

AN ELASTIC AMENDMENT: JUSTICE STEPHEN G. BREYER'S  
FLUID CONCEPTIONS OF FREEDOM OF SPEECH

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“Words like ‘freedom of speech’ do not define themselves.”  
— *Justice Stephen G. Breyer*<sup>1</sup>

During the past two decades, plenty of commentators labeled United States Supreme Court Justice Stephen G. Breyer a “liberal” judge.<sup>2</sup> Other observers, however, declared that Breyer was

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<sup>1</sup> Terry Gross, *Justice Breyer: The Court, the Cases and Conflicts*, NPR (Sept. 14, 2010, 11:00 AM), <http://www.npr.org/templates/story/story.php?storyId=129831688>.

<sup>2</sup> See, e.g., Ken I. Kersch, *Stephen Gerald Breyer*, in *BIOGRAPHICAL ENCYCLOPEDIA OF THE SUPREME COURT: THE LIVES AND LEGAL PHILOSOPHIES OF THE JUSTICES* 74, 74 (Melvin I. Urofsky ed., 2006) (“Along the way, Breyer has earned a place as a worthy liberal intellectual counterpart—and sparring partner—to conservative [J]ustice Antonin Scalia.”); David Aram Kaiser, *Putting Progress Back Into Progressive: Reclaiming a Philosophy of History for the Constitution*, 6 WASH. U. JURIS. REV. 257, 267 (2014) (“Breyer’s account of active liberty is consistent with the role that modern liberalism has envisioned for the modern welfare state.”); David E. Bernstein & Josh Blackman, *Supreme Court Justice Stephen Breyer Shows Progressive Streak*, N.J. STAR-LEDGER (July 12, 2011, 11:24 AM), [http://blog.nj.com/njv\\_guest\\_blog/2011/07/supreme\\_court\\_justice\\_stephen.html](http://blog.nj.com/njv_guest_blog/2011/07/supreme_court_justice_stephen.html) (“Breyer seems poised to become the . . . doyen of the [C]ourt’s liberal wing”); David Cole, *Has the Court Turned Left?*, N.Y. REVIEW BOOKS (June 29, 2015, 4:01 PM), <http://www.nybooks.com/blogs/nyrblog/2015/jun/29/supreme-court-kennedy-how-liberal/> (stating that Breyer, along with Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan comprised the current Court’s liberal wing); Jan Crawford, *Q&A: Justice Stephen Breyer*, CBS NEWS (Sept. 13, 2015, 9:47 AM), <http://www.cbsnews.com/news/q-a-justice-stephen-breyer/> (“[Breyer is] not only known as a liberal-leaning justice, but also the one most willing to publicly debate Scalia and other Justices who adhere to ‘Originalism’—a philosophy focused on the original understanding of the Constitution.”); Jeffrey Toobin, *Without a Paddle: Can Stephen Breyer Save the Obama Agenda in the Supreme Court?*, NEW YORKER, Sept. 27, 2010, at 34, 39 (“Like Bill Clinton, who appointed him, Breyer is a cautious, pragmatic liberal on social issues and civil liberties—pro-choice, pro-affirmative action, steadfast on the separation of church and state, suspicious of wide claims for executive power in wartime. He votes accordingly.”); Ben Kamisar, *Justice Thomas Sides with Liberals in Blocking Confederate License Plate*, HILL (June

unexpectedly “conservative.”<sup>3</sup> Some pundits insisted that Breyer is a “judicial activist,”<sup>4</sup> while others claimed that he embraces traditional judicial restraint and showed “deference” to Congress.<sup>5</sup> A number of analysts emphatically called him “progressive,”<sup>6</sup> while several other

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18, 2015, 11:06 AM), <http://thehill.com/blogs/blog-briefing-room/245401-justice-thomas-sides-with-liberals-in-blocking-confederate-license> (listing Breyer as one of the current Supreme Court bench’s liberals); Marti Lotman, *Liberal Justice Breyer: Other Side ‘Out to Lunch,’* NEWSMAX (Feb. 16, 2011, 9:48 PM), <http://www.newsmax.com/InsideCover/stephen-breyer-supreme-court/2011/02/16/id/386386/>.

<sup>3</sup> See, e.g., David Cole, *Justice Breyer v. The Death Penalty*, NEW YORKER (June 30, 2015), <http://www.newyorker.com/news/news-desk/justice-breyer-against-the-death-penalty> (“Breyer is the liberal Justice most likely to agree with his conservative colleagues.”); Hannah Fairfield & Adam Liptak, *A More Nuanced Breakdown of the Supreme Court*, N.Y. TIMES (June 26, 2014), [http://www.nytimes.com/2014/06/27/upshot/a-more-nuanced-breakdown-of-the-supreme-court.html?\\_r=0](http://www.nytimes.com/2014/06/27/upshot/a-more-nuanced-breakdown-of-the-supreme-court.html?_r=0); see also Adam Winkler, *Why Is John Roberts Siding with the Supreme Court’s Liberals?*, SLATE (June 11, 2015, 2:10 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2015/06/john\\_roberts\\_isn\\_t\\_a\\_reliable\\_conservative\\_vote\\_the\\_chief\\_justice\\_is\\_siding.html](http://www.slate.com/articles/news_and_politics/politics/2015/06/john_roberts_isn_t_a_reliable_conservative_vote_the_chief_justice_is_siding.html) (stating that at the time of this article, Roberts and Breyer had voted together on a surprising 90% of cases during that term).

<sup>4</sup> See JAMES D. BEST, *PRINCIPLED ACTION: LESSONS FROM THE ORIGINS OF THE AMERICAN REPUBLIC* 146 (2012) (claiming that commentators writing about Breyer’s judicial restraint were badly mistaken); *PRINCIPLES AND PRACTICE OF AMERICAN POLITICS: CLASSIC AND CONTEMPORARY READINGS* 401 (Samuel Kernell & Steven S. Smith, eds., 5th ed. 2013) (noting that many people view Justice Breyer’s book *Active Liberty* as the work of an “activist judge”); Tom Feeney, *Mystics of the Court: Stephen Breyer’s Activism*, NAT’L REVIEW (Dec. 14, 2005, 8:31 AM), <http://www.nationalreview.com/article/216249/mystics-court-tom-feeney>; see also 1 ELLIS WASHINGTON, *THE PROGRESSIVE REVOLUTION: LIBERAL FASCISM THROUGH THE AGES* 77 (2013) (calling Breyer a “judge gone wild” and a jurist who desires the creation of a judicial “oligarchy”).

<sup>5</sup> See Larry Kramer et al., *Panel on Originalism and Pragmatism*, in *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 183 (Steven G. Calabresi ed., 2007) (listing Breyer, along with Rehnquist and Ginsburg, as one of the Supreme Court’s greatest proponents of judicial restraint); Nelson Lund, *Two Faces of Judicial Restraint (Or Are There More?)* in *McDonald v. City of Chicago*, 63 FLA. L. REV. 487, 523 (2011) (comparing Breyer’s opinion in this particular case to the type of restraint one would expect from an eighteenth-century common law jury); Paul Gewirtz & Chad Golder, Opinion, *So Who Are the Activists?*, N.Y. TIMES (July 6, 2005), <http://www.nytimes.com/2005/07/06/opinion/so-who-are-the-activists.html> (stating that Breyer was the Supreme Court justice least likely to overturn a federal law); Jeffrey Rosen, *A Conservative Activist Court*, CBS NEWS (July 13, 2007, 3:26 PM), <http://www.cbsnews.com/news/a-conservative-activist-court/> (stating that Breyer, along with Ginsburg, exemplify the concept of judicial restraint more than any other Supreme Court justices at the time of that article’s publication) [hereinafter Rosen, *A Conservative Activist Court*]; Jeffrey Rosen, *Breyer Restraint*, NEW REPUBLIC, July 11, 1994, at 19, 21 [hereinafter Rosen, *Breyer Restraint*]; Jeffrey Toobin, *Breyer’s Big Idea: The Justice’s Vision for a Progressive Revival on the Supreme Court*, NEW YORKER, Oct. 31, 2005, at 36, 38 (“Paying deference to legislative judgments is a touchstone of Breyer’s philosophy.”).

<sup>6</sup> See, e.g., Bernstein & Blackman, *supra* note 2; Jeffrey Rosen, *What’s a Liberal Justice Now?*, N.Y. TIMES (May 26, 2009), <http://www.nytimes.com/2009/05/31/magazine/31court-t.html> (linking Breyer with other “progressive” jurists); Toobin, *supra* note 5, at 36; Damon Root, *‘A Freedom-Destroying Cocktail’: Justice Breyer Keeps Siding with the Cops in Fourth Amendment Cases*, REASON.COM (Apr. 28, 2014, 3:50 PM), <https://reason.com/blog/2014/04/28/a-freedom-destroying-cocktail-justice-br> (“It’s common these days for progressives to embrace Justice Breyer as one of their biggest heroes on the Supreme Court.”); Adam Winkler, *Active Liberty Lives!: Justice Breyer’s Opinion in the Recess*

authorities deemed his approach to deciding cases “pragmatic” or “empirical.”<sup>7</sup> Some announced that he is a “technocrat” with close government connections,<sup>8</sup> while others found that he is a “consensus builder” among his judicial brethren.<sup>9</sup> Writers compared him to bushels of historical figures, linking him to everyone from Benjamin

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*Appointments Case Deals a Blow to Originalism*, SLATE (July 8, 2014, 11:38 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/07/justice\\_breyer\\_s\\_theory\\_of\\_constitutional\\_interpretation\\_finally\\_gets\\_its.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/justice_breyer_s_theory_of_constitutional_interpretation_finally_gets_its.html) (“His is a progressive vision of the Constitution, one articulated previously in his books, like *Active Liberty*, and in various concurring and dissenting opinions he has authored over the years.”). While the definition of “progressive” can take many forms, and the definition that each commentator cited here intends is unclear, one can reasonably assume that most observers of the judiciary use the term “progressive” to reference a jurist’s tendency to avoid absolutist statements, engage in heavily fact-based analysis, and observe changing social conditions and their effects upon law and society. See, e.g., Thomas C. Grey, *Modern American Legal Thought, Patterns of American Jurisprudence*, 106 YALE L.J. 493, 497–500 (1996).

<sup>7</sup> DONALD C. DAHLIN, WE THE PEOPLE: A BRIEF INTRODUCTION TO THE CONSTITUTION AND ITS INTERPRETATION 38 (2012); Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 YALE L.J. 1675, 1677 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)) (“Breyer [is] a consummate pragmatic judge.”); Ken I. Kersch, *Justice Breyer’s Mandarin Liberty, Active Liberty: Interpreting Our Democratic Constitution*, 73 U. CHI. L. REV. 759, 760 (2006) (book review) (“In approaching a policy problem or a case, Justice Breyer is characteristically mindful that an appropriate judgment is possible only when a wealth of empirical data is close at hand.”); Joan Biskupic, *Breyer: Pragmatic Lawyer and Judge*, WASH. POST (June 27, 1994), <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/22/AR2007082201578.html> (“Breyer is not an ideological visionary at heart but a pragmatist with a time-honored American creed: that government can be made to work for people.”); Richard Wolf, *After 20 Years, Breyer is High Court’s Raging Pragmatist*, USA TODAY (Aug. 7, 2014, 10:21 AM), <http://www.usatoday.com/story/news/politics/2014/08/07/justice-stephen-breyer-supreme-court-20-years/13269445/>.

<sup>8</sup> MARK TUSHNET, IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT 198 (2013); Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 U. CHI. L. REV. 1911, 1919–20 (2009); Kersch, *supra* note 7, at 759 (“Most of the limited opposition to Breyer’s appointment came not from Republicans, but from the left wing of the Democratic Party, which saw him as a bloodless technocrat too cozy with business interests and insufficiently committed to civil liberties and civil rights.”); Toobin, *supra* note 5, at 39 (“Deference to Congress, a technocrat’s belief in governmental solutions, and a taste for compromise have all figured in Breyer’s jurisprudence.”).

<sup>9</sup> Chris Bull, *The Scoop on Breyer: When it Comes to Gay Rights, President Clinton’s Latest Supreme Court Nominee Keeps his own Counsel*, ADVOCATE, June 28, 1994, at 43, 44; Carl M. Cannon & Lyle Denniston, *Clinton Names Judge Breyer to Supreme Court*, BALT. SUN (May 14, 1994), at 1A (“In choosing [Breyer] . . . , Mr. Clinton was tapping exactly the sort of justice he had in mind—a consensus builder who would give the moderate bloc dominance on the high court.”); David Margolick, *Scholarly Consensus Builder - Stephen Gerald Breyer*, N.Y. TIMES (May 14, 1994), <http://www.nytimes.com/1994/05/14/national/14BREY.html>.

Constant<sup>10</sup> to Zechariah Chafee,<sup>11</sup> Louis Brandeis<sup>12</sup> to Robert Bork,<sup>13</sup> and even Grover from Sesame Street.<sup>14</sup>

Still, despite all of this widely ranging and often-conflicting postulating, Breyer remains an unexpectedly enigmatic figure on the Court today.<sup>15</sup> This is not intentional on his part, given that Breyer is a vigorous questioner at oral arguments; an emphatic writer about constitutional interpretation and the judiciary's role in society; and a frequent speaker at events beyond the Court's marble walls.<sup>16</sup> Still,

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<sup>10</sup> Richard A. Posner, *Justice Breyer Throws Down the Gauntlet*, 115 YALE L.J. 1699, 1700 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)). Breyer explicitly drew parallels between Constant's theories about the "liberty of the moderns" in contrast to the "liberty of the ancients" and Breyer's own aspirations for American democratic ideals in his book *Active Liberty*. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 4–6 (2005).

<sup>11</sup> See Charles L. Barzun, *Politics or Principle? Zechariah Chafee and the Social Interest in Free Speech*, 2007 B.Y.U. L. REV. 259, 262–63, 264, 265–66; David Bernstein, *Breyer's Dangerous Dissent in McCutcheon (the Campaign Finance Case)*, WASH. POST (Apr. 2, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/02/breyers-dangerous-dissent-in-mccutcheon-the-campaign-finance-case/>.

<sup>12</sup> CHRISTOPHER P. BANKS & DAVID M. O'BRIEN, *THE JUDICIAL PROCESS: LAW, COURTS, AND JUDICIAL POLITICS* 184 (2016); Owen M. Fiss, *The Censorship of Television*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 256, 273 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (describing Breyer's heavy reliance on three of Brandeis's concurring opinions); Robert F. Bauer, *Democracy As Problem Solving: Campaign Finance and Justice Breyer's Theory of "Active Liberty"*, 60 U. MIAMI L. REV. 237, 242 (2006). Breyer himself has declared significant admiration for Brandeis's approach to judicial problem-solving, particularly Brandeis's willingness to stand aside when the legislature held a clear advantage over the judiciary in grasping a situation. See Stephen G. Breyer, *Justice Brandeis as Legal Seer*, 42 BRANDEIS L.J. 711, 717, 718 (2004).

<sup>13</sup> Bernstein & Blackman, *supra* note 2 ("Ironically, the modern judge whose views most resemble Breyer's is failed Supreme Court nominee Robert Bork. Like Breyer, Bork rejected modern cases protecting individual rights, instead favoring majority rule . . ."). See also TIMOTHY SANDEFUR, *THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY* 125–130 (2014) (comparing the "progressive" philosophy of Breyer with the "progressive" philosophy of Bork).

<sup>14</sup> Dahlia Lithwick, *Justice Grover Versus Justice Oscar*, SLATE (Dec. 6, 2006, 4:31 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2006/12/justice\\_grover\\_versus\\_justice\\_oscar.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2006/12/justice_grover_versus_justice_oscar.html). The same article compared Justice Antonin Scalia to the Sesame Street character Oscar the Grouch. *Id.*

<sup>15</sup> This statement refers not only to Breyer's voting in cases argued before the Court, but also the rationales adopted in his opinions. For one illustration of his lack of predictability, see the tremendous variety among comments about Breyer's jurisprudence. See *supra* notes 2–14 and accompanying text. For another example, look at the large number of cases studied here where Breyer authored dissents or concurring opinions with which no other justice joined, indicating that his opinions tend to differ to a significant extent from even those justices with whom he agrees about the results in cases. See *infra* Parts II and III.

