students' free speech claims under an open-ended balancing test that weighs a free speech claim against the risk that student speech activity will substantially and materially disrupt a public school's regular educational activities) *with* Morse v. Frederick, 551 U.S. 393, 403, 408–10 (2007) (rejecting a public high school student's First Amendment claim using a categorical test that vests school officials with broad authority to proscribe even nonsense speech that could arguably have been interpreted to advocate the use of marijuana) *and* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986) (applying a categorical test to deny *any* First Amendment protection to a student's vulgar or scatological speech at a school-sponsored event). It bears noting that Justice Clarence Thomas has argued that *Tinker*'s open-ended balancing approach should be completely jettisoned in favor of a categorical approach that would sustain virtually any and all government restrictions on students' speech. *See Morse*, 551 U.S. at 422 (Thomas, J., dissenting) (objecting to the growing "patchwork of exceptions" to the *Tinker* standard and calling for *Tinker* to be overruled in favor of a categorical rule favoring the government).

[64] Brown v. Louisiana, 383 U.S. 131, 142 (1966) (observing that "[i]t is an unhappy circumstance that the locus of these events was a public library—a place dedicated to quiet, to knowledge, and to beauty" but nevertheless concluding that the silent protest in the public library constituted a "lawful, constitutionally protected exercise of their fundamental rights").

[65] *Id.* at 135–38.

[66] *Id.* at 142 ("Fortunately, the circumstances here were such that no claim can be made that use of the library by others was disturbed by the demonstration. . . . Were it otherwise, a factor not present in this case would have to be considered.").

[67] *See id.* at 143.

an anti–Vietnam War protest rally.[68] In a three-page, per curiam opinion, rendered without full briefing and oral argument, the 6-3 majority held that "[t]he base commandant can no more order petitioner off this public street because he was distributing leaflets than could the city police order any leafleteer off any public street."[69]

To be sure, the Burger Court also issued the decision *Greer v. Spock*,[70] which denied Dr. Benjamin Spock, the People's Party candidate for president in 1972, access to the Fort Dix Military Reservation, a U.S. Army base in New Jersey, for a campaign rally.[71] However, Justice Potter Stewart's First Amendment analysis did not begin and end with a declaration that Fort Dix was a non-public forum and therefore could be closed categorically to any and all First Amendment activity. Justice Stewart required the army to justify the ban on political activity on the base, and found that the army had a persuasive rationale for allowing most speech activity on base—but with the exception of partisan political activity.[72] In other words, the *Greer* majority engaged in a balancing exercise that considered Spock's interest in speaking against the army's interest in closing the base property to partisan campaign activity—and concluded that the constitutional balance favored the government on these facts.

Today, however, all three cases would be decided differently and on a much more summary basis. A military base is a non-public forum and any reasonable regulations would be deemed constitutional.[73] A public library is, at most, a limited purpose public forum and the government could limit the kinds of First Amendment activity that it permits to occur in such spaces.[74]

Professor Timothy Zick correctly observes that "[u]nder current forum analysis, the library, like most contested places, would most likely be considered a 'non-public' forum."[75] This is so because the Supreme

---

[68] Flower v. United States, 407 U.S. 197, 198–99 (1971).

[69] *Id.* at 198.

[70] 424 U.S. 828 (1976).

[71] *Id.* at 830–35.

[72] *Id.* at 839 (observing that "[w]hat the record shows . . . is a considered Fort Dix policy, objectively and evenhandedly applied, of keeping official military activities there wholly free of entanglement with partisan political campaigns of any kind," thus ensuring that "the military as such is insulated from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates.").

[73] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797, 802–06 (1985).

[74] Perry Ed. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37, 45–46 (1983) (discussing the concept of a limited purpose public forum in which the government limits access to government property based on speakers, speech content, or both); *see also* Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010) (holding that government support for student organizations at a government-operated law school created a limited purpose public forum that could impose restrictions on membership rules as a condition of using the forum).

[75] Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV.

Court has used a very narrow, tradition-bound test to identify "traditional public forums"; the Roberts and Rehnquist Courts have essentially categorically excluded government property associated with activities that did not exist in 1791 (such as commercial airports).[76] Lower federal courts have found that government property, such as national parks and monuments, do not constitute traditional public forums.[77] Thus, as Zick posits, contemporary First Amendment analysis would "fail[ ] to place the library [at issue in *Brown*] in local and more general historical perspective"[78] and would permit the government to arrest, try, and convict civil rights protestors who had engaged in unauthorized speech activity in a public library.

A categorical approach to making public property available has the effect of closing most government property to speech activity—even when the government, with little if any inconvenience, could make the property available. This provides a clear example of how a balancing test can and would protect more speech activity than a categorical test. More specifically, a balancing exercise would open up more public spaces to First Amendment activity than a categorical approach. Courts will not—and should not—permit would-be protesters to commandeer at will any and all public property that they wish to use for speech activity. However, it is entirely possible to imagine a First Amendment world in which courts require the government to provide a plausible reason for denying access to specific public property for speech activity. The Warren Court, and to a lesser degree, the Burger Court, took exactly this approach—whereas the Rehnquist and Roberts Courts have not.

439, 497 (2006).

[76] *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 682 (1992) (holding that an airport concourse does not constitute a traditional public forum and, in consequence, that the First Amendment permits any and all "reasonable" government regulations restricting speech activity in airports); *cf.* Stephen G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1634 (1998) (arguing that the government should always bear a burden of justification that shows proposed speech activity is inconsistent with the regular uses of particular government property and that "only if the speech would otherwise significantly interfere with the government's ability to carry out its legitimate duties" should a court not require the government to make the property available for First Amendment activity).

[77] *See, e.g.*, Hodge v. Talkin, 799 F. 3d 1145, 1159–62 (D.C. Cir. 2015); Oberwetter v. Hilliard, 639 F. 3d 545, 552–54 (D.C. Cir. 2011); Boardley v. U.S. Dep't of the Interior, 615 F. 3d 508, 515 (D.C. Cir. 2010).

[78] Zick, *supra* note 75, at 497.