<sup>16</sup> See RYAN A. MALPHURS, *RHETORIC AND DISCOURSE IN SUPREME COURT ORAL ARGUMENTS: SENSEMAKING IN JUDICIAL DECISIONS* 96–97 (2013); Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 246–47 (2002); Robert Barnes, *Breyer on the Constitution*, WASH. POST (Sept. 19, 2010, 8:19 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/19/AR2010091904342.html>; Emmarie Huettman, *Breyer and Scalia Testify at Senate Judiciary Hearings*, N.Y. TIMES (Oct. 5, 2011), <http://www.nytimes.com/2011/10/06/us/politics/breyer-and-scalia-testify-at-senate->

a clear understanding of his ideas often seems to be hiding from plain sight. On a Court frequently divided along rigid ideological and partisan lines,<sup>17</sup> history demonstrates that one cannot always be certain of Breyer.<sup>18</sup> Justice Anthony Kennedy receives considerably more attention as the “swing” vote on this bench,<sup>19</sup> but even a cursory jurisprudential glance suggests that Breyer seems to play closer to the political center than one might expect at first glance.<sup>20</sup>

Given this apparent and frequently overlooked unpredictability, questions inherently arise about what trends and patterns, if any, exist within Breyer’s judicial decision-making. On a Court where so many votes debatably are foregone conclusions in politically controversial cases,<sup>21</sup> Breyer’s perceptible independence makes him

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hearing.html; Ashby Jones, *I Can Read What I Want,’ Says Breyer on International-Law Debate*, WALL ST. J. (Apr. 2, 2010, 12:33 PM), <http://blogs.wsj.com/law/2010/04/02/i-can-read-what-i-want-says-breyer-on-international-law-debate/>; Adam Liptak, *Justice Breyer Sees Value in a Global View of Law*, N.Y. TIMES (Sept. 12, 2015), <http://www.nytimes.com/2015/09/13/us/politics/justice-breyer-sees-value-in-a-global-view-of-law.html>; *infra* Part I (discussing Breyer’s widely read published writings about his views on certain legal issues with significant implications on cases heard before the Supreme Court).

<sup>17</sup> See David Paul Kuhn, *The Incredible Polarization and Politicization of the Supreme Court*, ATLANTIC (June 29, 2012), <http://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/>; Adam Liptak, *The Polarized Court*, N.Y. TIMES (May 10, 2014), <http://www.nytimes.com/2014/05/11/upshot/the-polarized-court.html>; Lawrence Baum & Neal Devins, *Split Definitive: For the First Time in a Century, the Supreme Court is Divided Solely by Political Party*, SLATE (Nov. 11, 2011, 5:27 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/11/supreme\\_court\\_s\\_partisan\\_divide\\_and\\_obama\\_s\\_health\\_care\\_law.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/11/supreme_court_s_partisan_divide_and_obama_s_health_care_law.html); Norm Ornstein, *Is It Time to Give Term Limits to Supreme Court Justices?*, NAT’L J. (May 21, 2014), <http://www.nationaljournal.com/daily/2014/05/21/is-time-give-term-limits-supreme-court-justices>.

<sup>18</sup> See, e.g., Arnold H. Loewy, *A Tale of Two Justices (Scalia and Breyer)*, 43 TEX. TECH L. REV. 1203, 1203, 1205–06, 1207 (2011) (stating that Breyer, while a liberal, is more likely than other liberal justices to vote with the Court’s conservative justices, and noting that that Breyer tends to prefer standards rather than rules of certainty); Fairfield & Liptak, *supra* note 3; Jillian Rayfield, *Liberals Find Common Ground With . . . Scalia?*, SALON (June 6, 2013, 7:45 AM), [http://www.salon.com/2013/06/06/liberals\\_find\\_common\\_ground\\_with\\_scalia/](http://www.salon.com/2013/06/06/liberals_find_common_ground_with_scalia/); see *infra* Part III.C (discussing the justices with whom Breyer voted most often and least often in the freedom of speech cases discussed in this article). Indeed, even Breyer at times seems to become uncertain of his own decision-making. See Linda Greenhouse, *Between Certainty and Doubt: States of Mind on the Supreme Court Today*, 6 GREEN BAG 2d 241, 244 (2003) (“Justice Breyer is sometimes (or often) right, but usually, and quite publicly, in doubt.”).

<sup>19</sup> See Benjamin Pomerance, *What Might Have Been: 25 Years of Robert Bork on the United States Supreme Court*, 1 BELMONT L. REV. 221, 225 (2014); Massimo Calabresi & David Von Drehle, *What Will Justice Kennedy Do?*, TIME, June 18, 2012, at 30, 31, 39; Richard L. Hasen, *More Than Ever, It’s a Kennedy Court*, MORNING CALL (July 7, 2015, 5:52 PM), <http://www.mcall.com/opinion/mc-supreme-court-justice-kennedy-influence-yv-0708-20150707-story.html>.

<sup>20</sup> See *supra* notes 3, 18 and accompanying text.

<sup>21</sup> See, e.g., Sheldon Whitehouse, *Conservative Judicial Activism: The Politicization of the Supreme Court Under Chief Justice Roberts*, 9 HARV. L. & POL’Y REV. 195, 196–97, 198 208 (2015) (arguing that the choice among the current Court’s conservative members to invoke the

a valuable prize for any advocate whose line of reasoning finds favor with this judge.<sup>22</sup> An abundance of varying and often conflicting viewpoints about the varieties of arguments most likely to win over Breyer only adds to the challenge of this objective.<sup>23</sup>

This article seeks to contribute an element to this increasingly crowded body of scrutiny. It focuses on an area in which the Supreme Court has become particularly active throughout recent years and about which Breyer appears to hold particularly strong opinions: controversies pitting the constitutional guarantees of freedom of speech in a balancing game against competing interests asserted by the federal, state, or local government.<sup>24</sup> Here, too, the opinions about Breyer's hard-to-pin-down tendencies and their effects vary dramatically. To at least one reviewer, his freedom of speech decisions provides "the most important new ideas about the First Amendment on the Supreme Court since Justices Brennan and Black."<sup>25</sup> Others, however, bluntly label his free speech

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doctrine of originalism in recent controversial cases—only when convenient—demonstrates activism among these members to further Republican and corporate interests); Eric Hamilton, *Politicizing the Supreme Court*, 65 STAN. L. REV. ONLINE 35, 35 (2012), <http://www.stanfordlawreview.org/online/politicizing-supreme-court> (indicating that a significant number of Americans believed that politics inappropriately influenced the Supreme Court's recent decisions concerning healthcare); Jaime Fuller, *Have American Politics Killed the Impartial Supreme Court?*, WASH. POST (May 8, 2014), <http://www.washingtonpost.com/news/the-fix/wp/2014/05/08/have-american-politics-killed-the-impartial-supreme-court/> ("There is no doubt that many Supreme Court decisions land along partisan 5–4 lines under the Roberts court . . ."); see sources cited *supra* note 17.

<sup>22</sup> In other words, given that the voting in so many recent cases seem to split along clear ideological or partisan lines, any justice whose voting patterns seem to lean somewhat toward the political center becomes a key individual for any litigator seeking to carry the majority of votes in a case. See Hasen, *supra* note 19 (indicating that because Justice Kennedy is willing to depart from strict partisan voting, Supreme Court advocates view him as the critical swing vote and will focus their briefs directly towards him).

<sup>23</sup> See *supra* notes 2, 5–9, 12 and accompanying text.

<sup>24</sup> See Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 725 (2011); Ronald K.L. Collins, *Exceptional Freedom - The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 413 (2012); Gregory P. Magarian, *The Marrow of Tradition: The Roberts Court and Categorical First Amendment Speech Exclusions*, 56 WM. & MARY L. REV. 1339, 1340 (2015) ("The Roberts Court has made a lot of First Amendment law. Since Chief Justice John Roberts took the Supreme Court's helm in 2006, the Court has issued decisions on the merits in about thirty-five free speech cases."); Adam Liptak, *Study Challenges Supreme Court's Image as Defender of Free Speech*, N.Y. TIMES (Jan. 7, 2012), <http://www.nytimes.com/2012/01/08/us/study-challenges-supreme-courts-image-as-defender-of-free-speech.html>; Laurence Tribe, *Free Speech and the Roberts Court: Uncertain Protections*, WASH. POST (June 3, 2014) <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/03/free-speech-and-the-roberts-court-uncertain-protections/>. Breyer provides a particularly detailed discussion about freedom of speech, and his views about several facets of this subject, in *Active Liberty*. See BREYER, *supra* note 10, at 39–56. Breyer continued his discussions on this subject in his more recent book, *Making Our Democracy Work*. See STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* 159–64 (2010).

<sup>25</sup> Gewirtz, *supra* note 7, at 1681.

jurisprudence “dangerous.”<sup>26</sup> Look deeply enough, and the theories about Breyer’s work in this realm seem to occupy practically every imaginable point on the spectrum.<sup>27</sup>

Judging the merits of Breyer’s freedom of speech jurisprudence, however, is not the focus of this article. Instead, this discussion takes a more empirical approach, attempting to add greater clarity to the ongoing questions about Breyer’s inclinations in this area. By studying twenty-seven leading freedom of speech cases decided during Breyer’s two decades on the Court,<sup>28</sup> and identifying patterns and trends among Breyer’s voting and writing in these matters, this account aims to illustrate several key features regarding Breyer’s positions on these hotly contested legal issues.

The article proceeds in three main sections. Part I looks at several attributes of Breyer’s life prior to his Supreme Court appointment, and explores some of the principal features of his published writings about the law. Part II summarizes the twenty-seven free speech cases that are under review in this discussion, with an emphasis on Breyer’s holding in each. Lastly, Part III identifies trends gleaned from this examination, providing information about trends, patterns, and tendencies about Breyer’s decision-making in the free speech

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<sup>26</sup> David Limbaugh, *Justice Breyer’s Dangerous Jurisprudence*, TOWN HALL (Dec. 5, 2006, 12:01 AM), [http://townhall.com/columnists/davidlimbaugh/2006/12/05/justice\\_breyers\\_dangerous\\_jurisprudence/page/full](http://townhall.com/columnists/davidlimbaugh/2006/12/05/justice_breyers_dangerous_jurisprudence/page/full); Bernstein, *supra* note 11.

<sup>27</sup> See, e.g., OWEN FISS, A WAR LIKE NO OTHER: THE CONSTITUTION IN A TIME OF TERROR 216–17 (Trevor Sutton ed., 2015) (noting that in *Holder v. Humanitarian Law Project*, Chief Justice John Roberts criticized Breyer’s dissenting opinion as being “naïve” about the threats of terrorism, and also noting that Breyer did not declare enough protection for political speech in this same dissenting opinion to satisfy Professor Fiss’s interpretation of the First Amendment); Lillian R. BeVier, *The First Amendment on the Tracks: Should Justice Breyer be at the Switch?*, 89 MINN. L. REV. 1280, 1315 (2005) (“In fact, were [Breyer’s] approach to become the Court’s First Amendment methodology, it would portend the regular exercise of quite arbitrary judicial power.”); Mark Tushnet, *Justice Breyer and the Partial De-Doctrinalization of Free Speech Law*, 128 HARV. L. REV. 508, 514–15 (2014) (discussing Breyer’s tendency to partially, but not totally, avoid creating checklists and other absolute doctrines in his free speech jurisprudence). Breyer even managed to wind up in the headlines when answering a talk show host’s hypothetical question about whether burning the Quran qualified as constitutionally protected speech. Nathan Harden, *Justice Stephen Breyer: Enemy of Free Speech*, HUFFINGTON POST (Sept. 17, 2010, 2:03 PM), [http://www.huffingtonpost.com/nathan-harden/justice-stephen-breyer-en\\_b\\_719485.html](http://www.huffingtonpost.com/nathan-harden/justice-stephen-breyer-en_b_719485.html).

<sup>28</sup> See *infra* Part II. Of the cases studied here, I handpicked five for examination: see for example *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2243–53 (2014); *McCutcheon v. FEC* 134 S. Ct. 1434, 1465–84 (2014) (Breyer, J., dissenting); *United States v. Alvarez*, 132 S. Ct. 2537, 2551–56 (2012) (Breyer, J., concurring); *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2761–71 (2011) (Breyer, J., dissenting); *Garcetti v. Ceballos*, 547 U.S. 410, 444–50 (2006) (Breyer, J., dissenting); the remaining twenty-two cases were chosen at random using a search in LexisNexis for free speech cases decided during Breyer’s tenure on the Supreme Court.

realm and showing where Breyer stands among his brethren on these ever-important constitutional issues.

#### I. THE MAKINGS OF A JUSTICE: STEPHEN G. BREYER'S TRAIL TO WASHINGTON AND THE WORDS THAT HE SHARES BEYOND THE COURT

Stephen Gerald Breyer's roots run deeply into the West Coast.<sup>29</sup> Born into a middle-class Jewish family in San Francisco in 1938, the practice of law and the pursuit of civic ideals were part of his life from the outset.<sup>30</sup> His father, Irving, served as an attorney for the city's public school system.<sup>31</sup> His mother, Anne, an outspoken Democrat, volunteered frequently for the League of Women Voters.<sup>32</sup> Even as a youngster, lessons about partaking in the democratic process existed all around him.<sup>33</sup>

Lessons from school evidently sunk in at a young age, too. His third grade teacher's evaluations about Breyer's proficiency in "participating and cooperating" allegedly served as pivotal tutoring about the importance of collegiality.<sup>34</sup> Yet Breyer stood out in other aspects as well. At age 12, he earned the rank of Eagle Scout, gaining with it the nickname of "troop brain" from the other boys.<sup>35</sup> In high school, he distinguished himself on the debate team, facing off against opponents like future California Governor Jerry Brown.<sup>36</sup>

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<sup>29</sup> See Toobin, *supra* note 5, at 37.

<sup>30</sup> See THOMAS R. HENSLEY, *THE REHNQUIST COURT: JUSTICES, RULINGS, AND LEGACY* 96 (2006); Jennifer L. Jack, *10 Interesting Things You Didn't Know About Stephen Breyer*, U.S. NEWS & WORLD REPORT (Oct. 1, 2007, 3:00 PM), <http://www.usnews.com/news/national/articles/2007/10/01/10-things-you-didnt-know-about-stephen-breyer>.

<sup>31</sup> Jack, *supra* note 30.

<sup>32</sup> *Id.*

<sup>33</sup> For a good overview of ways in which Breyer's home life influenced his judicial philosophies, see Jane Manners, *Stephen G. Breyer*, in *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-2012*, at 492, 492 (Clare Cushman ed., 3rd ed. 2013). In interviews, Breyer has credited his father with instilling in him a "longstanding commitment to participatory democracy" and his mother with "fostering in him a diverse range of non-scholarly interests." *Id.* See also JAMES F. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT* 301 (1995) ("Breyer's mother had advised him not to spend too much time with books, and [Breyer] conceded that she was right. 'I mean, my ideas about people do not come from libraries,' he said.").

<sup>34</sup> See Gewirtz, *supra* note 7, at 1678.

<sup>35</sup> Jack, *supra* note 30.

<sup>36</sup> See James Marshall Crotty, *Do Debaters Make Better Lawyers?*, FORBES (Oct. 3, 2013, 5:45 PM), <http://www.forbes.com/sites/jamesmarshallcrotty/2013/10/03/do-debaters-make-better-lawyers/>; Jack, *supra* note 30. Later, Breyer's high school debate coach noted that he predicted a legal career for Breyer from the outset, stating: "You can spot the potential lawyers early . . . [Breyer] would do copious research on a debate topic while other kids were out, you know, doing things like stealing hubcaps." Molly E. Wharton, *Justice Stephen G. Breyer, HLS '64: Supreme Court Justice and Former Law Professor*, HARVARD CRIMSON (May 29, 2014),



“[Y]ou can’t escape your background, your own experiences [when deciding cases],” Breyer told an audience at New York University decades later, “[a]nd I start with Lowell High School, Class of 1955.”<sup>37</sup>

Before her son graduated high school, Anne Breyer talked him out of attending Harvard.<sup>38</sup> Fearing that he would become “too bookish,” she convinced him to attend Stanford University instead.<sup>39</sup> After four years of substantial academic success there, he went on to attend Oxford University as a Marshall Scholar and then—after two years abroad—wound up at Harvard anyway, enrolling at Harvard Law School in 1961.<sup>40</sup>

His first job after law school brought him to the chambers of United States Supreme Court Justice Arthur Goldberg.<sup>41</sup> A judge with generally liberal inclinations, Goldberg carved out his most memorable niche as a consensus builder, facilitating the historic merger of the American Federation of Labor and the Congress of Industrial Organizations and gaining praise in other areas—including the Security Council of the United Nations—as a gifted negotiator.<sup>42</sup> Interestingly, and perhaps not entirely coincidentally, several commentators refer to Breyer as a liberal consensus-building jurist today.<sup>43</sup>

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<http://www.thecrimson.com/article/2014/5/29/justice-stephen-g-breyer/>.

<sup>37</sup> Toobin, *supra* note 5, at 37.

<sup>38</sup> Jack, *supra* note 30.

<sup>39</sup> *Id.*

<sup>40</sup> Wharton, *supra* note 36. At Harvard, Professor Charles Fried, who taught Breyer’s first-year Criminal Law section, later remembered Breyer as a “very smart, playful, and curious student.” *Id.*

<sup>41</sup> For an excellent, in-depth commentary on Breyer’s clerkship with Goldberg and its potential effects upon Breyer’s judicial inclinations today, see generally Laura Krugman Ray, *The Legacy of a Supreme Court Clerkship: Stephen Breyer and Arthur Goldberg*, 115 PENN ST. L. REV. 83, 110, 134 (2010) (explaining details about Breyer’s clerkship with Goldberg and the effects it had on his career). While Breyer did write a short article about clerking for Goldberg, the piece is primarily a tribute to Goldberg as a strong teacher and a “wonderful lifelong friend,” and reveals little insights into Breyer’s specific opinions about Goldberg’s jurisprudence. *Id.* at 110, 111; see Stephen Breyer, *Clerking for Justice Goldberg*, in JOURNAL OF SUPREME COURT HISTORY 4, 5–6 (1990).

<sup>42</sup> See SEYMOUR M. FINGER, INSIDE THE WORLD OF DIPLOMACY: THE U.S. FOREIGN SERVICE IN A CHANGING WORLD 105–06 (2002); Davidson Nicol, *The Security Council*, in PATHS TO PEACE: THE UN SECURITY COUNCIL AND ITS PRESIDENCY 29 (Davidson Nicol ed., 1981) (“Goldberg was a skilled and respected negotiator during his time on the Council.”); DAVID L. STEBENNE, ARTHUR J. GOLDBERG: NEW DEAL LIBERAL 121 (1996); Gerald Berendt et al., *Arthur J. Goldberg’s Legacies to American Labor Relations*, 32 J. MARSHALL L. REV. 667, 681, 682, 683–84, 701 (1999) (describing Goldberg’s skills as a negotiator, teacher, mentor, and leader); Ray, *supra* note 41, at 88–89; Eric Pace, *Arthur J. Goldberg Dies at 81; Ex-Justice and Envoy to U.N.*, N.Y. TIMES (Jan. 20, 1990), <http://www.nytimes.com/1990/01/20/obituaries/arthur-j-goldberg-dies-at-81-ex-justice-and-envoy-to-un.html>.

<sup>43</sup> See *supra* notes 2, 9 and accompanying text. Additionally, Breyer stated in one interview that Goldberg imparted significant wisdom about managing situations where best efforts at

Also notable is the fact that Court decided one of the most famous First Amendment cases in history, *New York Times v. Sullivan*,<sup>44</sup> just months before Breyer's clerkship began.<sup>45</sup> In this decision, the Court unanimously declared that the First Amendment protected even inaccurate speech about a public official's conduct, provided that the speaker lacked actual malice in making the statements.<sup>46</sup> Goldberg wrote a special concurrence to the Court's speech-centric holding, stating that:

In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel.<sup>47</sup>

While it is unclear what Breyer actually thought about his boss's holding at the time, such language does bear resemblance to phrases that Breyer has utilized in his own Court opinions.<sup>48</sup>

Following his clerkship, Breyer accepted a post handling antitrust cases for the United States Department of Justice.<sup>49</sup> During this period, he met his future wife, Joanna Hare, a psychologist from an

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gaining consensus fell short of fruition. See Ray, *supra* note 41, at 113.

<sup>44</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). See Roy S. Gutterman, *The Landmark Libel Case, Times v. Sullivan, Still Resonates 50 Years Later*, FORBES (Mar. 5, 2014, 12:06 AM), <http://www.forbes.com/sites/realspin/2014/03/05/the-landmark-libel-case-times-v-sullivan-still-resonates-50-years-later/>.

<sup>45</sup> See *N.Y. Times Co.*, 376 U.S. at 254; Ray, *supra* note 41, at 110. Interestingly, the clerk who worked particularly closely with Goldberg on *New York Times v. Sullivan* was none other than Alan Dershowitz, a man who is recognized today as one of the nation's most highly regarded legal scholars. For some of Dershowitz's recollections about working on the *Sullivan* concurring opinion with Goldberg, see *Alan Dershowitz Dishes About Hobby Lobby, O.J. Simpson, and the Constitution*, NAT'L CONST. CTR. (Mar. 28, 2014), <http://blog.constitutioncenter.org/2014/03/alan-dershowitz-dishes-about-hobby-lobby-o-j-simpson-and-the-constitution/>. The most famous case on which Breyer worked during his clerkship with Goldberg is probably *Griswold v. Connecticut*, focusing on the issue of whether the Constitution grants a right to marital privacy. *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); see Ray, *supra* note 41, at 96. Goldberg's concurring opinion in this decision, which Breyer allegedly helped draft, argued that such privacy is protected under the Due Process Clause of the Fourteenth Amendment. See *Griswold*, 381 U.S. at 486, 488 (Goldberg, J., concurring). However, Breyer did not state his personal views about Goldberg's *Griswold* opinion during his Senate confirmation hearings for the Supreme Court, and has declined to go into specifics about this subject on other occasions as well. See Ray, *supra* note 41, at 112.

<sup>46</sup> *N.Y. Times Co.*, 376 U.S. at 256, 279–80, 291.

<sup>47</sup> *Id.* at 299 (Goldberg, J., concurring).

<sup>48</sup> See, e.g., *infra* notes 131–32, 421–23, 489–94 and accompanying text. In particular, Goldberg's central emphasis on protecting speech essential for a democratic society echoes a stance that Breyer frequently takes in freedom of speech cases. See *infra* Part III.B.

<sup>49</sup> HENSLEY, *supra* note 30, at 96.

aristocratic British family.<sup>50</sup> In 1967, he returned to Harvard Law School as a professor, quickly gaining a strong reputation for his teachings in administrative law.<sup>51</sup> The “Law and Economics” movement had already caught fire at the University of Chicago by this point, and Breyer staked out a position at Harvard on the side of regulatory reform.<sup>52</sup> His views demonstrated a considerably greater trust in the state than the Chicago law and economics leaders.<sup>53</sup> To Breyer, people should rely upon the government to utilize experts in designing rational and efficient regulatory systems.<sup>54</sup> Several observers compared his perspectives to those of a “European technocrat.”<sup>55</sup>

<sup>50</sup> *Id.*; Manners, *supra* note 33, at 493.

<sup>51</sup> See HENSLEY, *supra* note 30, at 96; Manners, *supra* note 33, at 493; SIMON, *supra* note 33, at 301. Alan Dershowitz described Breyer’s teaching style as “very questioning” and “very skeptical.” Wharton, *supra* note 36.

<sup>52</sup> See Kersch, *supra* note 2, at 76. For a few of many existing comparisons between the “Chicago School” and the “Harvard School” of the Law and Economics movement, as well as discussions about the overlap between these two Law and Economics schools of thought in more recent years, see KATALIN JUDIT CSERES, COMPETITION LAW AND CONSUMER PROTECTION 44–47 (2005) (comparing the “Harvard School” and the “Chicago School” of the Law and Economics Movement); ROGER J. VAN DEN BERGH & PETER D. CAMESASCA, EUROPEAN COMPETITION LAW AND ECONOMICS: A COMPARATIVE PERSPECTIVE 41–47 (2001) (discussing the similarities and differences of the “Harvard School” and the “Chicago School,” as they pertain to vertical restraints, merger control, and entry barriers); William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 71–80 (discussing the “double helix” of the Harvard and Chicago schools and how it relates to United States Antitrust Policy); Thomas A. Piraino, Jr., *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 IND. L.J. 345, 348–50 (2007) (providing background information regarding the foundation of the “Harvard School” and the “Chicago School,” and their influence on antitrust law); Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 HARV. L. REV. 917, 919 (2003) (book review) (noting that one of the key differences between the “Harvard School” and the “Chicago School” was that the Harvard School embraced structuralism while the Chicago School rejected it).

<sup>53</sup> See, e.g., Kersch, *supra* note 2, at 76 (“The Harvard wing [which Breyer helped lead during his time teaching at Harvard Law School] departed from the Chicago school, however, in the relative confidence it placed in the competence of government experts to design systematically rational and efficient regulatory regimes at the national level.”); VAN DEN BERGH & CAMESASCA, *supra* note 52, at 41–44 (describing key differences between the Harvard School and the Chicago School regarding the role of government in economic regulation); Kovacic, *supra* note 52, at 14 (listing Breyer, along with Phillip Areeda and Donald Turner, as the leaders of the Harvard School, opposing Robert Bork, Frank Easterbrook, and Richard Posner as the leaders of the Chicago School); see Kovacic, *supra* note 52, at 8 n.23. As an example, Breyer was an instrumental advocate in integrating Harvard School concepts into judicial decisions in the antitrust law realm. Kovacic, *supra* note 52, at 34.

<sup>54</sup> See STEPHEN G. BREYER, REGULATION AND ITS REFORM 320–21 (1982). Breyer’s book, *Regulation and Its Reform*, represents one of Breyer’s most definite statements in this area, discussing in considerable detail how the government, by researching empirical data thoroughly, planning carefully, and executing its plans patiently, can engage in regulation that successfully implements the best possible results for the populace. *Id.* This leaves the government greater power to self-correct than the Chicago Movement would allow. For a discussion on the Chicago Movement see *supra* note 52.

<sup>55</sup> See Kersch, *supra* note 7, at 761; *supra* note 8 and accompanying text.

During the mid-1970s, Breyer sought to put those principles directly into practice. Serving as a legal counsel for the Senate Judiciary Committee, Breyer advocated for the deregulation of several industries.<sup>56</sup> He gained particular traction for his campaign to reduce federal regulation within the airline industry.<sup>57</sup> As a Democrat supporting deregulation, he surprised conservatives; as a purveyor of carefully crafted economic arguments, he won them over.<sup>58</sup> Before long, he became the Judiciary Committee's chief counsel.<sup>59</sup> He continued to provide significant policy advice to Senator Edward Kennedy, encouraging Kennedy to support deregulation of airlines, trucking, and the natural gas industry.<sup>60</sup>

Yet other positions awaited. "President Jimmy Carter appointed Breyer to the U.S. Court of Appeals for the First Circuit in 1980."<sup>61</sup> Five years later, Breyer also began serving on the then-new United States Sentencing Commission, appointed by President Ronald

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<sup>56</sup> Toobin, *supra* note 5, at 38, 39.

<sup>57</sup> See WILLIAM T. COLEMAN JR & DONALD T. BLISS, COUNSEL FOR THE SITUATION: SHAPING THE LAW TO REALIZE AMERICA'S PROMISE 251–52 (2010); MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION 40, 41 (1985); Kersch, *supra* note 2, at 75; Andrew Downer Crain, *Ford, Carter, and Deregulation in the 1970s*, 5 J. TELECOMM. & HIGH TECH. L. 413, 425–26, 427–28 (2007); *Airline Deregulation, Revisited*, BLOOMBERG (Jan. 20, 2011), <http://www.bloomberg.com/bw/stories/2011-01-20/airline-deregulation-revisitedbusinessweek-business-news-stock-market-and-financial-advice>. In his effort to deregulate the airline industry, Breyer worked closely with one of his mentors (although not necessarily an individual with whom he walked in lockstep), economist Alfred Kahn. Kersch, *supra* note 2, at 75; see Howard A. Shelanski, *Justice Breyer, Professor Kahn, and Antitrust Enforcement in Regulated Industries*, 100 CAL. L. REV. 487, 488, 490–95 (2012) (comparing and contrasting Breyer and Kahn's approach to economic regulation).

<sup>58</sup> See Robert Kuttner, *A Liberal Loved by Economic Conservatives*, BALTIMORE SUN (June 19, 1994), [http://articles.baltimoresun.com/1994-06-14/news/1994165162\\_1\\_stephen-breyer-predatory-pricing-judge-breyer](http://articles.baltimoresun.com/1994-06-14/news/1994165162_1_stephen-breyer-predatory-pricing-judge-breyer); Toobin, *supra* note 5, at 39. Interestingly, Kuttner states that on economic issues, Breyer is no different than the Chicago School leaders such as Bork, Easterbrook, and Posner. Kuttner, *supra* note 58. He focused on Breyer's voting in antitrust cases at the time of his article, which revealed Breyer ruling against plaintiffs in antitrust cases routinely. See *id.* However, he also notes that Breyer willingly and, in Kuttner's opinion, surprisingly, concedes that "some regulation is necessary." *Id.*

<sup>59</sup> Kersch, *supra* note 2, at 75.

<sup>60</sup> See JEFFREY TOOBIN, THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT 84 (2012); Neil A. Lewis, *In a Sea of Praise, Discouraging Words*, N.Y. TIMES (May 16, 1994), <http://www.nytimes.com/1994/05/16/us/in-a-sea-of-praise-discouraging-words.html> ("In the 1970's, when Mr. Breyer was a senior aide to Senator Edward M. Kennedy, the Massachusetts Democrat who is his principal political patron, he was the intellectual father of deregulating the airline and trucking industries."). Breyer called this period his "happiest professional memory." TOOBIN, *supra* note 60, at 84. His efforts to broker the compromises necessary to achieve these deregulation goals once again demonstrated to him the value of compromise and open negotiations. See *id.* at 84–85. For an in-depth look at Breyer's rationale behind deregulating the natural gas industry in the United States, see STEPHEN G. BREYER & PAUL W. MACAVOY, ENERGY REGULATION BY THE FEDERAL POWER COMMISSION 132–33 (1974).

<sup>61</sup> Kersch, *supra* note 2, at 75.

Reagan.<sup>62</sup> In a four-year time span, Breyer and his fellow Commission members developed a 258-box grid for judges to use when assessing punishments for any one of around seven hundred federal offenses.<sup>63</sup> Weighing multiple factors, the process focused on providing a formulaic means for the federal punishment to fit the crime.<sup>64</sup> However, nine years after completing his work on the committee, Breyer publically criticized the grid.<sup>65</sup> Although he praised the idea as well-intentioned, he stated that the various guidelines were “simply too long and too complicated,” and relied upon far too many factors, to truly prove effective in their real-world application.<sup>66</sup>

In 1990, Justice Breyer became the Chief Judge of the First Circuit.<sup>67</sup> By 1993, when Justice Byron White announced his intention to retire from the Court, insiders were already beginning to list Breyer as a likely replacement.<sup>68</sup> President Bill Clinton called for Breyer to meet with him at the White House.<sup>69</sup> Then, in an event that today lives on as a cautionary tale, Breyer crashed his bicycle, breaking a rib and puncturing a lung just a few days before his meeting with Clinton.<sup>70</sup> Suffering from his injuries, he insisted on speaking with Clinton anyway.<sup>71</sup> Yet his pain worsened during their conversation, and the discussion went poorly.<sup>72</sup> Apparently, Clinton mistook Breyer’s actions as standoffishness and arrogance.<sup>73</sup> In the

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<sup>62</sup> Erwin Chemerinsky, *Breyer, Stephen G.*, in *THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* 75 (Roger K. Newman ed., 2009). According to one commentator, Breyer’s work on the Sentencing Commission “provided liberal legitimacy to a cornerstone of Reagan-era law-and-order forces.” *Id.*

<sup>63</sup> See Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 35–36 (2005); Linda Greenhouse, *Guidelines on Sentencing Are Flawed, Justice Says*, N.Y. TIMES (Nov. 21, 1998), <http://www.nytimes.com/1998/11/21/us/guidelines-on-sentencing-are-flawed-justice-says.html>.

<sup>64</sup> See Luna, *supra* note 63, at 35–36.