B. Government Employee Speech About Matters of Public Concern Versus the Government's Managerial Necessities as an Employer

In *Pickering v. Board of Education*,[79] the Warren Court pioneered First Amendment protection for government employees who speak out about a matter of public concern. Justice Thurgood Marshall, writing for a unanimous bench on this point, explained that "[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[80]

In other words, federal courts must weigh a government employee's interest in speaking out about a matter of public concern against the risk that the speech activity could disrupt the government's workplace. In *Pickering*, the balance favored Marvin L. Pickering, a public school teacher in Illinois, and the Supreme Court held that the First Amendment protected his public comments about the school district's efforts to get local voters to approve a bond issue to improve the local public schools.[81] This conclusion held true, moreover, even though Pickering's speech, a letter to the editor published in a local newspaper, contained some factual errors.[82]

The Roberts Court, by way of contrast, took a different approach in *Garcetti v. Ceballos*[83]—and adopted a categorical rule that systematically favors government employers over government employees. Richard Ceballos, an assistant district attorney, objected both orally and in an office memorandum to the office permitting a law enforcement officer to provide allegedly false information to a state court judge in order to obtain a search warrant.[84] Ceballos believed that he suffered official retaliation as a result of these actions and sought the protection of the First Amendment under *Pickering*.[85]

The Supreme Court held that the First Amendment provided Ceballos with literally no protection against official retaliation for his

---

[79] 391 U.S. 563 (1968).

[80] *Id.* at 568.

[81] *Id.* at 572–73 (observing that school board failed to show that Pickering's speech had "in any way either impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally" and that on these facts "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public").

[82] *Id.* at 570–73.

[83] 547 U.S. 410 (2006).

[84] *Id.* at 412–15.

[85] *Id.* at 413–15.

whistleblowing speech.[86] Justice Anthony M. Kennedy, writing for the 5-4 majority, found that government employees enjoy no First Amendment protection for speech about a matter of public concern if that speech falls within the scope of their official duties.[87] Simply put, "[t]he First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities."[88] Thus, "[b]ecause Ceballos' memo falls into this category," the majority concluded that "his allegation of unconstitutional retaliation must fail."[89]

In *Pickering*, the Warren Court adopted a balancing test that would lead to meaningful First Amendment protection for at least some government employees, some of the time. The test is problematic because it incorporates a heckler's veto: an adverse reaction by a government employee's co-workers may serve as a valid basis for firing the government employee who speaks out about a matter of public concern.[90] However, weak or imperfect First Amendment protection in this context is probably unavoidable because of the government's legitimate managerial concern in maintaining functional offices.

The Roberts Court, by way of contrast, has embraced a categorical approach that wrings out judicial discretion to validate government employee speech claims when the speech arguably relates to the employee's official duties. The *Garcetti* approach will lead to very consistent and predictable outcomes—but the outcomes will consistently favor the government over would-be speakers. Consistency of this sort comes at simply too high a price. Government employees should be permitted to participate in the process of democratic deliberation.[91] Moreover, whistleblowing speech by government employees could well be essential to empowering voters to hold government accountable through their ballots.[92]

To be sure, the Warren Court's balancing approach in *Pickering* will require judges to exercise discretion in an open and transparent way. However, if the effective choice is between an open-ended balancing test that may from time to time under-protect government

---

[86] *See id.* at 420–24.

[87] *Id.* at 424–26.

[88] *Id.* at 424.

[89] *Id.*

[90] KROTOSZYNSKI, *supra* note 8, at 88–90.

[91] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) ("To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.").

[92] KROTOSZYNSKI, *supra* note 8, at 91–94.

employees, but will protect at least some government employees who speak out about a matter of public concern and deter official government retaliation against employees who embrace speech over silence, and a categorical rule that provides no protection at all to government employees, core First Amendment values would be best served by adopting and applying the balancing approach. If the First Amendment exists to facilitate the process of democratic deliberation, then more speech activity should be preferred to less speech activity.

C. Decreasing First Amendment Protection for Speech Activity in the Nation's Public Schools, Colleges and Universities

The Warren Court pioneered First Amendment protection for students and faculty in the nation's public schools. In *Tinker v. Des Moines Independent Community School District*,[93] Justice Abe Fortas, writing for a 7-2 majority, held that high school and middle school students enjoyed a First Amendment right to wear black armbands, while on campus, to protest the Vietnam War.[94]

Perhaps most famously, Justice Fortas observed that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[95] In addition, however, he carefully explained that public school officials must tolerate political speech by their students in order to vindicate core First Amendment values:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.[96]

This stirring celebration of the First Amendment, however, does not actually provide the governing legal test.

---

[93] 393 U.S. 503 (1969).

[94] *See id.* at 504, 513–15.

[95] *Id.* at 506.

[96] *Id.* at 511.

Despite this soaring and relatively absolute language, the *Tinker* test actually involves an open-ended balancing exercise. More specifically, school officials may proscribe on-campus speech if the speech plausibly presents a risk of materially and substantially interfering with the regular daily operations of the school.[97] On the facts at bar, the Des Moines public school officials failed to show such a risk existed and, accordingly, the students were entitled to engage in their protest of the Vietnam War while on campus.[98]

The Burger, Rehnquist, and Roberts Courts, unlike the Warren Court, limited the jurisprudential scope of *Tinker* by adopting categorical rules that permitted school administrators to ban ribald speech,[99] comprehensively regulate curricular speech,[100] and proscribe speech that supposedly advocated the use of marijuana.[101] When a student engages in ribald speech while on campus, speaks incident to an official curricular activity, or speaks ambiguously about illegal drugs, no balancing exercise applies and school officials may censor the student's speech with an entirely free hand (including punishing a student for uttering it by suspending her, denying her the right to participate in extracurricular activities, or banning the student from commencement exercises).

The categorical approach the Justices adopted and deployed in *Bethel School District No. 403 v. Fraser*, *Hazelwood School District v. Kuhlmeier*, and *Morse v. Frederick* will produce very consistent results on a predictable basis. But, these cases essentially zero out a public school student's interest in speaking out about matters of public concern without the government having to shoulder any meaningful burden of justification for censoring the student's speech. *Tinker* requires judges to weigh facts and circumstances on a case-by-case basis—and judges deciding cases with similar facts will reach different conclusions. But one cannot gainsay that the *Tinker* balancing approach will facilitate more speech activity related to the process of democratic self-government than the categorical approach of *Fraser*, *Kuhlmeier*, and *Morse*.

---

[97] *Id.* at 509–10.