<sup>65</sup> Greenhouse, *supra* note 63 (quoting Breyer calling for the abolition of mandatory minimum sentences and criticizing the guidelines as too long and convoluted, despite his own direct involvement in bringing these guidelines to fruition).

<sup>66</sup> See *id.*

<sup>67</sup> Kersch, *supra* note 2, at 75.

<sup>68</sup> Ruth Marcus, *Judge Ruth Ginsburg Named to High Court*, WASH. POST (June 15, 1993), <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/23/AR2007082300887.html> (“White House officials had first said Clinton was leaning toward Interior Secretary Bruce Babbitt, then that he was inclined to name Judge Stephen G. Breyer of the [First] U.S. Circuit Court of Appeals in Boston.”).

<sup>69</sup> *Id.* (“Clinton held a much-publicized lunch with Breyer on Friday—White House aides even provided details of the menu—and Breyer was told to stay in town.”).

<sup>70</sup> See JOAN BISKUPIC, *BREAKING IN: THE RISE OF SONIA SOTOMAYOR AND THE POLITICS OF JUSTICE* 81 (2014); JEFFREY TOOBIN, *THE NINE* 80 (2008).

<sup>71</sup> See TOOBIN, *supra* note 70, at 80.

<sup>72</sup> See BISKUPIC, *supra* note 70, at 81; TOOBIN, *supra* note 70, at 80.

<sup>73</sup> See TOOBIN, *supra* note 70, at 80. After this face-to-face meeting with the injured Breyer,

end, Ruth Bader Ginsburg, not Breyer, received the nomination.<sup>74</sup>

One year later, however, another vacancy opened when Harry Blackmun retired.<sup>75</sup> Clinton invited Breyer back to the White house, and this time, the interview went well, leading Clinton to name Breyer as Blackmun's replacement.<sup>76</sup> The Senate Judiciary Committee endorsed their former chief counsel's appointment unanimously.<sup>77</sup> When his candidacy came before the full Senate, however, the confirmation hearings featured a surprising level of opposition, led by Indiana Senator Richard G. Lugar.<sup>78</sup> Lugar claimed that Breyer's overseas investments in Lloyds of London insurance ventures would likely cause a conflict of interest, as cases

Clinton allegedly told his aides that Breyer seemed "heartless" and "[he didn't] see enough humanity," and concluded that he "want[ed] a judge with a soul." *Id.*

<sup>74</sup> Marcus, *supra* note 68. The story of Breyer's bicycle accident now occupies a hallmark place in Supreme Court lore, reaching enough of an audience that when Justice Breyer crashed his bicycle in a more recent accident, the subject of Breyer falling off his bike managed to garner attention from *The New York Times*, *The Washington Post*, *The Los Angeles Times*, National Public Radio, and other major mainstream media outlets. See, e.g., *Justice Breyer Has Shoulder Surgery*, N.Y. TIMES (Apr. 27, 2013), <http://www.nytimes.com/2013/04/28/us/politics/justice-breyer-has-shoulder-surgery-after-bike-crash.html>; Ann E. Marimow, *Supreme Court Justice Stephen Breyer Fractures Shoulder in Biking Accident in D.C.*, WASH. POST (Apr. 27, 2013), [https://www.washingtonpost.com/local/supreme-court-justice-stephen-breyer-hurts-shoulder-in-biking-accident-in-dc/2013/04/27/f9fafde8-af6d-11e2-a986-eec837b1888b\\_story.html](https://www.washingtonpost.com/local/supreme-court-justice-stephen-breyer-hurts-shoulder-in-biking-accident-in-dc/2013/04/27/f9fafde8-af6d-11e2-a986-eec837b1888b_story.html); David Savage, *Supreme Court Justice Stephen Breyer Breaks Shoulder in Bike Crash*, L.A. TIMES (Apr. 27, 2013), <http://articles.latimes.com/2013/apr/27/nation/la-na-nn-justice-breyer-broken-shoulder-20130427>; Melisa Goh, *Justice Breyer Fractures Shoulder in (Another) Bike Accident*, NPR (Apr. 27, 2013, 3:15 PM), <http://www.npr.org/sections/thetwo-way/2013/04/27/179480100/justice-breyer-fractures-shoulder-in-another-bike-accident>.

<sup>75</sup> See *The Supreme Court; Statements on Retirement of Blackmun from Court*, N.Y. TIMES (Apr. 7, 1994), <http://www.nytimes.com/1994/04/07/us/the-supreme-court-statements-on-retirement-of-blackmun-from-court.html>.

<sup>76</sup> Paul Richter, *Clinton Picks Moderate Judge Breyer for Supreme Court Spot*, L.A. TIMES (May 14, 1994), [http://articles.latimes.com/1994-05-14/news/mn-57615\\_1\\_supreme-court](http://articles.latimes.com/1994-05-14/news/mn-57615_1_supreme-court). Interestingly, though, Breyer's nomination disappointed several groups, including Latinos and individuals seeking a judge with a more consistently liberal voting record on key issues. See *id.* Individuals ranging from New York State Governor Mario Cuomo to federal appellate Judge Richard S. Arnold to Interior Secretary Bruce Babbitt were rumored to be Clinton's preferences, but Breyer proved to be the safest available choice in the end. See *id.*

<sup>77</sup> Lyle Denniston, *Senate Panel OK's Breyer, 18-0, for Supreme Court*, BALT. SUN (July 20, 1994), [http://articles.baltimoresun.com/1994-07-20/news/1994201008\\_1\\_judge-breyer-democrats-and-republicans-supreme-court](http://articles.baltimoresun.com/1994-07-20/news/1994201008_1_judge-breyer-democrats-and-republicans-supreme-court).

<sup>78</sup> Robert L. Jackson, *Senate Backs Breyer Confirmation, 87-9*, L.A. TIMES (July 30, 1994), [http://articles.latimes.com/1994-07-30/news/mn-21542\\_1\\_supreme-court](http://articles.latimes.com/1994-07-30/news/mn-21542_1_supreme-court); *Senator Lugar on Judge Breyer*, BALT. SUN (July 27, 1994), [http://articles.baltimoresun.com/1994-07-27/news/1994208084\\_1\\_senate-judiciary-judge-breyer-judiciary-committee](http://articles.baltimoresun.com/1994-07-27/news/1994208084_1_senate-judiciary-judge-breyer-judiciary-committee). At the confirmation hearings, one writer stated that "Breyer exhibited a child's enthusiasm in explaining the technical aspects of a judicial decision; he rapturously recited the details, for example, of a seventy-two-year-old property rights decision by Justice Oliver Wendell Holmes, Jr." SIMON, *supra* note 33, at 301. He also praised Holmes's often-quoted statement that the law should focus not on logic, but experience, and offered his own declaration for the objective of the law in the United States as a whole: "to help Americans 'live together productively, harmoniously and in freedom.'" *Id.*

involving these interests could come before the Court.<sup>79</sup> Other members of the Senate argued that Breyer tended to display a bias toward “big business” in his decisions.<sup>80</sup> Some journalists called Breyer a complete enigma, noting that he lacked any “overarching constitutional view.”<sup>81</sup>

Nevertheless, with staunch support from Senate leaders on both sides of the political aisle—Edward Kennedy for the Democrats, Orrin Hatch for the Republicans—the issue was never really in doubt.<sup>82</sup> On July 29, 1994, a Senate vote of 87 to 9 confirmed Breyer as the one hundred eighth Supreme Court Justice in United States history.<sup>83</sup> A week after that, the new justice took his seat on the Court for the first time.<sup>84</sup>

By this point, Breyer’s best-known published writings focused specifically on administrative law and economic regulation.<sup>85</sup> In one

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<sup>79</sup> Jackson, *supra* note 78 (“Lugar said that Lloyd’s insures industrial polluters, a situation that could force Breyer to recuse himself from toxic-waste and asbestos cases that may come before the court. Breyer said that he would extricate himself from the investment as soon as possible.”); *Judge Breyer’s Investments*, BALT. SUN (July 15, 1994), [http://articles.baltimoresun.com/1994-07-15/news/1994196186\\_1\\_judge-breyer-lloyd-of-london-judge-stephen](http://articles.baltimoresun.com/1994-07-15/news/1994196186_1_judge-breyer-lloyd-of-london-judge-stephen).

<sup>80</sup> See Richter, *supra* note 76.

<sup>81</sup> Biskupic, *supra* note 7.

<sup>82</sup> See Jackson, *supra* note 78 (discussing the widespread bipartisan support that Breyer ultimately received); *Mr. Justice Breyer*, BALT. SUN (May 14, 1994), [http://articles.baltimoresun.com/1994-05-14/news/1994134023\\_1\\_justice-breyer-judge-breyer-court-justice](http://articles.baltimoresun.com/1994-05-14/news/1994134023_1_justice-breyer-judge-breyer-court-justice) (“Though a liberal protégé of Sen. Edward M. Kennedy, [Breyer’s] admirers include such conservatives as Sens. Strom Thurmond, Orrin Hatch and Bob Dole.”). One of the more interesting colloquies from the confirmation hearings occurred between Hatch and Breyer. When Hatch asked Breyer if he agreed that judges only applied law, and never made law, Breyer declined to provide the senator with an easy agreement. See SIMON, *supra* note 33, at 302. Instead, Breyer explained to Hatch that in the controversies reaching the Supreme Court, a precise understanding of the current state of the law was not always readily available. *Id.* The Court, Breyer emphasized, had to decide what the law said in “vast, open areas” in which both sides raised legitimate arguments. *Id.* Consequently, Breyer said, the Court’s proper function centered on identifying “the correct solution, the helpful solution consistent with the underlying human purpose.” *Id.*

<sup>83</sup> See Jackson, *supra* note 78.

<sup>84</sup> See *id.*

<sup>85</sup> For a few examples of Breyer’s published administrative law contributions, in addition to the works discussed in the following paragraphs, see Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 549, 550–51 (1979) (asserting that too often, governmental regulatory strategies are poorly matched for the specific problems that they are created to reform, and proposing a framework for governments to utilize in achieving a more narrowly tailored fit between societal problems and governmental solutions); Stephen Breyer, *Judicial Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 379 (1986) (evaluating judicial oversight over agencies); Stephen Breyer, *Reforming Regulation*, 59 TUL. L. REV. 4, 7, 14 (1984) (studying methods that each branch of government could utilize in overseeing, managing, and working with agencies, and using his success in deregulating the airline industry as a case study for these methods) [hereinafter Breyer, *Reforming Regulation*]; Stephen Breyer, *Vermont Yankee and the Courts’ Role in the Nuclear Energy Controversy*, 91

piece titled *Economics for Lawyers and Judges*, he issued a particularly revealing statement about the proper role and nature of the laws.<sup>86</sup> To Breyer, a quality law or regulation needed to provide rules that were relatively simple, stable over time, relatively uniform, basic enough that even non-experts can apply them, and “useful for resolution of disputes litigated through the adversarial process.”<sup>87</sup> Another article, titled *Antitrust, Deregulation, and the Newly Liberated Marketplace*, focused on governments keeping themselves in check, tampering with the free market only when absolutely necessary to protect health and safety, or to preserve reasonable consumer prices.<sup>88</sup>

His seminal work in this area, the book *Breaking the Vicious Circle: Toward Effective Risk Regulation*, argued that American governments had fallen into an infinite loop of public misconceptions, legislative overreaction, and technical uncertainty.<sup>89</sup> According to Breyer’s analysis, too much time within this unending maelstrom had caused many Americans to lose faith in a government’s ability to regulate effectively, even when significant risks were at issue.<sup>90</sup> To break this vicious cycle, Breyer called not for a “smaller” government, but an overall more effective government, particularly within regulatory agencies.<sup>91</sup> To carry this out, Breyer pushed for an

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HARV. L. REV. 1833, 1833 (1978) (criticizing the judicial branch for “intruding too deeply” into the *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* dispute, a realm where Breyer believed the opinions of administrative experts should have received greater deference from the judiciary) [hereinafter Breyer, *Vermont Yankee*].

<sup>86</sup> Stephen Breyer, *Economics for Lawyers and Judges*, 33 J. LEGAL EDUC. 294, 296 (1983).

<sup>87</sup> Howard Latin, *Legal and Economic Considerations in the Decisions of Judge Breyer*, 50 L. & CONTEMP. PROBS. 57, 57 (1987); see also Breyer, *supra* note 86, at 296 (explaining the characteristics of simple rules).

<sup>88</sup> See Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CALIF. L. REV. 1005, 1011–12 (1987). Using examples from deregulating the airline industry, and comparing those examples with Breyer’s ideas about effective deregulation of the telecommunications industry, Breyer’s analysis of competing approaches ultimately resulted in four conclusions about when the government should intervene in the marketplace and when the state should use a hands-off, deregulated approach. *See id.* at 1044–45.

<sup>89</sup> See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 50 (1993).

<sup>90</sup> *See id.* at 50–51. In particular, Breyer identified three common problems. One dilemma, which he named the “tunnel vision” or “the last 10 percent” problem, emerges when regulators insist on completely eradicating a given problem, even when the costs of destroying “the last 10 percent” of the problem far outweigh the benefits. *See id.* at 11. Another issue, which Breyer called the “random agenda” problem, occurs when illogical factors such as political pressures, public fears, and even happenstance govern administrative agency agendas, rather than detailed empirical analyses of what issues are truly most pressing in society. *See id.* at 19–20. Lastly, Breyer observed an “inconsistency” problem arising from the overall lack of coordination and communication among the various agencies, and among the experts within each individual agency. *See id.* at 21.

<sup>91</sup> *See id.* at 59.



executive branch group of “super-regulators” who would work among the various agencies to establish best practices, create priorities, and determine how to best allocate resources.<sup>92</sup> In a sense, it was the classic Breyer recommendation, combining oversight by a select group of experts with multi-level collaborations inside the government, all with an eye toward producing a sensible, moderated governmental product that the average citizen can rightfully trust.<sup>93</sup>

Following his confirmation to the Court, however, Breyer’s writings changed focus considerably. In more recent years, he turned his attention to matters of constitutional interpretation and the contemporary role of judges.<sup>94</sup> From these works, a distinct theme emerges: Breyer’s fervent belief in the overriding importance of popular participation in democratic processes.<sup>95</sup> Repeatedly, his recent writings focused on a holistic view of the Constitution, one that

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<sup>92</sup> See *id.* at 59–60; Eric J. Gouvin, *A Square Peg in a Vicious Circle: Stephen Breyer’s Optimistic Prescription for the Regulatory Mess*, 32 HARV. J. ON LEGIS. 473, 480 (1995) (reviewing STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993)). Under Breyer’s model, each aspiring “super-regulator” would pass a series of rotations, not unlike the rotations that a medical student must complete before becoming a licensed doctor, on Capitol Hill, within the Office of Management and Budget, and throughout a variety of administrative agencies. See BREYER, *supra* note 89, at 71–72; Gouvin, *supra* note 92, at 480.

<sup>93</sup> Compare *supra* notes 88–92 and accompanying text (describing Breyer’s belief that the government become more effective through the use of experts and through less involvement in the market), with the discussion of the trends emerging from Breyer’s free speech jurisprudence described in *infra* Part III (noting that the first showcases the Judge’s opinions on efficient regulation and the later showcases the Judge’s viewpoint on freedom of speech, which shows that Breyer has a tendency to uphold existing laws and regulations).

<sup>94</sup> One of the earlier examples of Breyer’s judiciary-focused statements emerged in 1991, while he was still Chief Judge of the First Circuit. Delivering a lecture at the University of Southern California Law Center, Breyer focused his speech on judges using legislative history as a statutory interpretation tool. Stephen Breyer, *The Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 845 (1992). At the outset, he declared that in his opinion, “appellate courts are in part administrative institutions that aim to help resolve disputes and, while doing so, interpret, and thereby clarify, the law.” *Id.* at 847. He also stated that “law itself is a human institution, serving basic human or societal needs,” and therefore appropriate to evaluate “in terms of certain pragmatic values including . . . coherence and workability . . .” *Id.* Furthermore, he promoted the notion of appellate courts “helping to achieve justice by interpreting the law in accordance with the ‘reasonable expectations’ of those to whom it applies.” *Id.* Breyer then proceeded to an analysis of ways in which studying legislative history helps courts avoid absurd results, reveal obvious drafting errors, gain context in understanding specialized jargon, identify a “reasonable purpose” for the statute on the whole, and select the proper result among several competing reasonable interpretations of the same controversial law. *Id.* at 860–61. While relying so heavily on legislative history to resolve ambiguities in interpreting laws is hardly perfect, Breyer determined that it was better than alternative methods, such as developing and adhering to “canons of interpretation” for every case. *Id.* at 869. This topic led to one of his early intellectual sparring matches with Justice Scalia, a precursor of things to come. See Michael D. Sherman, *The Use of Legislative History: A Debate Between Justice Scalia and Judge Breyer*, 16 ADMIN. L. NEWS 1, 1 (1991).

<sup>95</sup> See, e.g., *infra* notes 98–111 and accompanying text; see *infra* Part III.H.

reveals an original intent by the Framers to preserve a system “in which all citizens share the government’s authority, participating in the creation of public policy.”<sup>96</sup> According to Breyer’s statements, viewing constitutional issues through this wide-angle lens will yield more historically and socially sound jurisprudence, as the law is meant to “help[] a community of individuals democratically find . . . solutions to . . . contemporary social problems.”<sup>97</sup>

*Active Liberty: Interpreting Our Democratic Constitution*, Breyer’s best-known book to date, devotes more than 150 pages to exploring this topic.<sup>98</sup> Within this volume, Breyer argued vigorously for the United States to recognize that the Constitution is designed to help citizens take part in the very processes that the document itself safeguards.<sup>99</sup> To Breyer, the government appears to hold two core functions: actively safeguarding essential individual liberties, and then stepping back so the citizens retain the means to govern themselves effectively.<sup>100</sup> Only through upholding these functions will the government honestly gain the people’s trust, according to Breyer.<sup>101</sup> Only through maintaining the people’s trust will the people participate in the nation’s governance.<sup>102</sup> Only through popular participation in the nation’s governance will the democratic form of government maintain legitimacy and survive in the United States.<sup>103</sup>

In *Active Liberty*, Breyer took special pains to reject the so-called “originalist” method of reviewing historical evidence to determine what a particular provision meant when the drafters wrote it in 1787 and then attempting to fit those words and values into modern times.<sup>104</sup> To him, such attempts needlessly detract attention from the Constitution’s overriding and fundamental goals, a classic case of

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<sup>96</sup> BREYER, *supra* note 10, at 33.

<sup>97</sup> *Id.* at 6.

<sup>98</sup> *Id.*

<sup>99</sup> *See, e.g., id.* at 23 (“[T]he people could continue to share sovereign authority; they could continue to participate actively in the governing processes.”); *id.* at 46 (discussing this concept in the context of campaign finance cases and the First Amendment); *id.* at 56–57, 62 (describing this concept in the context of federalism); *id.* at 64 (“[The Dormant Commerce Clause] encourages judicial modesty in enforcing Commerce Clause objectives, leading courts to defer to the conclusions of the democratic process.”); *id.* at 103 (“[The Framers] sought to create a workable democracy—a democratic process capable of acting for the public good.”).

<sup>100</sup> *See id.* at 32–34.

<sup>101</sup> *See id.* at 21, 23.

<sup>102</sup> *See id.*

<sup>103</sup> *See id.* at 32–33 (“The Framers included elements designed to ‘control and mitigate’ the ill effects of more direct forms of democratic government, but in doing so, the Framers ‘did not see themselves as repudiating either the Revolution or popular government.’”).

<sup>104</sup> *See, e.g., id.* at 116–17.

missing the forest for the trees.<sup>105</sup> Under Breyer's rationale, the Framers intentionally used broad language when drafting several key provisions in the Constitution so future generations could adapt these provisions to a changing society—but while always remaining true to the larger objective of maintaining a democratic government in which people trust and in which people may participate.<sup>106</sup>

Even more recently, Breyer expounded upon this concept further in his book *Making Our Democracy Work*, writing:

[The Court] must understand that its actions have real-world consequences. And it must recognize and respect the roles of other governmental institutions. By taking account of its own experience and expertise as well as those of other institutions, the Court can help make the law work more effectively and thereby better achieve the Constitution's basic objective of creating a workable democratic government.<sup>107</sup>

Judges, wrote Breyer in *Making Our Democracy Work*, play an important role within this system, not apart from it.<sup>108</sup> Instead of existing as entities fully separate from the rest of the government, Breyer urges jurists to form working relationships with other governmental entities, from Congress and the White House all the way through the multiple executive branch agencies.<sup>109</sup> Of course, the Court also bears the obligation of judging the activities of these entities and, when necessary, ordering them to either take action or refrain from action. Even Breyer himself admitted in *Making Our Democracy Work* that forming these relationships between the Court and other government entities could produce some strained situations.<sup>110</sup> However, he notably went on to add that these issues

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<sup>105</sup> See *id.* at 131–32.

<sup>106</sup> See *id.* at 34 (“In sum, our constitutional history has been a quest for workable government, workable democratic government, workable democratic government protective of individual personal liberty. Our central commitment has been to ‘government of the people, by the people, for the people.’”); *id.* at 37 (“Increased recognition of the Constitution’s democratic objective—and an application of the role courts can play in securing that objective—can help guide judges both as actors in the deliberative process and as substantive interpreters of relevant constitutional and statutory provisions.”); *id.* at 74 (“[T]he Constitution authorizes courts to proceed ‘practically’ when they examine new laws in light of the Constitution’s enduring values.”).

<sup>107</sup> BREYER, *supra* note 24, at xiii.

<sup>108</sup> See, e.g., *id.* at 75 (“[W]hen the Court interprets the Constitution, it should take account of the roles of other governmental institutions and the relationships among them.”); *id.* at 97 (“[Courts] act in tandem with Congress, carrying out the legislators’ objectives in even the most complex statutes, such as those dealing with bankruptcy, transit system mergers, or pension benefit guarantees.”).

<sup>109</sup> See *id.* at 73, 119–20.

<sup>110</sup> See, e.g., *id.* at 105 (“If a court finds a statute unconstitutional, it cannot avoid friction.

did not pose an insurmountable concern, and again encouraged the judiciary to improve their relationships with government agencies and other entities.<sup>111</sup>

Breyer's writings also echo with calls for restraint.<sup>112</sup> His works display a desire to stay out of the way of the legislature unless overturning a law is absolutely necessary to preserve the purposes for which the Framers wrote the Constitution in the first place.<sup>113</sup> Similarly, he writes about a certain level of trust and deference that courts owe to the opinions of experts within administrative agencies.<sup>114</sup> For some time now, Breyer wrote in *Making Our Democracy Work*, people have "developed a habit" of obeying the Court's holdings, even in controversial cases.<sup>115</sup> Yet this longstanding habit, he continued, is something that "cannot be taken for granted."<sup>116</sup> Then, bringing a large component of his thesis full-circle, he pointed out that Americans will display more trust in the government, such as accepting the rulings of the judicial branch and preserving the exercise of the rule of law in the nation, only if the government safeguards their ability to participate in the democratic system.<sup>117</sup>

Examining Breyer's life leading up to his United States Supreme Court appointment, and surveying his published writings both before

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It has to strike the statute down.").

<sup>111</sup> See *id.* at 216.

<sup>112</sup> See *infra* notes 113–15 and accompanying text.

<sup>113</sup> See BREYER, *supra* note 10, at 17–18. However, Breyer also states that judges should not feel insecure about stepping in when a law blatantly violates the "democratic objective" of the Constitution. See *id.* at 37–38.

<sup>114</sup> See BREYER, *supra* note 24, at 106, 114–15, 119–20 (outlining a framework for the Supreme Court to decide to defer to the judgment of agency experts when faced with a statute where Congress is silent about delegation of power to an agency); Breyer, *Reforming Regulation*, *supra* note 85, at 9–10; Breyer, *Vermont Yankee*, *supra* note 85, at 1833.

<sup>115</sup> BREYER, *supra* note 24, at 71.

<sup>116</sup> *Id.* According to Breyer, "[t]he Court itself must help maintain the public's trust in the Court, the public's confidence in the Constitution, and the public's commitment to the rule of law." *Id.* at xiii.

<sup>117</sup> See *id.* at xiv ("[B]y understanding that its actions have real-world consequences and taking those consequences into account, the Court can help make the law work more effectively. It can thereby better achieve the Constitution's basic objective of creating a workable democratic government. In this way the Court can help maintain the public's confidence in the legitimacy of its interpretive role."); *id.* at 46 ("[T]he Constitution's most basic objective, [is] the creation of a single nation. The Constitution does so by creating political institutions strong enough to permit the 'people' to govern themselves . . ."); *id.* at 71–72 (stating that the Supreme Court, to uphold its own legitimacy, must use its power of judicial review in a manner that honors lessons from the past about the importance of participating in the democratic process within the constitutional government); *id.* at 81 ("The Constitution establishes political institutions designed to ensure a workable, democratic form of government . . ."); *id.* at 105 (stating that purpose-oriented interpretation focusing on safeguarding the democratic process for Americans will preserve the public's approval of the Court's holdings).

and during his Court tenure, a number of trends emerge. Collegiality and consensus-building, avoiding absolutism, preserving the ability of citizens to participate in the democratic process, instilling mutual trust among the three branches of government and the various entities within those branches, concentrating on contemporary real-world consequences of decisions rather than focusing solely on the Framers original intent, and refraining from overturning existing laws unless absolutely necessary to preserve essential individual rights appear to be among Breyer's primary priorities.

Still, such propositions and constructs in the abstract do not necessarily translate directly into a judge's real-world decision-making. Bearing this in mind, we now move to a representative sampling of Justice Breyer's free speech jurisprudence, studying his actual opinions and rationales for these opinions in this highly contested area of the law.

## II. JUSTICE BREYER ON FREEDOM OF SPEECH: A SAMPLING OF BREYER'S FREE SPEECH JURISPRUDENCE ON THE UNITED STATES SUPREME COURT

The twenty-seven cases studied in this article represent a wide range of issues, disputes, and litigants. They include a tremendous variety of speech and expression forms, ranging from commercial advertising to picketing to corporate contributions for political campaigns. They encompass the tenure of two Chief Justices of the Supreme Court, William Rehnquist and John Roberts, and proceed through a Supreme Court bench that has seen a relatively high level of turnover in recent years.<sup>118</sup> Of the Justices who were on the Court when Breyer began his tenure, only three of them—Ruth Bader Ginsburg, Anthony Kennedy, and Clarence Thomas—remain on the bench today.<sup>119</sup>

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<sup>118</sup> The Supreme Court has filled four vacancies within the past decade. *See* sources cited *infra* note 119. By comparison, Breyer served as the Court's "junior justice" for eleven years, the second-longest duration in history without any changes in the Supreme Court's membership. Tony Mauro, *Breyer Just Missed Record as Junior Justice*, NAT'L L. J. (Jan. 10, 2008), <http://www.nationallawjournal.com/legaltimes/id=900005559514/Breyer-Just-Missed-Record-as-Junior-Justice>.

<sup>119</sup> *Compare Biographies of Current Justices of the Supreme Court*, SUP. CT. U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Apr. 11, 2016), *with Justices by Court*, OYEZ, <https://www.oyez.org/courts> (last visited Apr. 11, 2016) (noting the absence of Justice Scalia, Chief Justice Rehnquist, Justice Stevens, Justice O'Connor, and Justice Souter). Justice Scalia passed away in 2016. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>. Chief Justice Rehnquist passed away in 2005. Linda Greenhouse, *William H. Rehnquist, Chief Justice of Supreme Court, Is Dead at 80*, N.Y. TIMES (Sept. 4, 2005),

In all of these cases, however, the basic framework remains the same. On one side of the matter is a party asserting the protection of freedom of speech guaranteed by the First Amendment and extended to the states through the Fourteenth Amendment. On the other side of the dispute is another party, commonly the federal government or a state government, arguing that some competing societal interest outweighs the individual's freedom of speech rights. In each case studied here, the Court engaged in a balancing of the interests between these two opposing sides to reach their result. Amid such difficult decisions, one might reasonably expect a judge's deepest tendencies and ideals to emerge when making these close calls. By studying Justice Breyer's positions in these cases, we may come away better understanding his judicial leanings and beliefs as a whole. At the very least, we will better comprehend his views regarding this particularly sensitive area of the law, a field with daily importance in the lives of Americans and an area in which the Court has proven quite active in recent years.<sup>120</sup>

We turn now to a summary of the twenty-seven cases studied in this article, with a particular focus on Justice Breyer's holdings in each of these decisions.

A. *Turner Broadcasting System v. Federal Communications Commission*<sup>121</sup>

The Federal Cable Television Consumer Protection and Competition Act mandated a certain number of channels for local broadcast television on all cable television systems.<sup>122</sup> A group of cable broadcasters claimed that the law unconstitutionally infringed upon their freedom of speech by interfering with their editorial autonomy.<sup>123</sup> The government responded by claiming that this mandate helped ensure that the public received a variety of

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<http://www.nytimes.com/2005/09/04/politics/william-h-rehnquist-chief-justice-of-supreme-court-is-dead-at-80.html>. Justices Sandra Day O'Connor, John Paul Stevens, and David Souter all retired several years after Breyer joined the Supreme Court's bench. See Robert Barnes, *Justice John Paul Stevens Announces His Retirement from Supreme Court*, WASH. POST (Apr. 10, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/09/AR2010040902312.html>; William Branigin et al., *Supreme Court Justice O'Connor Resigns*, WASH. POST (July 1, 2005, 7:11 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/01/AR2005070100653.html>; Jess Bravin & Evan Perez, *Justice Souter to Retire from Court*, WALL ST. J. (May 1, 2009, 12:01 AM), <http://www.wsj.com/articles/SB124114676548376235>.

<sup>120</sup> See *supra* note 24 and accompanying text.

<sup>121</sup> *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997).

<sup>122</sup> *Id.* at 185.

<sup>123</sup> See *id.* at 185–86.

information sources, including local news outlets, on their television stations, and could help the public benefit from a competitive communications marketplace.<sup>124</sup>

The Court agreed with the interests that the government asserted.<sup>125</sup> In evaluating the mandate, the Court's majority utilized the four-part test designed in *United States v. O'Brien*,<sup>126</sup> which asked whether the regulation fell "within the constitutional power of the government," whether the regulation advanced "an important or substantial governmental interest," whether the regulation "is unrelated to the suppression of free expression," and whether the regulation restricted speech to a level that was "no greater than is essential to the furtherance of [the government's] interest."<sup>127</sup> Writing for the majority, Justice Anthony Kennedy stated that Congress possessed a substantial interest in "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television . . . ."<sup>128</sup>

Breyer agreed with the majority's result, providing Chief Justice William Rehnquist, David Souter, John Paul Stevens, and Kennedy with a pivotal fifth vote.<sup>129</sup> However, Breyer authored a separate concurring opinion regarding the rationale.<sup>130</sup> He acknowledged that the federal statute imposed a significant burden on the speech of cable system directors, stating that the law "interferes with the protected interests of the cable operators to choose their own programming; it prevents displaced cable program providers from obtaining an audience; and it will sometimes prevent some cable viewers from watching what, in its absence, would have been their preferred set of programs."<sup>131</sup> He also expressed skepticism about the true value of using this law to promote fair competition in the television market.<sup>132</sup>

With First Amendment interests at issue on both sides of the dispute—the cable networks' rights to control editorial content

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<sup>124</sup> *See id.* at 190–92.

<sup>125</sup> *Id.* at 224–25.

<sup>126</sup> *United States v. O'Brien*, 391 U.S. 367 (1968).

<sup>127</sup> *Id.* at 377.

<sup>128</sup> *Turner*, 520 U.S. at 189 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994)).

<sup>129</sup> *See id.* at 225 (Breyer, J., concurring).

<sup>130</sup> *Id.* at 225–26.

<sup>131</sup> *Id.* at 226.