[98] *Id.* at 511 (upholding the right of the school students to wear the black arm bands on campus and explaining that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible").

[99] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986). *Fraser* was decided by the Burger Court.

[100] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988). The Rehnquist Court decided *Kuhlmeier*.

[101] Morse v. Frederick, 551 U.S. 393 (2007). The Roberts Court handed down *Morse*.

The Warren Court routinely embraced open-ended balancing tests. This had the effect of protecting more expressive activity than would have been the case under a less flexible approach. Moreover, reliance on balancing tests to decide First Amendment claims tended to benefit marginalized speakers who lacked the financial wherewithal to disseminate a message using their own money or property.

Whenever government has a legitimate managerial justification for withholding its assistance to would-be speakers, a balancing approach permits courts to weigh carefully the competing, and conflicting, interests in a specific context.[102] At least in some cases, this exercise will result in a court ordering a government defendant to facilitate speech activity when it would rather not do so.[103] Because democratic deliberation is essential to the legitimacy of our governing institutions, requiring the government to facilitate speech when it can do so would represent a better approach than hewing to categorical rules that treat all would-be speakers equally—but equally badly.[104]

III. BALANCING TESTS OR CATEGORICAL RULES?: CONSIDERING THE POTENTIAL VIRTUES AND VICES OF BOTH APPROACHES TO FRAME AND DECIDE FIRST AMENDMENT DISPUTES.

As explained in the previous Part, in cases involving expressive freedoms the Rehnquist and Roberts Courts—unlike the Warren and Burger Courts—have not routinely embraced tests that require the open exercise of discretion by federal judges. This raises the question:

---

[102] Brown v. Louisiana, 383 U.S. 131, 141–42 (1966); *see also* Gey, *supra* note 76, at 1566–76 (arguing that federal courts have failed to make sufficient public space available for First Amendment activities and positing that a more functional approach to public forum analysis would help to address this failure successfully).

[103] *See, e.g.*, Williams v. Wallace, 240 F. Supp. 100, 106–09 (M.D. Ala. 1965) (requiring the federal and state governments to facilitate a mass, five-day march from Selma, Alabama to Montgomery, Alabama to protest a state-wide system of official disenfranchisement of African American voters). Judge Frank M. Johnson, Jr. recognized that the proposed five-day march, over the main regional highway, would be highly disruptive to those seeking to use the road for local and interstate travel. He explained that the right to engage in disruptive protest should be, at least to some extent, commensurate with the "enormity" of the wrongs being protested and petitioned against:

> [I]t seems basic to our constitutional principles that the extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested and petitioned against. In this case, the wrongs are enormous. The extent of the right to demonstrate against these wrongs should be determined accordingly.

Id. at 106.

[104] Gey, *supra* note 76, at 1536–38, 1542–55, 1576–77. Professor Gey argues that the government should be allowed to deny access to public property for speech activity "only if the speech would otherwise significantly interfere with the government's ability to carry out its legitimate duties" and posits that "[r]igorous enforcement of this interference standard would stem the current trend toward a narrowing of the public forum." *Id.* at 1634.

What is objectionable, if anything, about using open-ended balancing tests to decide First Amendment disputes?

Balancing is quotidian in other areas of the law. For example, in deciding whether the government has satisfied the requirements of procedural due process federal courts apply a three part balancing test that considers the nature of the private interest at stake, the government's interest in using the procedures that it voluntarily provided, and the probability that additional process would reduce the risk of error.[105] To be sure, some members of the Supreme Court rejected this approach because it can produce inconsistent results.[106] However, the Justices who raised these objections to *Mathews v. Eldridge* balancing have done so exclusively in *dissenting* opinions.

Is there something particularly problematic with discretion in the context of free speech cases? Arguably, there is: the open exercise of discretion in First Amendment cases can give rise to an appearance of content-, viewpoint-, or even speaker-based discrimination. What's more, balancing tests will produce conflicting results in cases featuring very similar facts. Federal judges, attempting to decide close cases in good faith, will reach different outcomes that will be difficult to reconcile (precisely because reasonable minds can and will differ about how to fix the balance in close cases).

A fair-minded observer might posit that these different outcomes are the product of judicial sympathy—or antipathy—toward particular would-be speakers.[107] Thus, play in the joints in First Amendment cases—meaning a non-trivial risk of courts reaching different outcomes

---

[105] *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (reviewing precedent and holding that procedural due process analysis "generally requires consideration of three distinct factors" that include (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail").

[106] *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 561–62 (1985) (Rehnquist, J., dissenting).

[107] *Compare NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911–15 (1982) (holding protected a boycott that included the use of threats because "the boycott clearly involved constitutionally protected activity" and "the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment"), *and* Cox v. Louisiana, 379 U.S. 559, 568–75 (1965) (holding protected a large civil rights protest proximate to a local courthouse), *with* Hill v. Colorado, 530 U.S. 703, 719, 725–30 (2000) (sustaining a highly targeted Colorado law aimed at preventing protest near abortion clinics and suggesting that the speech ban did not even regulate speech at all but rather was "a regulation of the places where some speech may occur"), *and* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 762–64, 769–71 (1994) (sustaining, in part, an injunction that prohibited anti-abortion protests near a family planning clinic). Dissenting in *Hill*, Justice Scalia observed that "it blinks reality to regard this statute, in its application to oral communications, as anything other than a content-based restriction upon speech in the public forum, *Hill*, 530 U.S. at 748, and objected that "[r]estrictive views of the First Amendment that have been in dissent since the 1930s suddenly find themselves in the majority," *id.* at 765.

in cases presenting substantially identical facts—could give rise to the appearance of bias by federal and state judges. This, in turn, could easily have a corrosive effect on public confidence in the courts—and thus undermine their legitimacy with the body politic.[108]

By way of contrast, categorical rules—rules that strictly limit judicial discretion—will generate consistent outcomes across a decentralized system of federal and state courts.[109] Consistent results in free speech cases, that are the product of categorical, bright-line rules, avoid the risk of judges appearing biased toward, or against, particular would-be speakers. But, at what price?

Bright line rules will provide less protection for free speech generally, at least in circumstances where the government possesses, to use Professor Robert Post's wonderful turn of phrase, a legitimate claim over its managerial domain.[110] A categorical rule, in the context of access to public property, the government's workplace, and in public schools, colleges, and universities, will almost inevitably favor the government over would-be speakers.

Professor Post argues that "[t]he constitutional question in each case is whether the authority to regulate speech is necessary for the achievement of legitimate institutional objectives."[111] Post predicts, correctly, that federal judges will be wary of "second-guessing [a government supervisor's] managerial authority regarding speech."[112] If a court did this, "that authority would *pro tanto* diminish."[113] Accordingly, the risk of this kind of "damage" means "that before engaging in judicial review a court must determine whether such review would itself diminish the authority at issue to such an extent as to impair the ability of the bureaucracy to attain its legitimate ends."[114] The requisite analysis

---

[108] Claims of this sort have been made with respect to the Supreme Court's state action doctrine decisions prior to the enactment of comprehensive federal civil rights laws; these decisions sometimes seemed to strain in order to find state action in order to proscribe racially discriminatory behavior and policies. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29–31 (1959) (objecting to a state action decision finding state court enforcement of a racially restrictive covenant running with the land to constitute state action for purposes of applying the Equal Protection Clause); *see also* Jonathan D. Varat & Vikram D. Amar, CONSTITUTIONAL LAW: CASES AND MATERIALS 1071 (15th ed. 2017) (observing that "[b]y the end of World War II through 1968, all Supreme Court decisions that reached the question whether unconstitutional state action was present decided that it was" but "[s]ince 1970, most Supreme Court decisions considering the same issue have not found unconstitutional state action" in cases that do not involve racial discrimination).

[109] Ronald J. Krotoszynski, Jr., *The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power*, 89 NOTRE DAME L. REV. 1021 (2014).

[110] Post, *Subsidized Speech*, *supra* note 60, at 164–67.

[111] POST, CONSTITUTIONAL DOMAINS, *supra* note 60, at 237.

[112] *Id.*

[113] *Id.*

[114] *Id.*

involves careful consideration of "the relationship between the practice of judicial review and the nature of the managerial authority at issue."[115]

Accordingly, even very progressive jurists, such as Justice Thurgood Marshall and Abe Fortas, were unwilling to completely disregard the government's need to achieve its programmatic objectives. A categorical First Amendment rule that requires the government to *always* accommodate would-be speakers would be unacceptably disruptive to the government's legitimate managerial plans and interests. If federal courts are to validate speech claims in these contexts, there simply must be balancing of the government's interest in achieving its managerial objectives efficiently against the value of private citizens engaging in First Amendment activity.[116]

The balancing is also difficult—and fraught—because of the incommensurable values at stake. How does a federal district judge weigh the risk of disruption in a public school facing serious racial tensions if a middle school principal prohibits students from wearing both "Trump/Pence 2020" and "Black Lives Matter" t-shirts while on campus? A reasonable school administrator could anticipate that both shirts would result in material and substantial disruption to the school's operations—and accordingly proscribe the wearing of both.[117] On the other hand, a "Tom Steyer 2020" t-shirt probably would not present a similar risk of disruption. To permit the Steyer shirt while banning the others, however, could reasonably be perceived as a form of content- or viewpoint-based discrimination. In reality, however, it is not.[118]

Nevertheless, in order to avoid an appearance of censorship, a risk-averse school administrator might attempt to ban all clothing that carries a political message while on campus. This zeroes out both potentially disruptive and wholly innocuous speech (e.g., "I Support the World Wildlife Fund")—but it avoids any appearance of political or ideological favoritism. Federal courts cannot be faulted too harshly for taking the same approach when the government can identify a non-speech related managerial reason for refusing to accommodate First Amendment activity.

---

[115] *Id.*

[116] *See id.* at 235–39.

[117] *See, e.g.*, West v. Derby Unified Sch. Dist. No. 260, 206 F. 3d 1358, 1365–66 (10th Cir. 2000) (holding that a school district could reasonably conclude that a hand-made drawing of a Confederate battle flag could present a substantial and material risk of disruption to the school's operations and explaining that the school's administration "had reason to believe that a student's display of the Confederate flag might cause disruption and interfere with the rights of other students to be secure and let alone").

[118] KROTOSZYNSKI, *supra* note 8, at 113–15.

Of course, the Warren Court recognized the risk of appearing to play favorites among speakers—but more often than not would insist that government incur inconvenience and expense in order to facilitate more speech. Or, to be more precise, the Warren Court adopted tests that routinely required lower state and federal courts to consider carefully whether the balance of equities in a particular case favored the would-be speaker over the government.[119]

Categorical rules in times of national tumult and distress are even more potentially pernicious in exacerbating the chasm between free speech haves and free speech have nots. As Professor Christina Wells has persuasively argued, judges are not any more immune to mass panic and irrational fear than everyone else.[120] Drawing on social psychology research, Wells warns that "[t]o the extent that individuals perceive a group as threatening due to ostensible risks associated with it, we know that substantial errors in risk assessment occur in particular circumstances."[121] This effect also correlates strongly with the perceived nature of the risk: "The potentially catastrophic nature of the threat can further exacerbate the tendency to overestimate the likelihood of an event. Social influences often reinforce this skewed risk assessment through the phenomena of informational and reputational cascades, which can cause widespread, though erroneous, beliefs regarding the likelihood of an event."[122]

Wells concludes that taking affirmative doctrinal steps to attempt to address the risk of judges holding irrational fears during times of national stress and tumult will not be enough. This is so because, allowing these perceived risks to cloud their judgment, "[j]udges may still fall prey to fear and prejudice or they may simply make the strategic determination that they do not wish to involve themselves in these matters."[123]

Thus, at the very moments when, under Professor Vincent Blasi's "pathological perspective,"[124] the process of democratic self-government most requires judicial courage,[125] Wells's research suggests that the judges are most apt to be AWOL. We may want judges to exhibit civic

---

[119] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Brown v. Louisiana, 383 U.S. 131 (1966); Cox v. Louisiana, 379 U.S. 536 & 559 (1965).

[120] Christina E. Wells, *Fear and Loathing in Constitutional Decision Making*, 2005 WIS. L. REV. 115, 117 ("Judges are, after all, human. They remain subject to the same passions, fears, and prejudices that sweep the rest of the nation.").

[121] *Id.* at 170.

[122] *Id.* at 170–71.

[123] *Id.* at 222.