<sup>132</sup> *See id.*

versus the ability of the people to receive “a rich mix” of informational sources—Breyer stated that “the key question becomes one of proper fit.”<sup>133</sup> To determine this “fit,” Breyer said that the proper test involved determining “both whether there are significantly less restrictive ways to achieve Congress’ over-the-air programming objectives, and also to decide whether the statute, in its effort to achieve those objectives, strikes a reasonable balance between potentially speech-restricting and speech-enhancing consequences.”<sup>134</sup> Given that 40 percent of American households did not subscribe to cable television, the law met the important goal of providing these households with “a rich mix of over-the-air programming.”<sup>135</sup> While cable subscribers could lose access to some channels when cable providers switched to the required amount of local programming, this burden was outweighed by the benefits to the average American viewers, especially those viewers who did not have cable but still wanted to watch a rich array of informational sources.<sup>136</sup> Therefore, based on this proportional analysis, Breyer held that this federal statute did not violate the First Amendment, even though it did suppress a significant amount of speech.<sup>137</sup>

*B. United States v. Playboy Entertainment Group*<sup>138</sup>

Section 505 of the Federal Communications Decency Act required cable operators providing television channels “‘primarily dedicated to sexually-oriented programming’ . . . to ‘fully scramble or . . . block’” these channels, preventing children from possibly witnessing or hearing sexual images or audio through “signal bleed,” a phenomenon in which partially scrambled digital signals still appear on the television screen.<sup>139</sup> Alternatively, the cable providers could broadcast those stations only between 10 p.m. and 6 a.m., a time period when children were unlikely to watch television.<sup>140</sup> Playboy Entertainment Group claimed that Section 505 violated the First

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<sup>133</sup> *Id.* at 226, 227.

<sup>134</sup> *Id.* at 227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799–800 (1989)).

<sup>135</sup> *See id.* at 190, 226 (Breyer, J., concurring).

<sup>136</sup> *See id.* at 226.

<sup>137</sup> *See id.* (“I believe that this purpose—to assure the over-the-air public ‘access to a multiplicity of information sources’—provides sufficient basis for rejecting appellants’ First Amendment claim.”) (internal citations omitted) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994)).

<sup>138</sup> *United States v. Playboy Entm’t Grp. Inc.*, 529 U.S. 803 (2000).

<sup>139</sup> *Id.* at 806.

<sup>140</sup> *Id.*



Amendment's freedom of speech protections.<sup>141</sup>

The Supreme Court's 5-4 majority agreed with Playboy's claims.<sup>142</sup> Writing for the Court, Kennedy stated that while protecting minors from sexually explicit television images and sounds was a compelling interest, Section 505 did not represent the least restrictive means of accomplishing this objective.<sup>143</sup> According to Kennedy's opinion, the government failed to show the likelihood of minor children observing sexually explicit signal bleed, thus neglecting to demonstrate a widespread societal problem.<sup>144</sup> Other less-restrictive alternatives, such as notifying parents of their right to request that cable operators fully block all sexually oriented channels, would provide an individualized solution to the problem without instituting the type of content-based blanket ban on a particular form of speech that Section 505 imposed.<sup>145</sup>

Breyer dissented, joined by Rehnquist, O'Connor, and—for the most part—Scalia.<sup>146</sup> According to Breyer, the Court's majority mischaracterized Section 505 as a total ban on speech.<sup>147</sup> Instead, Section 505 burdened only a select category of speech, an imposition that properly met a legitimate legislative effort to protect minors from obscene content.<sup>148</sup> Since the restriction dealt only with channels that provided primarily sexually oriented programming, Breyer concluded that the matter “[did] not present the kind of narrow tailoring concerns seen in other cases.”<sup>149</sup>

Furthermore, Breyer wrote, the government provided statistical evidence that 75 percent of cable scrambling systems were inadequate in preventing signal bleed, meaning that approximately twenty-nine million American children were at risk of observing sexual images or hearing sexually oriented audio.<sup>150</sup> Finally, Breyer's dissent determined that the majority neglected to make a “realistic assessment of the alternatives” available to the government.<sup>151</sup>

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<sup>141</sup> *Id.* at 807.

<sup>142</sup> *Id.* at 806, 827, 835. The majority in this case consisted of Kennedy, Justice John Paul Stevens, Justice David Souter, Justice Ruth Bader Ginsburg, and Justice Clarence Thomas. *Id.* at 806.

<sup>143</sup> *See id.* at 827.

<sup>144</sup> *See id.* at 819, 820–21.

<sup>145</sup> *See id.* at 824, 825–26.

<sup>146</sup> *Id.* at 835 (Breyer, J., dissenting).

<sup>147</sup> *Id.* at 838 (“[T]he majority’s characterization of this statutory scheme as ‘prohibiting . . . speech’ is an exaggeration.”).

<sup>148</sup> *See id.*

<sup>149</sup> *Id.* at 839 (first citing *Reno v. ACLU*, 521 U.S. 844, 877–79 (1997), and then *Butler v. Michigan*, 352 U.S. 380, 382 (1957)).

<sup>150</sup> *Id.* at 839 (Breyer, J., dissenting).

<sup>151</sup> *Id.* at 846.

Merely notifying parents of their right that request cable providers block sexually oriented programming in their individual households failed to take into account situations where parents were not involved in their children's lives.<sup>152</sup> Under such a framework, a neglectful parent who did not request the individualized channel block would leave their children exposed to the indecent images and audio that Section 505 was designed to prevent.<sup>153</sup> To Breyer, Section 505 restricted speech "no more than necessary to further [the] compelling need" of safeguarding minors against such images and audio, and thus did not violate the First Amendment.<sup>154</sup>

C. *City of Erie v. Pap's A.M.*<sup>155</sup>

The Erie (Pennsylvania) City Council "enacted an ordinance banning public nudity."<sup>156</sup> Pap's A.M., an establishment featuring nude erotic dancing as entertainment, claimed that the ban violated the First Amendment by proscribing an entire category of expression, and sought a permanent injunction against the ordinance's enforcement.<sup>157</sup> The City of Erie argued that the ordinance was necessary to combat other problems commonly associated with public nudity, including drunkenness, violence, and prostitution.<sup>158</sup> After a lengthy litigation process during which Pap's A.M. actually closed its nude dancing club, the United States Supreme Court granted *certiorari* to hear the case.<sup>159</sup>

In a 6-3 decision, the Court determined that the Erie ordinance passed constitutional muster.<sup>160</sup> Sandra Day O'Connor's controlling plurality opinion, which Breyer joined, declined to apply strict scrutiny to the ordinance.<sup>161</sup> Instead, the majority utilized the four-factor symbolic speech test developed in *United States v. O'Brien*, which asked whether the regulation fell "within the constitutional power of the government," whether the regulation advanced "an important or substantial governmental interest," whether the regulation "is unrelated to the suppression of free expression," and whether the regulation restricted speech to a level that was "no

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<sup>152</sup> See *id.* at 842, 843-44.

<sup>153</sup> See *id.* at 843-44.

<sup>154</sup> *Id.* at 846.

<sup>155</sup> *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

<sup>156</sup> *Id.* at 282.

<sup>157</sup> *Id.* at 284.

<sup>158</sup> *Id.* at 290.

<sup>159</sup> *Id.* at 287.

<sup>160</sup> *Id.* at 281, 302.

<sup>161</sup> See *id.* at 281, 289-90, 296.

greater than is essential to the furtherance of [the government's] interest."<sup>162</sup>

Under the majority's holding, the City of Erie's police powers permitted the municipality's "efforts to protect public health and safety," a category that included combating drunkenness, violence, and prostitution.<sup>163</sup> Previous studies that the City Council conducted demonstrated links between public nudity and these ills, and the Court had no reason to overturn the council's "expert judgment."<sup>164</sup> Furthermore, O'Connor wrote that the ordinance was content-neutral, prohibiting all forms of public nudity rather than banning nude dancing alone.<sup>165</sup> "[A]ny incidental impact on the expressive element of nude dancing is *de minimis*," O'Connor stated, adding that a "least restrictive means analysis" was not even required because of the ordinance's content neutrality.<sup>166</sup> Since the ordinance satisfied the four *O'Brien* criteria, O'Connor concluded that the ordinance did not breach the First Amendment's safeguards.<sup>167</sup>

#### D. *Nixon v. Shrink Missouri Government PAC*<sup>168</sup>

State statutes in Missouri limited campaign contributions for candidates seeking statewide office.<sup>169</sup> These contribution "caps" ranged from \$250 to \$1,000.<sup>170</sup> Twenty-four years earlier, the Court in *Buckley v. Valeo*<sup>171</sup> allowed a \$1,000 limit upon individual campaign contributions for candidates seeking federal office.<sup>172</sup> When a Missouri political action committee was barred from contributing as much money as it wanted to give to a candidate seeking the Republican nomination for State Auditor, the political action committee and the candidate himself sued, claiming that Missouri's campaign contribution limits violated the First and Fourteenth Amendments by preventing the political action committee from expressing its political views through financial contributions and potentially preventing the State Auditor candidate

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<sup>162</sup> *Id.* at 296, 301.

<sup>163</sup> *See id.* at 296, 297.

<sup>164</sup> *Id.* at 297–98 ("In the absence of any reason to doubt it, the city's expert judgment should be credited.")

<sup>165</sup> *See id.* at 296.

<sup>166</sup> *Id.* at 301–02 (emphasis in original).

<sup>167</sup> *See id.*

<sup>168</sup> *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000).

<sup>169</sup> *Id.* at 382.

<sup>170</sup> *Id.*

<sup>171</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>172</sup> *Id.* at 385 (citing *Buckley*, 424 U.S. at 13).

from running in the election.<sup>173</sup> The State of Missouri argued that the limit furthered the state government's compelling interest in preventing corruption, or the appearance of corruption, in state elections.<sup>174</sup>

In a 6-3 decision, the Court upheld Missouri's limitations on campaign contributions.<sup>175</sup> Writing for the majority, Justice David Souter stated that the principles articulated within *Buckley* applied to both federal and statewide campaign contributions.<sup>176</sup> Furthermore, Souter continued on to declare that Missouri's law would pass constitutional muster even without the precedent of *Buckley*.<sup>177</sup> Discussing at length the importance of a political system where the governed maintain confidence in the government, Souter agreed with the state government's argument that "the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."<sup>178</sup> Unless a federal or state statute limiting campaign contributions was "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless," Souter indicated that the Court would probably find that the law in question did not breach the First and Fourteenth Amendment free speech protections for candidates and contributors.<sup>179</sup>

Breyer agreed with the majority's judgment, but authored a concurring opinion with which only Ginsburg joined.<sup>180</sup> In his opinion, Breyer focused on the three dissenting justices' contentions that the majority's holding "weaken[ed] the First Amendment."<sup>181</sup> "The Court's opinion does not question the constitutional importance of political speech or that its protection lies at the heart of the First Amendment," Breyer wrote.<sup>182</sup> He then went on to describe reasons why strict scrutiny was not the best test for resolving this dispute,

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<sup>173</sup> *Id.* at 383.

<sup>174</sup> *See id.* at 383–84.

<sup>175</sup> *Id.* at 380, 397–98.

<sup>176</sup> *See id.* at 381, 397–98.

<sup>177</sup> *Id.* at 390 ("In defending its own statute, Missouri espouses those same interests of preventing corruption and the appearance of it that flows from munificent campaign contributions. Even without the authority of *Buckley*, there would be no serious question about the legitimacy of the interests claimed, which, after all, underlie bribery and anti-gratuity statutes.").

<sup>178</sup> *See id.* at 390–95.

<sup>179</sup> *Id.* at 397.

<sup>180</sup> *See id.* at 399 (Breyer, J., concurring).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 400.

stating:

But this is a case where constitutionally protected interests lie on both sides of the legal equation. For that reason there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words “strict scrutiny.” Nor can we expect that mechanical application of the tests associated with “strict scrutiny”—the tests of “compelling interests” and “least restrictive means”—will properly resolve the difficult constitutional problem that campaign finance statutes pose.<sup>183</sup>

The Missouri contribution limits statute, in Breyer’s estimation, “permits all supporters to contribute the same amount of money, in an attempt to make the process fairer and more democratic.”<sup>184</sup> Deference to the state’s legislature was warranted, he continued, as the state’s lawmakers understood the scope of the problems regarding “the integrity of the electoral process” in their own state better than the Court could possibly grasp.<sup>185</sup> He also pointed out that laws imposing unreasonably low campaign contribution limits should not necessarily receive First Amendment protection, as they could prevent challengers from mounting an effective campaign against an incumbent with whom the voting public is already familiar.<sup>186</sup> However, the plaintiffs demonstrated no such “undue insulation” in this case, allowing the statute to withstand their First and Fourteenth Amendment challenges.<sup>187</sup>

*E. Bartnicki v. Vopper*<sup>188</sup>

On a cell phone call with a teacher’s union negotiator, the teacher’s union president made a statement about “blow[ing] off [the] front porches” of school board members.<sup>189</sup> A radio broadcaster later played a tape of this conversation obtained after an unidentified party wiretapped the call between the union negotiator and the union president.<sup>190</sup> Both the negotiator and the president filed suit against

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 401.

<sup>185</sup> *See id.* at 401–02. Breyer specifically pointed out the democratic importance of the statute at issue in this case, stating that the electoral process is “the means through which a free society democratically translates political speech into concrete governmental action.” *Id.* at 401.

<sup>186</sup> *See id.* at 402.

<sup>187</sup> *Id.* at 403, 404, 405.

<sup>188</sup> *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

<sup>189</sup> *Id.* at 518–19.

<sup>190</sup> *Id.* at 518, 519.

the radio broadcaster for violating federal and state prohibitions against wiretapping.<sup>191</sup>

However, the United States Supreme Court's 6-3 majority held in favor of the radio broadcaster.<sup>192</sup> The First Amendment, according to Justice John Paul Stevens's majority opinion, protects dissemination of illegally obtained communications that were later obtained lawfully and address matters of public concern.<sup>193</sup> Applying strict scrutiny even though the wiretapping statutes were content-neutral, Stevens determined that "privacy concerns give way when balanced against the interest in publishing matters of public importance."<sup>194</sup>

The Court's majority saw no reason to upset the precedent of cases like *New York Times Co. v. United States*,<sup>195</sup> in which the Court afforded First Amendment protection to information on a matter of public concern that was made available to the media only by a third party stealing the data.<sup>196</sup> Since the anti-wiretapping statutes punished the innocent publishers, and not the offending wiretappers themselves, Stevens's opinion concluded that these laws penalized the wrong parties, a fact justified by a lack of empirical information from the government showing that the laws deterred wiretappers.<sup>197</sup> Under this rationale, the societal interest in obtaining information on a matter of public concern far outweighed the limited value of the anti-wiretapping provisions.<sup>198</sup>

Breyer agreed with the majority's final result.<sup>199</sup> However, he issued a separate concurring opinion arguing for a considerably narrower position.<sup>200</sup> To Breyer, the Court's majority applied the incorrect test under the circumstances.<sup>201</sup> Given that "important competing constitutional interests are implicated"—speech about a matter of public concern on the one hand, personal privacy from wiretapping on the other—the strict scrutiny test's inherently strong presumption toward finding the statute unconstitutional was misplaced in deciding this case.<sup>202</sup> Instead, Breyer called for a

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<sup>191</sup> *Id.* at 519–20.

<sup>192</sup> *Id.* at 518, 541.

<sup>193</sup> *Id.* at 517–18, 528.

<sup>194</sup> *Id.* at 521, 534.

<sup>195</sup> *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

<sup>196</sup> *See Bartnicki*, 532 U.S. at 528, 537 (citing *N.Y. Times*, 403 U.S. at 714, 715, 733).

<sup>197</sup> *Bartnicki*, 532 U.S. at 529, 530–31, 532.

<sup>198</sup> *See id.* at 534.

<sup>199</sup> *Id.* at 535 (Breyer, J., concurring).

<sup>200</sup> *See id.* at 541.

<sup>201</sup> *See id.* at 536.

<sup>202</sup> *Id.* at 536–37 (citing *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1984)).

proportional analysis that asked only “whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences.”<sup>203</sup>

In applying this balancing test, Breyer reached the same ultimate conclusion as the majority.<sup>204</sup> Under his rationale, the exercise of the wiretapping laws in this particular case “[did] not reasonably reconcile the competing constitutional objectives.”<sup>205</sup> Instead, given that the broadcaster did not engage in unlawful activity to obtain and publish the tape, the law imposed an undue restriction on media freedom.<sup>206</sup> Furthermore, Breyer emphasized that the speech in question proposed an act of violence, “thereby raising a significant concern for the safety of others.”<sup>207</sup> Since laws consistently provide a privilege to disclose threats against the public welfare, the nature of the speech in the phone conversation enhanced the public’s interests in learning the contents of this dialogue.<sup>208</sup> Emphasizing that his findings were strictly limited to this particular case in which “the speakers’ legitimate privacy expectations are unusually low [because they were limited public figures issuing a threat to another party’s safety], and the public interest in defeating those expectations is unusually high,” Breyer found that the lawful actions of the broadcaster deserved constitutional protection against the wiretapping statutes.<sup>209</sup>

#### F. *United States v. United Foods, Inc.*<sup>210</sup>

The federal Mushroom Promotion, Research, and Consumer Information Act required fresh mushroom handlers to pay assessments used primarily to fund mushroom-promoting advertisements.<sup>211</sup> United Foods refused to pay the assessment, claiming that the Mushroom Act violated its First Amendment free

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<sup>203</sup> *Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring).