[124] Blasi, *supra* note 61, at 449–52.

[125] *Id.* at 452–56.

courage in such times,[126] and Professor Blasi's normative argument has much to recommend it—the process of democratic deliberation is obviously most critical at times of national crisis. When the stakes are potentially astonishingly high, "We the People" must engage in careful, thoughtful, and well-informed public discourse.[127]

Wells tells us that although this may be what we want and also what a democratic polity needs, it is not likely to be what we will get from the courts.[128] From this perspective, and as Blasi argues in his iconic article, it might be desirable to adopt and enforce strict bright line rules that delimit judicial discretion—and hence make it arguably harder for frightened judges to shirk their constitutional duties.[129] As Blasi states his case in chief, "[t]he adjudicative methodologies and doctrines that can best protect the core commitments of the first amendment in pathological periods are those that are consciously designed to counteract the unusual social dynamics that characterize such periods."[130]

Even so, however, the most likely potential beneficiaries of these categorical rules are would-be speakers who have the financial means to speak. In good times and bad times alike, categorical rules will burden marginalized speakers more heavily than wealthy and socially-empowered speakers—at least when the categorical rule implicates the government's managerial domain. For example, if courts permit the government to restrict access to government property for speech activity based on "security" concerns,[131] the categorical rule will fence out both wealthy and poor would-be speakers. But wealthy speakers have

---

[126] Vincent A. Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653, 692–96 (1988).

[127] *Id.* at 686 (observing that for Justice Louis Brandeis and Thomas Jefferson "the key to a successful democracy lies in the spirit, the vitality, the daring, the inventiveness of its citizens"); *see also* ROBERT POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE FIRST AMENDMENT 39–42 (2012) (discussing, in some detail, the importance of democratic deliberation to the project of democratic self-government). Post observes that "[f]or the last eighty years, First Amendment jurisprudence has been founded on the premise that 'speech concerning public affairs is . . . the essence of self-government.'" *Id.* at 40.

[128] Wells, *supra* note 120, at 117–18, 168–72, 214–22.

[129] Blasi, *supra* note 61, at 467–68 (arguing that "one of the most important ways in which adjudication in ordinary times might influence the course of pathology would be by helping to promote an attitude of respect, devotion, perhaps even reverence, regarding those central norms" and suggesting that "an emphasis in adjudication during normal times on the development of procedures and institutional structures that are relatively immune from the pressure of urgency by virtue of their formality, rigidity, built-in delays, or strong internal dynamics" would be helpful in safeguarding free speech in times of national stress).

[130] *Id.* at 513.

[131] *See, e.g.*, Bl(a)ck Tea Soc'y v. Boston, 378 F.3d 8 (1st Cir. 2004). The federal courts are all too credulous when the government argues that "there might be trouble" if speech activity occurs proximate to incumbent government officials and high-ranking party officials. *See* RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES 31–54 (2012).

the option of simply renting or buying real property for the purpose of engaging in First Amendment activity; poor speakers do not have the luxury of renting or buying space for public protest.[132]

In sum, bright line rules—such as those against content- or viewpoint-based regulations of speech, or prior restraints—facilitate the ability of those with the property necessary to speak to do so. But what if a would-be speaker needs access to government property, a government job, a high school or college education, or a license from the state? Categorical rules will almost never favor would-be speakers over the government in these circumstances. The social cost of categorical rules will be distributed against financially marginal speakers—and particularly those who espouse highly unpopular causes.[133]

If we actually believe in the equality of all citizens as participants in the process of democratic self-government,[134] then this outcome should be completely unacceptable. A vision of equality limited to the equal voting weight of all ballots is both empty and unduly formalistic.[135] The ability to participate meaningfully in the process of democratic deliberation that informs the act of voting must be part of the overall constitutional picture.

IV. CAN FIRST AMENDMENT RULES SUCCESSFULLY ACCOMMODATE "PLAY IN THE JOINTS"?

Does a solution exist to the problem of judges incurring an unacceptable risk of the appearance of bias if the Supreme Court were to once again regularly embrace balancing tests rather than categorical rules in First Amendment cases? In this brief Essay, I cannot hope to address this question in a comprehensive fashion across all areas of First Amendment law.[136] It is possible, however, to sketch out some preliminary thoughts that should inform the answers to this question. Despite the scope of the question and the difficulty in formulating satisfactory answers to it, the problem is one that merits sustained consideration and engagement.

---

[132] KROTOSZYNSKI, *supra* note 8, 1–18, 22–26, 238–39 n.2.

[133] *See* SHIFFRIN, *supra* note 21, at 110–18, 124–30. Professor Shiffrin posits that "the First Amendment spotlights a different metaphor than the marketplace of ideas or the richness of public debate; instead, it supports the American ideal of protecting and supporting dissent by putting dissenters at the center of the First Amendment tradition." *Id.* at 128.

[134] Reynolds v. Sims, 377 U.S. 533, 558, 560–63 (1964); Gray v. Sanders, 372 U.S. 368, 381 (1962).

[135] KROTOSZYNSKI, *supra* note 8, at 215–18.

[136] My recent book, THE DISAPPEARING FIRST AMENDMENT, engages these questions at some length and in some detail, and proposes specific doctrinal reforms in several discrete areas of First Amendment jurisprudence that would, quite literally, create more space and opportunity for ordinary citizens to participate meaningfully in the process of democratic self-government. *See* KROTOSZYNSKI, *supra* note 8, passim.

Many, if not most, serious theories of the First Amendment place the relationship of freedom of expression to the process of democratic self-government at the epicenter of the First Amendment. Leading free speech scholars, including Alexander Meiklejohn,[137] Harry Kalven, Jr.,[138] Owen Fiss,[139] Cass Sunstein,[140] and Vincent Blasi,[141] all posit that speech merits judicial protection because of its integral relationship to the process of democratic self-government. Accordingly, we should be open to the idea that the First Amendment imposes not only negative limitations on the ability of the government to censor speech, but also affirmative duties to facilitate speech related to the process of democratic deliberation.[142] As I will explain below, expanding the First Amendment "ceiling" need not imply abandoning a serious commitment to protect, through robust judicial enforcement of mandatory, categorical rules, a First Amendment "floor." The federal courts could, at least in theory, pursue both goals concurrently; were they to do so, our democracy would be the better for it.

A bifurcated First Amendment jurisprudence that creates a First Amendment "floor" that automatically safeguards speech through categorical rules, but also includes a "ceiling" that offers expanded First Amendment rights when necessary to facilitate the ability of ordinary citizens of average, or below average, means to participate freely in the process of democratic deliberation that informs the casting of ballots on election day could provide a viable potential solution to the problems associated with relying solely on categorical free speech rules. One certainly cannot gainsay that categorical rules play an important role in safeguarding the process of democratic deliberation. As Professor Blasi has observed, bright line, categorical rules make it easier for judges to vindicate First Amendment claims by unpopular speakers seeking to advocate for disliked causes.[143] Judges are able to attempt to deflect responsibility for controversial free speech decisions by invoking the bright line rule: "I wish I could do otherwise, but my hands are tied!"[144]

---

[137] MEIKLEJOHN, *supra* note 4, at 22–27, 89–91.

[138] HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 89–105 (Jamie Kalven ed., 1988); HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 140–45 (1965).

[139] OWEN M. FISS, THE IRONY OF FREE SPEECH (1996); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408–16 (1986).

[140] SUNSTEIN, *supra* note 62, at ix-xi, 44–48, 202–06; SUNSTEIN, *supra* note 4, at 19–22.

[141] Blasi, *supra* note 61, at 449–52.

[142] SUNSTEIN, *supra* note 62, at ix ("The idea of free speech has an affirmative side.").

[143] Blasi, *supra* note 61, at 468–73.

[144] Justice Kennedy took this approach in Texas v. Johnson, 491 U.S. 397 (1989), the Supreme Court's landmark First Amendment decision that held flag burning to be protected expressive conduct. In his concurring opinion, Kennedy noted that his vote in the case "exact[ed] a personal toll," *id.* at 420, and more-or-less apologized for it:

As Professor Fred Schauer has explained, judges are always responsible for their decision—and whether to apply, modify, or abolish a legal precedent.[145] He observes that "[w]hen lawyers argue and when judges write opinions, they seek to justify their conclusions, and they do so by offering reasons."[146] Reasons provide legitimacy for an outcome: "Having given a reason, the reason-giver has, by virtue of an existing social practice, committed herself to deciding those cases within the scope of the reason in accordance with the reason."[147]

There's a danger, however, to framing rules in the present to govern the future because, "[i]f the reasons provided by courts constrain future decisions, then giving reasons can be opposed as undesirably encouraging courts to influence decisions arising in contexts at which they can only guess."[148] The more specific and categorical a judge's reason, the greater the risk of making a blown call. Schauer explains that "giving reasons requires decisionmakers to decide cases they can scarcely imagine arising under conditions about which they can only guess, in a future they can only imperfectly predict."[149] Because of this effect—limiting the discretion of future judges to decide a case using the best possible justifications—giving reasons (i.e., creating categorical rules) creates potential social costs that have to be considered when evaluating their utility.[150]

> The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

Id. In other words, Justice Kennedy felt obliged to publicly apologize for vindicating the application of the First Amendment bright line rule against the government engaging in content-based (and arguably viewpoint-based) censorship of core political speech. If the Constitution lacked a First Amendment with a Free Speech Clause, would Justice Kennedy have voted the same way? Of course, it is impossible to know the answer to this question. The constitutional text—and the categorical rule associated with that text—clearly made it more difficult for Kennedy to follow his heart rather than his head. *But cf. id.* at 439 (Stevens, J., dissenting) (arguing that "[t]he ideas of liberty and equality have been an irresistible force in motivating . . . the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach" and positing that "[i]f those ideas are worth fighting for—and our history demonstrates that they are—it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration"). It bears noting that Justice Stevens permitted his personal reverence for the U.S. flag and what it symbolized for him to color his legal judgment. *See id.* at 437 (Stevens, J., dissenting) ("The value of the flag as a symbol cannot be measured. Even so, I have no doubt that the interest in preserving that value for the future is both significant and legitimate.").

[145] *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995).

[146] *Id.* at 635.

[147] *Id.* at 656.

[148] *Id.* at 654.

[149] *Id.* at 658.

[150] *See id.* (observing that "the advantages of giving reasons come at a price" and explaining

These observations have some immediate relevance in considering the desirability of categorical rules over balancing tests in First Amendment law. Even if categorical rules are helpful in constraining judicial discretion in future cases, and are necessary to secure important First Amendment values, we should nevertheless remain open to the possibility of open-ended balancing exercises that provide judges with the flexibility to permit "as applied" challenges to otherwise constitutionally-valid speech regulations.[151] In other words, one could imagine a more subtle, nuanced First Amendment world in which categorical rules play an important role in constraining the government's censorial impulses—but which operate in conjunction with more open-ended balancing tests of the sort embraced by the Warren Court.[152]

Categorical rules, such as the rules against content and viewpoint-based speech regulations and the rule against prior restraints, play an important role in facilitating open access to the political marketplace of ideas. Accordingly, it would be a mistake—and a big one—to posit that categorical rules have no role to play in interpreting and applying the First Amendment. Categorical rules do important work vindicating expressive freedoms. But to acknowledge the potential of categorical rules is not to rule out the possibility of balancing tests adding something important to the adjudication of free speech disputes. A dual system of rules that incorporates a mix of categorical rules and balancing tests could better secure expressive freedoms than a system that relies exclusively on only one kind of decisional rule.

Access to public property provides an example of an area of First Amendment jurisprudence where such a bifurcated system could be implemented in a fashion that would do considerably more good than harm to core First Amendment values. Cases like *Flower* v. *United States*,[153] *Brown* v. *Louisiana*,[154] and *Williams v. Wallace*[155] all demonstrate that it is entirely possible to imagine a First Amendment world in which the government could be required to make non-public forums available for speech activity without undue disruption or inconvenience.[156]

Yet, the Supreme Court's more recent decisions, such as *United States v. Kokinda*[157] and *International Society for Krishna*

---

that "[n]ot only does giving reasons take time and sometimes open up conversations best kept closed, it also commits the decisionmaker in ways that are rarely recognized").

[151] KROTOSZYNSKI, *supra* note 8, at 29–31, 40–42.

[152] *See supra* text and accompanying notes 64 to 104.

[153] Flower v. United States, 407 U.S. 197 (1971).