<sup>204</sup> *Id.* at 541.

<sup>205</sup> *Id.* at 538.

<sup>206</sup> *See id.*

<sup>207</sup> *Id.* at 539.

<sup>208</sup> *Id.* at 539 (citing *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 854 (10th Cir. 1972); *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 350 (Cal. 1976)).

<sup>209</sup> *Bartnicki*, 532 U.S. at 540–41 (Breyer, J., concurring) (“I emphasize the particular circumstances before us because, in my view, the Constitution permits legislatures to respond flexibly to the challenges future technology may pose to the individual’s interest in basic personal privacy . . . . For these reasons, we should avoid adopting overly broad or rigid constitutional rules, which would unnecessarily restrict legislative flexibility.”).

<sup>210</sup> *United States v. United Foods, Inc.*, 533 U.S. 405 (2001).

<sup>211</sup> *Id.* at 408.

speech rights.<sup>212</sup> In response, the government pointed to the case of *Glickman v. Wileman Brothers & Elliott*,<sup>213</sup> in which the Court decided that a government-imposed fee for “collective product advertising” was “simply a question of economic policy for Congress and the Executive to resolve,” and thus did not trigger a First Amendment analysis.<sup>214</sup> The facts in the instant case, according to the government, were identical to *Glickman*.<sup>215</sup>

However, the Court’s 6-3 majority disagreed.<sup>216</sup> Writing for the Court, Kennedy determined that the Mushroom Act’s assessment did violate the First Amendment.<sup>217</sup> *Glickman* did not apply, Kennedy wrote, because unlike the statute affecting the plaintiffs in that case, the Mushroom Act did not deprive the mushroom growers of their “ability to compete” through a uniform price or a supply constraint.<sup>218</sup> Under Kennedy’s analysis, allowing a “compelled subsidy for speech in the context of a program where the principal object is speech itself” was nonsensical.<sup>219</sup> The First Amendment, Kennedy concluded, did not allow the government to force a certain type of expression “by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity.”<sup>220</sup>

Breyer dissented.<sup>221</sup> Joined by Ginsburg and largely by O’Connor, he argued that the Court improperly departed from *Glickman* in its holding.<sup>222</sup> To Breyer, the presence or absence of price and output regulations should not by itself tilt the scales in favor of First Amendment protection.<sup>223</sup> The government’s regulatory program directly advanced a reasonable goal of “maintaining and expanding existing markets and uses for mushrooms.”<sup>224</sup> Nothing about this objective was out of the ordinary, as “collective promotion and

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<sup>212</sup> *Id.* at 408–09.

<sup>213</sup> *Glickman v. Wileman Bros. & Elliot*, 521 U.S. 457 (1997).

<sup>214</sup> *United Foods*, 533 U.S. at 419 (Breyer, J., dissenting) (quoting *Glickman*, 521 U.S. at 468).

<sup>215</sup> *United Foods*, 533 U.S. at 411.

<sup>216</sup> *Id.* at 415, 419.

<sup>217</sup> *Id.* at 408, 416.

<sup>218</sup> *Id.* at 412, 413, 414 (quoting *United Foods, Inc. v. United States*, 197 F.3d 221, 223 (1999)).

<sup>219</sup> *United Foods*, 533 U.S. at 415.

<sup>220</sup> *Id.* at 413 (first citing *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 212, 241–42 (1977); and then citing *Keller v. State Bar of Cal.*, 496 U.S. 1, 5 (1990)).

<sup>221</sup> *United Foods*, 533 U.S. at 419 (Breyer, J., dissenting).

<sup>222</sup> *Id.* at 419–20 (citing *Glickman v. Wileman Bros. & Elliot*, 521 U.S. 457, 468, 469–70 (1997)).

<sup>223</sup> *United Foods*, 533 U.S. at 421 (Breyer, J., dissenting).

<sup>224</sup> *Id.*



research is a perfectly traditional form of government intervention in the marketplace.”<sup>225</sup>

The type of expression at issue here, Breyer continued, did not rise to the level of other compelled contribution cases that triggered a First Amendment analysis, such as cases where the government demanded contributions from employees to trade unions and from trial lawyers to bar associations.<sup>226</sup> In such cases, the contributors were forced to donate money to organizations that could use the money to fund public statements that “might ‘conflict with one’s ‘freedom of belief,’” including public stances about issues like gun control, abortion, and prayer in public schools.<sup>227</sup> In the instant case, however, Breyer stated that the public messaging in question could not reasonably “engender[] any crisis of conscience.”<sup>228</sup>

Breyer criticized the Court’s majority for employing a test that was far “stricter” than necessary.<sup>229</sup> While the majority used the traditional *Central Hudson* test for commercial speech cases, Breyer stated that this “more stringent standard” exceeded the confines of this matter.<sup>230</sup> Since the law compelled only monetary payments and not speech itself, furthered the basic First Amendment commercial speech interests by promoting truthful dissemination about a commercial product to consumers, and imposed “no special risk of other forms of speech-related harm,” Breyer determined that the matter merely involved a form of garden variety governmental economic regulation.<sup>231</sup> Not only did the First Amendment permit such speech, but a First Amendment analysis was completely unwarranted from the outset.<sup>232</sup>

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<sup>225</sup> *Id.*

<sup>226</sup> *See id.* at 422–23 (first citing *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 222 (1977); then citing *Keller v. State Bar of Cal.*, 496 U.S. 1, 9 (1990); then citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 625, 642 (1943); and then citing *Wooley v. Maynard*, 430 U.S. 705, 707–08, 717 (1977)).

<sup>227</sup> *United Foods*, 533 U.S. at 423 (Breyer, J., dissenting) (quoting *Glickman*, 521 U.S. at 471).

<sup>228</sup> *United Foods*, 533 U.S. at 423 (Breyer, J., dissenting) (quoting *Glickman*, 521 U.S. at 472).

<sup>229</sup> *United Foods*, 533 U.S. at 428 (Breyer, J., dissenting).

<sup>230</sup> *Compare United Foods*, 533 U.S. at 409, 410 (majority opinion) (explaining that the Court had applied the *Central Hudson* test to analyze speech regulations providing less than full First Amendment protection to commercial speech, but concluding that the court did not reach that inquiry in this case because the government did not assert an argument under that standard) *with id.* at 429 (Breyer, J., dissenting) (arguing that the government regulation was constitutional and could satisfy the stringent *Central Hudson* standard for commercial speech) (citing *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 564 (1980)).

<sup>231</sup> *United Foods*, 533 U.S. at 425, 426, 427, 428 (Breyer, J., dissenting).

<sup>232</sup> *See id.* at 425, 428 (quoting *Glickman*, 521 U.S. at 477).

*G. Thompson v. Western States Medical Center*<sup>233</sup>

A federal statute prohibited pharmacies from advertising medicines that pharmacists mix themselves, known as “compounded drugs.”<sup>234</sup> Seven licensed pharmacies that specialized in compounding medicines sued the federal government, claiming that the statute violated the First Amendment.<sup>235</sup> The federal government responded by claiming an interest in protecting consumers from harm, as compounded drugs did not pass through all of the safety testing that mass-produced medications received prior to commercial distribution.<sup>236</sup>

In a 5-4 holding, the Court’s majority struck down the law as unconstitutional.<sup>237</sup> O’Connor’s majority opinion asserted that the government had at its disposal other options that restricted less speech.<sup>238</sup> To O’Connor, the government could create a mandatory label for compounded drugs stating that the products had not passed the same safety tests as mass-produced medicines, or impose a limit on the quantity of compounded drugs that each pharmacy could sell.<sup>239</sup> Either option would accomplish the government’s goals of alerting consumers about the lack of testing without imposing an absolute ban on a particular form of commercial speech.<sup>240</sup> Given the availability of less-restrictive alternatives that would accomplish the same goal, O’Connor’s majority opinion determined that the federal law could not pass the *Central Hudson* commercial speech test.<sup>241</sup>

Breyer dissented, joined by the bipartisan lineup of Rehnquist, Stevens, and Ginsburg.<sup>242</sup> In his dissent, he pointedly criticized the majority’s opinion for not affording enough credibility to the government’s safety-motivated regulatory scheme.<sup>243</sup> The majority, he argued, jumped to impose alleged alternatives too quickly without properly considering the work of experts in the legislative and executive branches who deemed the advertising ban necessary to

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<sup>233</sup> *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002).

<sup>234</sup> *Id.* at 360–61.

<sup>235</sup> *Id.* at 360.

<sup>236</sup> *Id.* at 362, 368–69.

<sup>237</sup> *Id.* at 359, 377.

<sup>238</sup> *Id.* at 376.

<sup>239</sup> *Id.* at 372, 376.

<sup>240</sup> *Id.*

<sup>241</sup> *See id.* at 370, 371, 377 (citing *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 565 (1980)).

<sup>242</sup> *Thompson*, 535 U.S. at 378 (Breyer, J., dissenting); *see infra* note 673 (discussing generally the partisan voting habits of Rehnquist, Stevens, Breyer and Ginsburg).

<sup>243</sup> *Thompson*, 535 U.S. at 385–86 (Breyer, J., dissenting).

protect the public from lightly tested medicines.<sup>244</sup>

In his opinion, he also rejected components of the *Central Hudson* test's usefulness.<sup>245</sup> “[A]n overly rigid ‘commercial speech’ doctrine will transform what ought to be a legislative or regulatory decision about the best way to protect the health and safety of the American public into a constitutional decision prohibiting the legislature from enacting necessary protections,” he stated.<sup>246</sup> Given the high value of protecting the American public from potentially harmful drugs, he determined that the government had cleanly met its burden, and thus the law posed no First Amendment harm.<sup>247</sup>

#### *H. Ashcroft v. Free Speech Coalition*<sup>248</sup>

The federal Child Pornography Prevention Act of 1996 banned “any visual depiction” . . . that “is, or appears to be, of a minor engaging in sexually explicit conduct.”<sup>249</sup> This statute also forbade all sexually revealing images that were “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression” that it showed “a minor engaging in sexually explicit conduct.”<sup>250</sup> A trade association for the “adult-entertainment industry,” along with a book publisher who promoted the nudist lifestyle, a photographer who specialized in erotic scenes, and a painter who specialized in nudes, sued the federal government, claiming that these provisions of the statute violated the First Amendment by posing an overbroad restriction on speech and expression.<sup>251</sup>

The Court sided with the plaintiffs.<sup>252</sup> In a 7-2 decision, the justices found these two provisions overbroad, posing a risk of forbidding not only the constitutionally unprotected category of child pornography, but also a wide range of constitutionally protected speech.<sup>253</sup> Throughout Justice Anthony Kennedy’s majority opinion, which

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<sup>244</sup> See *id.* at 388, 389 (first citing *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 349 (2001); and then citing *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188–89 (1979) (Blackmun, J., concurring)).

<sup>245</sup> See *Thompson*, 535 U.S. at 388–89 (Breyer, J., dissenting) (citing *Cent. Hudson*, 447 U.S. at 566).

<sup>246</sup> *Thompson*, 535 U.S. at 389 (Breyer, J., dissenting).

<sup>247</sup> *Id.* at 378–79 (citing *Cent. Hudson*, 447 U.S. at 564).

<sup>248</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

<sup>249</sup> *Id.* at 241.

<sup>250</sup> *Id.* at 241, 242.

<sup>251</sup> *Id.* at 243.

<sup>252</sup> *Id.* at 258.

<sup>253</sup> *Id.* at 239, 251, 258.

Breyer joined, references to the threat of banning speech with potential “literary, artistic, political, or scientific value” were abundant.<sup>254</sup> Citing multiple movies, theatrical performances, and works of art that involved sexual activity among adolescent children, Kennedy noted that the makers of these creative contributions could receive severe sanctions under these two sections of the law.<sup>255</sup> The majority strongly reiterated that child pornography merited little First Amendment protection, regardless of any other accompanying values.<sup>256</sup> However, “[t]he First Amendment requires a more precise restriction” tailored to the offending categories of speech than these broad-based provisions provided.<sup>257</sup>

*I. Ashcroft v. American Civil Liberties Union*<sup>258</sup>

The Child Online Protection Act contained multiple provisions aimed at protecting children from accessing sexually obscene materials on the Internet.<sup>259</sup> Previously, the Court had invalidated the Communications Decency Act of 1996, a statute with similar objectives, because the Court found that less speech-restrictive alternative solutions were available.<sup>260</sup> In answer to the Court’s objections, Congress passed the Child Online Protection Act criminalizing the “knowing posting” of online materials that were “harmful” to individuals under age seventeen without providing safeguards to restrict minors from accessing such material.<sup>261</sup> The law defined “harmful” as any content that “the average person, applying contemporary community standards,” would deem appealing to or pandering to “the prurient interest,” and represents, without any “serious literary, artistic, political, or scientific value for minors,” an “actual or simulated” lewd or sexual act “in a manner patently offensive with respect to minors.”<sup>262</sup>

The plaintiffs sued the federal government, claiming that the same problems that invalidated the Communications Decency Act of 1996 continued to plague the Child Online Protection Act as well.<sup>263</sup> After

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<sup>254</sup> *Id.* at 246, 248, 251 (first citing *Miller v. California*, 413 U.S. 15, 24 (1973); and then quoting *New York v. Ferber*, 458 U.S. 747, 763 (1982)).

<sup>255</sup> *See Free Speech Coal.*, 535 U.S. at 247–48.

<sup>256</sup> *See id.* at 250 (citing *Ferber*, 458 U.S. at 762, 763).

<sup>257</sup> *Free Speech Coal.*, 535 U.S. at 258.

<sup>258</sup> *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

<sup>259</sup> *Id.* at 659.

<sup>260</sup> *Id.* at 661.

<sup>261</sup> *See id.* at 661, 662.

<sup>262</sup> *Id.* at 661–62.

<sup>263</sup> *See id.* at 660–61, 663.

a federal district court issued a preliminary injunction against enforcing the law, the United States objected, claiming that the district court abused its discretion and arguing that the law guarded against child pornography, a form of speech receiving very little First Amendment protection, as well as other forms of obscenity against which minors needed state-provided protection.<sup>264</sup>

In a 5-4 decision, the Court agreed with the plaintiffs.<sup>265</sup> Applying strict scrutiny, Kennedy wrote in his majority opinion that “there are a number of plausible, less restrictive alternatives to the statute.”<sup>266</sup> For instance, Kennedy stated that “[b]locking and filtering software” would prove less restrictive, but just as effective in meeting the compelling governmental interest of safeguarding minors against obscene content.<sup>267</sup> While conceding that such software was not flawless, Kennedy noted that the government did not provide “specific evidence” demonstrating that using this software would undermine the government’s compelling interests in protecting minors.<sup>268</sup> Given the broad restrictions on speech and expression that this law imposed, and considering the government’s failure to sufficiently reject less restrictive alternatives as inadequate, Kennedy concluded that the statute posed constitutional problems, and thus the district court did not abuse its discretion in issuing the preliminary injunction.<sup>269</sup>

Breyer dissented.<sup>270</sup> Joined fully by Rehnquist and O’Connor, and partially by Scalia, he argued that the Court overstepped its authority by second-guessing Congress’s research and expertise in passing this statute.<sup>271</sup> Applying the test for “obscene” speech first articulated in *Miller v. California*,<sup>272</sup> Breyer concluded that the Child Online Protection Act targeted “legally obscene material” that did not receive First Amendment protection, “and very little more.”<sup>273</sup> In addition, Breyer emphasized that the Child Online Protection Act did

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<sup>264</sup> See *id.* at 659–60, 663, 664 (citing *ACLU v. Ashcroft*, 322 F.3d 240, 266 (3d Cir. 2003)).

<sup>265</sup> *Ashcroft*, 542 U.S. at 673, 676.

<sup>266</sup> *Id.* at 666, 670 (citing *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 826 (2000)).

<sup>267</sup> *Ashcroft*, 542 U.S. at 666–67.