[154] Brown v. Louisiana, 383 U.S. 1 (1966).

[155] Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965).

[156] KROTOSZYNSKI, *supra* note 131, at 194–202, 204–05.

[157] United States v. Kokinda, 497 U.S. 720 (1990).

Consciousness v. Lee,[158] adopt and apply a rigid categorical approach that removes literally *any* burden of justification from the government for banning speech activity on a military base, at a post office, or using a main regional highway. If government property constitutes a nonpublic forum, then that is that—would be speakers enjoy no First Amendment rights of access to it.

Would it be wholly unreasonable to imagine a First Amendment world in which *some* would-be speakers—but not *all* would-be speakers—might be able to access a military base for that expressive activity? Suppose that serious allegations of sexual harassment arise against a base commander (borrowing the facts of *Greer* for this hypothetical) and persons wish to protest the base commander's failure to fully and fairly address these allegations. Public outrage erupts. In the age of the #MeToo movement, would a mass public protest on the base's property related to the base commander's indifference to the allegations be entirely unthinkable? Should a protest on base property directed against the failure to investigate the allegations—hybrid speech that implicates not only the freedoms of speech, association, and assembly, but also the right of petition,[159] be permitted via an appropriate judicial order?[160]

In my view, would-be speakers who can establish a nexus between particular property for speech activity and protest should have an opportunity to make their case—even if, in general, military base property is not available for public protest activity.[161] Over time courts would work out an analytical framework that establishes clear rules of the road (so to speak); as decisions accrete over time, one would expect to see greater consistency of results. This is, in important respects, the essence of the common law method of adjudication.[162] Inconsistency of results, in theory, should decline with the passage of time.

---

[158] Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992).

[159] KROTOSZYNSKI, *supra* note 131, at 1–10, 208–16.

[160] *See, e.g.*, *Williams*, 240 F. Supp. at 106–109.

[161] *See* Greer v. Spock, 424 U.S. 828 (1976) (upholding a ban on partisan political rallies on a New Jersey military base). *But cf.* Flower v. United States, 407 U.S. 197 (1971) (permitting leafletting on a Texas military base notwithstanding the base commander's desire to prohibit it).

[162] Some federal agencies have used case-by-case adjudication, rather than quasi-legislative rulemaking, using so-called notice and comment informal procedures, to establish regulatory policies. The National Labor Relations Board (NLRB) provides perhaps the best example of a federal agency taking this approach—using adjudication rather than rulemaking to establish major regulatory policies. *See* Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274 (1991). The reason is obvious—virtually *all* NLRB cases involve the need to balance carefully an employer's interest in operating a workplace efficiently against labor organizers or unions seeking to exercise collective bargaining rights. *See generally* Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. 1467 (2015).

Professor Tim Zick has written lucidly and persuasively about the importance of place to public protest.[163] Place and spatial topography can be essential to the ability of would-be speakers to disseminate a message to a particular audience.[164] First Amendment doctrinal rules should be sufficiently flexible to take this important reality into account.

In fact, in the wider world, constitutional courts routinely engage in balancing exercises to determine whether the government may enforce a law or regulation that abridges a fundamental right.[165] As one group of legal scholars has explained, "[t]o speak of human rights is to speak of proportionality."[166]

Proportionality analysis generally involves a two-step process: First, a plaintiff seeking to invoke a constitutional right must establish that the government's actions violate an established constitutional right. Once the plaintiff successfully invokes a constitutionally-protected right, the burden shifts to the government to establish that the abridgment of the right is prescribed by law and demonstrably necessary in a free and democratic society, which means that the measure advances an important or pressing government interest, does so directly, and is narrowly tailored to achieve the government's objective (i.e., constitutes a "minimal impairment" of the right).[167]

Simply put, there's no good reason why the First Amendment could not reflect and incorporate a kind of balancing exercise that vests judges, federal and state alike, with the discretion to require the government to facilitate speech activity when it has the ability—but not the will—to do so. The First Amendment, like the Roman god Janus, could have two faces: a negative scope of application (which would encompass categorical rules against content- and viewpoint-based discrimination, the ban on prior restraints, and the invalidity of press licensing measures) and, at the same time, a positive aspect that imposes affirmative obligations on the state to empower ordinary people to

---

[163] TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES (2009).

[164] KROTOSZYNSKI, *supra* note 131, at 4–10, 50–54, 197–216.

[165] AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Doron Kalir trans., 2012); Vicki C. Jackson, *Constitutional Law in the Age of Proportionality*, 124 YALE L.J. 3094 (2015).

[166] Grant Huscroft, et al., *Introduction* in PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING 1, 1 (Grant Huscroft, Bradley W. Miller & Grégoire Webber eds., 2014). These legal scholars posit that "[i]t is no exaggeration to claim that proportionality has overtaken rights as the orienting idea in contemporary human rights law and scholarship." *Id.* For a thoughtful explanation and overview of the centrality of proportionality review to securing fundamental rights in many democratic polities, see *id.* at 1–4.

[167] R. v. Oakes, [1986] 1 S.C.R. 103, 112 (Can.); *see also* Vicki C. Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENT. 803, 804 (2004) ("Canada has played a particularly influential role in the transnational development of proportionality testing in constitutional law.").

access and engage the political marketplace of ideas. The negative aspect would constitute a kind of "floor," whereas the positive aspect would serve as a kind of "ceiling."

Adopting this approach would not level down any would-be speaker currently protected under existing doctrinal rules; it would not suffer from the vice of diminishing any existing First Amendment rights. At the same time, taking this approach would have the distinct First Amendment virtue of expanding the universe of protected expression by facilitating more speech related to the process of democratic self-government. If free speech is integral to the process of democratic self-government, then interpreting and applying the First Amendment to impose affirmative duties on the government to facilitate speech of this kind would be good for democracy. Accordingly, federal courts should embrace, not reject, doctrinal innovations that make it easier for more citizens to speak their version of truth to power. Moreover, they should do so even if this requires the courts to embrace an affirmative role for the First Amendment in literally creating the space necessary for democracy to function.

Taking this approach would, of course, involve the risk of judges appearing to favor some speakers over others. But this holds true in any context where a judge must openly and transparently exercise discretion to resolve a pending dispute.[168] The amount of discretion associated with proportionality review is quite broad and open-ended. It vastly exceeds the more limited scope of discretion that this Essay proposes as a new aspect of First Amendment jurisprudence. Moreover, constitutional courts in liberal democracies that practice proportionality review, such as Canada, Germany, and South Africa, nevertheless enjoy broad public confidence and institutional legitimacy.[169] This suggests that the presence of judicial discretion in the process of enforcing constitutional

---

[168] KROTOSZYNSKI, *supra* note 8, at xiii-xiv, 217–18, 223–25; KROTOSZYNSKI, *supra* note 131, at 202–07.

[169] It bears noting that Justice Stephen Breyer has tentatively endorsed the use of proportionality analysis—and has done so specifically in the context of the First Amendment. *See* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 367 (2009) (Breyer, J., dissenting) (arguing that the federal courts, when deciding a First Amendment question, should ask "whether the statute imposes a burden upon speech that is disproportionate in light of the other interests the government seeks to achieve," observing that "[c]onstitutional courts in other nations also have used similar approaches when facing somewhat similar problems," and citing and describing cases from Canada, Israel, South Africa and the European Court of Human Rights that use proportionality analysis in cases involving expressive freedoms); *see also* Sorrell v. IMS Health Inc., 564 U.S. 552, 582 (2011) (Breyer, J., dissenting) ("In this case I would ask whether Vermont's regulatory provisions work harm to First Amendment interests that is disproportionate to their furtherance of legitimate regulatory objectives."); United States v. Playboy Entm't Group, 529 U.S. 803, 841 (2000) (Breyer, J., dissenting) (arguing that "a judge [should] not . . . apply First Amendment rules mechanically" but instead "decide whether, in light of the benefits and potential alternatives, the statute works speech-related harm (here to adult speech) out of proportion to the benefits that the statute seeks to provide (here, child protection)").

rights need not be antithetical to the reputations of judges as honest brokers (or neutral adjudicators). Discretion need not seriously diminish, much less destroy, public confidence in the federal courts.

If free and open democratic deliberation is an essential condition for elections to serve as an effective means of securing government accountability, and also the principal means of conveying democratic legitimacy on the elected institutions of government, the ability to participate in this process must be self-evidently open to any and all citizens. Simply put, elections conducted without free and open public debate cannot convey democratic legitimacy on the institutions of government. To the extent that the process of democratic deliberation is more open and inclusive, democracy will be the stronger for it.

V. CONCLUSION

Alexander Meiklejohn famously argued for public subsidies to support and facilitate the process of democratic deliberation.[170] He suggested "[i]n every village, in every district of every town or city, there should be established at public expense cultural centers inviting all citizens, as they may choose, to meet together for the consideration of public policy."[171] It might be unrealistic to expect the government to build free speech community centers for the purpose of engaging in democratic discourse. Nevertheless, the First Amendment has a positive, or affirmative, role to play in securing the process of democratic deliberation.[172]

Our doctrinal First Amendment rules should facilitate, not impede, the ability of ordinary citizens to participate meaningfully in the process of democratic self-government. If this is our objective, we have a lot of work left to do—yet, unfortunately, the needle seems to be moving in the wrong direction. Rather than pressing the government to facilitate speech when it has the ability to do so without undue inconvenience or disruption to its operations, the Supreme Court instead seems quite content to permit the government to manage its resources more or less like a private citizen or corporation.[173] In a polity that purports to

---

[170] Meiklejohn, *supra* note 62, at 260–61.

[171] *Id.* at 260.

[172] SUNSTEIN, *supra* note 4, at 20–23.

[173] *See* Davis v. Commonwealth, 167 U.S. 43, 47–48 (1897) ("The Fourteenth Amendment to the Constitution of the United States does not destroy the power of the States to enact police regulations as to the subjects within their control . . . and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the State."). Thus, the government, like a private property owner, enjoys the right to decide who may use its property for speech activity. *See id.* at 48 (holding that "[t]he right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser").

maintain a serious commitment to the equality of all citizens—"one person, one vote" in the words of the Supreme Court[174]—we can and must do better to enable ordinary citizens of average means to participate in the political marketplace of ideas.

In conclusion, contemporary First Amendment jurisprudence all too often has come to resemble a Procrustean bed. In its efforts to exorcise judicial discretion from cases involving expressive freedoms, the Roberts Court has disregarded relevant facts—while at the same time, stretched certain relevant legal and policy considerations beyond their ability to support a result.[175] The Aristotelean virtuous mean[176] lies between the vicious extremes of embracing a First Amendment universe featuring only unfettered judicial discretion or categorical rules that produce consistent results on a predictable basis, but sanction far-reaching government efforts to stifle or squelch dissenting voices. The truth—if the Roberts Court could but find the wisdom to see it—is that a democratic polity requires *both* categorical rules *and* balancing tests to ensure that democratic discourse is "uninhibited, robust, and wide open."[177]

---

[174] Gray v. Sanders, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."); *see also* SUNSTEIN, *supra* note 4, at 20 (positing that "the system of deliberative democracy is premised on and even defined by reference to the commitment to political equality" and "[a]t least in the public sphere, every person counts as no more or less than one").

[175] *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 425–26 (2006) (rejecting "the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties" and refusing to extend any First Amendment protection to government employees for such statements because "[o]ur precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job"). *Garcetti* clearly constitutes a First Amendment Procrustean bed: It fails to acknowledge or engage in the complexities presented by circumstances in which a government employee speaks out incident to her official duties. A more nuanced, context-specific approach would take into account the relevance of the speech to the ability of voters to hold the government accountable; speech of a whistleblowing cast should have a stronger claim on the First Amendment than proselytizing while on the job at the DMV. *See* KROTOSZYNSKI, *supra* note 8, at 88–94 (advocating enhanced First Amendment protection for "whistleblowing speech" by government employees and distinguishing it from more generic forms of government employee speech about matters of public concern).

[176] Aristotle, THE NICHOMACHEAN ETHICS 42-53, paras. 1106a5–1109b (Terence Irwin trans., Hackett Publishing Co. 1985); *see also* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 286–88 (1996) (describing and discussing the Aristotelian concept of the "virtuous mean" and noting that it lies between problematic extreme forms of behavior that reflect either a surfeit or a shortage of a particular character trait).

[177] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be *uninhibited, robust, and wide-open*, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.") (emphasis added).