<sup>268</sup> *Id.* at 668 (“Whatever the deficiencies of filters, however, the Government failed to introduce specific evidence proving that existing technologies are less effective than the restrictions in COPA.”) (citing *ACLU v. Reno*, 31 F. Supp 2d 473, 492 (E.D. Pa. 1999)).

<sup>269</sup> See *Ashcroft*, 542 U.S. at 673.

<sup>270</sup> *Id.* at 676 (Breyer, J., dissenting).

<sup>271</sup> See *id.* at 676, 690.

<sup>272</sup> *Miller v. California*, 413 U.S. 15 (1973).

<sup>273</sup> *Ashcroft*, 542 U.S. at 678 (Breyer, J., dissenting).

not absolutely ban all online content that was “harmful” to minors.<sup>274</sup> Instead, parties providing the “harmful” content could apply programs verifying age of users “using a credit card, adult personal identification number, or other similar technology.”<sup>275</sup> If the content provider developed “an Internet screen that minors, but not adults, will find difficult to bypass,” then the provider would be in full compliance with this law.<sup>276</sup>

Breyer stated that such measures did impose certain burdens, both financial and administrative, upon content providers and adult Internet users.<sup>277</sup> However, he determined that on balance, “the Act at most imposes a modest additional burden on adult access to legally obscene material, perhaps imposing a similar burden on access to some protected borderline obscene material as well.”<sup>278</sup> The costs involved were small, Breyer wrote, and the fears that adult viewers might become “embarrassed” by directly requesting such content from Internet providers held no First Amendment bearing.<sup>279</sup> Additionally, he noted that the Court in past decisions had discussed several problems with “blocking” software, including the software’s ability to reject constitutionally protected speech as well as the speech that the government had a compelling interest to restrict.<sup>280</sup> Thus, the blocking software did not truly qualify as an alternative solution, as using it and stopping there would be the equivalent of improving nothing, as this software existed prior to the law’s passage.<sup>281</sup> As the government had articulated a compelling interest and demonstrated that this law was the least restrictive plausible means of meeting that compelling interest, Breyer concluded that the law satisfied the First Amendment.<sup>282</sup>

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<sup>274</sup> See *id.* at 679, 680.

<sup>275</sup> *Id.* at 682.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 682–83. These burdens ranged from monetary cost to potential embarrassment for the user seeking the permission to access the material. See *id.* (citing *ACLU v. Reno*, 31 F. Supp. 2d 473, 495 (E.D. Pa. 1999)).

<sup>278</sup> *Ashcroft*, 542 U.S. at 683 (Breyer, J., dissenting).

<sup>279</sup> *Id.* at 682–83 (first citing *Reno*, 31 F.Supp. 2d at 495; then citing *United States v. Am. Library Ass’n*, 539 U.S. 194, 209 (2003); and then citing *Reno v. ACLU*, 521 U.S. 844, 890 (1997)).

<sup>280</sup> See *Ashcroft*, 542 U.S. at 683–84 (Breyer, J., dissenting).

<sup>281</sup> See *id.* at 684 (“Conceptually speaking, the presence of filtering software is not an *alternative* legislative approach to the problem of protecting children from exposure to commercial pornography. Rather, it is part of the status quo, *i.e.*, the backdrop against which Congress enacted the present statute . . . . It is always less restrictive to do *nothing* than to do *something*. But ‘doing nothing’ does not address the problem Congress sought to address—namely, that, despite the availability of filtering software, children were still being exposed to harmful material on the Internet.”).

<sup>282</sup> *Id.* at 689.

However, Breyer did not stop there. Instead, he added a final section to his dissent, chastising the majority for ruining any chance of a “constructive discourse between our courts and our legislatures.”<sup>283</sup> According to Breyer, the majority’s opinion failed to allow the government an option “other than ‘ban totally or do nothing at all’” in this particular area.<sup>284</sup> Pointing out that “the obscene and the nonobscene do not come tied neatly into separate, easily distinguishable, packages,” Breyer concluded that the Court’s ultimate holding hamstrung prosecutors from enforcing a “middle way” in which providers of obscene content could restrict access to children while still providing it, after meeting some small burdens, to adults who lawfully wished to see such material.<sup>285</sup>

*J. United States v. American Library Association*<sup>286</sup>

The Children’s Internet Protection Act required libraries seeking federal funding to install “filtering software” on their computers.<sup>287</sup> Such software would “help prevent computer users from gaining Internet access to child pornography, obscenity, or material comparably harmful to minors.”<sup>288</sup> The American Library Association contended that the law restricted their patrons’ rights under the First Amendment to view Internet content and communicate online freely.<sup>289</sup> In rebuttal, the federal government argued that it maintained a compelling interest in safeguarding young library users against inappropriate and obscene online content.<sup>290</sup>

By a 6-3 margin, the Court upheld the law.<sup>291</sup> In his opinion for the controlling plurality, Rehnquist stated that unlike books, Internet sites are too vast in number for public libraries to make conscious choices of precisely what material to give customers in furtherance of

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<sup>283</sup> *Id.* (quoting *Blakely v. Washington*, 542 U.S. 296, 326 (2004) (Kennedy, J., dissenting)).

<sup>284</sup> *Ashcroft*, 542 U.S. at 691 (Breyer, J., dissenting).

<sup>285</sup> *See id.* (“That matters in a world where the obscene and the nonobscene do not come tied neatly into separate, easily distinguishable, packages. In that real world, this middle way might well have furthered First Amendment interests by tempering the prosecutorial instinct in borderline cases. At least, Congress might have so believed.”).

<sup>286</sup> *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003).

<sup>287</sup> *Id.* at 199, 203.

<sup>288</sup> *Id.* at 215 (Breyer, J., concurring).

<sup>289</sup> *See id.* at 201–02 (majority opinion) (quoting *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401, 453, 457 (E.D. Pa. 2002)).

<sup>290</sup> *See Am. Library Ass’n*, 539 U.S. at 201, 203 (quoting *Am. Library Ass’n*, 201 F. Supp. 2d at 471, 479).

<sup>291</sup> *Am. Library Ass’n*, 539 U.S. at 198, 220.

the library's traditional educational mission.<sup>292</sup> Therefore, a library's categorical exclusion of certain types of websites was not unusual or abnormal.<sup>293</sup> Given that many libraries exclude pornographic books and periodicals from their collections, decisions to ban the same types of material from their computers did not overly burden the speech and expression rights of their customers.<sup>294</sup> While filtering software could potentially censor constitutionally protected speech that ranged beyond the targeted categories, an adult patron could ask the librarian to temporarily disable the filter "to enable access for bona fide research or other lawful purposes."<sup>295</sup> Thus, the restrictions under the law did not unreasonably restrict the First Amendment rights of library patrons.<sup>296</sup> Since the law did not require libraries to commit an unconstitutional act to receive the federal funding, the statute was therefore a valid exercise of Congressional power under the Spending Clause.<sup>297</sup>

Breyer agreed with the majority's holding.<sup>298</sup> However, he wrote a solo concurring opinion calling for the application of "heightened" scrutiny, but not strict scrutiny, when evaluating the facts of the case.<sup>299</sup> The burden imposed on library patrons in needing to ask a librarian to enable access to the sites was small, Breyer concluded, while the interest in preventing child pornography and safeguarding minors against obscene content was "legitimate, and even

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<sup>292</sup> See *id.* at 203–04, 207–08 (quoting and citing *Am. Library Ass'n*, 201 F. Supp. 2d at 420, 421, 463).

<sup>293</sup> See *Am. Library Ass'n*, 539 U.S. at 208

<sup>294</sup> *Id.* ("Most libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion. We do not subject these decisions to heightened scrutiny; it would make little sense to treat libraries' judgments to block online pornography any differently, when these judgments are made for just the same reason.")

<sup>295</sup> *Id.* at 209.

<sup>296</sup> See *id.* at 209, 214. To the argument that some patrons might be embarrassed to ask a librarian to unblock certain sites, even if the patron wanted to view these sites for solely legitimate research purposes, Rehnquist responded that "the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment." *Id.* at 209.

<sup>297</sup> *Id.* at 214.

<sup>298</sup> *Id.* at 215–16, 220 (Breyer, J., concurring).

<sup>299</sup> *Id.* at 217. Breyer included an explanation of why, in his opinion, strict scrutiny was not the proper test for this case:

To apply "strict scrutiny" to the "selection" of a library's collection (whether carried out by public libraries themselves or by other community bodies with a traditional legal right to engage in that function) would unreasonably interfere with the discretion necessary to create, maintain, or select a library's "collection" (broadly defined to include all the information the library makes available).

*Id.* (citing *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 257 (1974)).



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compelling.”<sup>300</sup> On balance, Breyer concluded that the law was proportional to the means sought, and thus satisfied the free speech demands of the First Amendment.<sup>301</sup>

*K. Nike v. Kasky*<sup>302</sup>

Various commentators claimed that Nike shoes were made in factories that instituted sweatshop conditions and multiple unfair labor practices.<sup>303</sup> Nike claimed that the allegations were wrong and issued rebuttals through press releases, letters to institutional buyers, and letters to the editor.<sup>304</sup> The commentators, in turn, asserted that Nike’s claims were false, and took legal action against Nike for misleading the public through statements that were aimed at convincing people to continue buying Nike goods.<sup>305</sup> In a 5-3 decision, the California Supreme Court determined that Nike’s denials qualified as “commercial speech,” thus allowing Nike to be punished if their statements actually were false, and remanded the case for further proceedings.<sup>306</sup> Nike then appealed to the United States Supreme Court.<sup>307</sup>

The majority of the United States Supreme Court’s justices, however, refused to issue a decision on this issue.<sup>308</sup> Instead, the majority held that the California high court had not delivered a final judgment in the case, reaching only the determination that Nike’s speech in question was in fact commercial speech.<sup>309</sup> Since the lower state court now held the power to review the matter again, including rendering a decision about whether Nike’s statements were misleading to the public, the Court’s majority decided that they lacked the authority to step in and decide the case.<sup>310</sup>

Breyer dissented.<sup>311</sup> Joined by O’Connor, he stated that the Court not only could decide the case, but should issue a decision holding that Nike’s speech received full First Amendment protection.<sup>312</sup> To

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<sup>300</sup> *Id.* at 215, 220 (Breyer, J., concurring).

<sup>301</sup> *Id.* at 220.

<sup>302</sup> *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003).

<sup>303</sup> *Id.* at 656 (Stevens, J., concurring).

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 657 (quoting *Kasky v. Nike, Inc.*, 45 P.3d 243, 247 (Cal. 2002)); *Id.*

<sup>307</sup> Brief for Petitioner at i, *Nike, Inc. et al. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575).

<sup>308</sup> *Nike*, 539 U.S. at 656, 657–58 (Stevens, J., concurring) (supporting dismissal of the writ of certiorari as improvidently granted).

<sup>309</sup> *See id.* at 657 (citing *Kasky*, 45 P.3d at 247).

<sup>310</sup> *See Nike*, 539 U.S. at 657–658, 664 (Stevens, J., concurring).

<sup>311</sup> *Id.* at 665 (Breyer, J., dissenting).

<sup>312</sup> *Id.* at 665, 678–79, 684 (citing *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469,

Breyer, the case's outcome hinged on the fact that Nike's speech was not exclusively commercial in nature.<sup>313</sup> The messages that the company sent fell outside the traditional advertising medium.<sup>314</sup> While convincing consumers to remain loyal to Nike products likely served as a motivating factor for the company in issuing these statements, the stimulus for the speech came from the need to respond to the company's critics.<sup>315</sup> Since the detractors focused on political issues like fair labor practices, Breyer held that the response from Nike fell at least partially within the realm of political speech.<sup>316</sup> As a result, Breyer concluded that Nike's statements merited full First Amendment protection, just as other true but misleading statements are protected on First Amendment grounds.<sup>317</sup>

*L. Beard v. Banks*<sup>318</sup>

A Pennsylvania prison policy prevented certain inmates classified as particularly dangerous from receiving newspapers, magazines, and photographs.<sup>319</sup> One of the inmates sued, claiming that the policy denying all access to these materials violated the First Amendment.<sup>320</sup> The State of Pennsylvania argued that these stringent restrictions were necessary when dealing with this particularly difficult category of inmates.<sup>321</sup> Since the inmates could transform newspapers and magazines into attack weapons such as "spears" or "blow guns," the State claimed that denying such

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480 (1989)). *See also Nike*, 539 U.S. at 667 (Breyer, J., dissenting) ("After receiving 34 briefs on the merits (including 31 *amicus* briefs) and hearing oral argument, the Court dismisses the writ of certiorari, thereby refusing to decide the questions presented, at least for now. In my view . . . the questions presented directly concern the freedom of Americans to speak about public matters in public debate . . . and delay itself may inhibit the exercise of constitutionally protected rights of free speech without making the issue significantly easier to decide later on.").

<sup>313</sup> *Id.* at 676.

<sup>314</sup> *Id.* at 676, 677, 678 (first citing *United States v. United Foods*, 533 U.S. 405, 409 (2001); then citing *Fox*, 492 U.S. at 473–74; and then citing *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980)).

<sup>315</sup> *See Nike*, 539 U.S. at 666 (Breyer, J., dissenting).

<sup>316</sup> *Id.* at 677.

<sup>317</sup> *Id.* at 684. Breyer concluded his opinion with the following statement:

The position of at least one *amicus* . . . echoes a famous sentiment reflected in the writings of Voltaire: 'I do not agree with what you say, but I will fight to the end so that you may say it.' A case that implicates that principle is a case that we should decide."

*Id.*

<sup>318</sup> *Beard v. Banks*, 548 U.S. 521 (2006).

<sup>319</sup> *Id.* at 524–25 (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

<sup>320</sup> *Beard*, 548 U.S. at 527 (first citing *Turner*, 482 U.S. at 89; then citing *Overton v. Bazzetta*, 539 U.S. 126, 131–32 (2003)).

<sup>321</sup> *See Beard*, 548 U.S. at 530.

materials to these notably dangerous and difficult inmates met the “legitimate penological objective[]” of preserving prison safety.<sup>322</sup> Additionally, the State argued that this ban provided an incentive for these prisoners to behave well and move into a lower security classification in which they could possess books, newspapers, and photographs.<sup>323</sup> Lastly, the State held that minimizing the amount of property that these inmates possessed also met a “legitimate penological objective[],” as it improved the ability of correctional officers “to detect concealed contraband and to provide security.”<sup>324</sup>

Breyer, writing the opinion for the Court, agreed with the State’s line of reasoning.<sup>325</sup> Joined by Roberts, Kennedy, and Souter to form a controlling plurality, Breyer centered his writing on the precedent formed within the case of *Turner v. Safley*,<sup>326</sup> which required that prison rules constraining an inmate’s constitutional rights be “reasonably related to legitimate penological interests.”<sup>327</sup> Additionally, *Turner* demanded proof of “alternative means of exercising the right that remain open to prison inmates.”<sup>328</sup> On balance, the *Turner* test also called upon the Court to evaluate the importance of the penological interest at issue, and consider if “ready alternatives” existed for furthering this interest.<sup>329</sup>

Breyer’s opinion decided in favor of the State on each of these questions.<sup>330</sup> In fact, he wrote that the State’s justification of “providing increased incentives for better prison behavior” was enough by itself to satisfy *Turner*’s requirement of showing that the policy was reasonably related to a legitimate penological interest.<sup>331</sup> While inmates had no alternative means of accessing books, newspapers, and photographs while they were within this particular security level, the prisoners did have the alternative of gaining these materials by proving to corrections personnel that they belonged in a less-stringent security level.<sup>332</sup> Stating that the Court should give “substantial deference to the professional judgment of prison administrators,” Breyer’s opinion held that the State easily passed

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<sup>322</sup> *Id.* at 530, 531 (quoting *Turner*, 482 U.S. at 95).

<sup>323</sup> *Beard*, 548 U.S. at 531.

<sup>324</sup> *Id.* (quoting *Turner*, 482 U.S. at 95).

<sup>325</sup> *Beard*, 548 U.S. at 524, 525.

<sup>326</sup> *Turner v. Safley*, 482 U.S. 78 (1987).

<sup>327</sup> *See Beard*, 548 U.S. at 525 (quoting *Turner*, 482 U.S. at 89).

<sup>328</sup> *Beard*, 548 U.S. at 529 (quoting *Turner*, 482 U.S. at 90).

<sup>329</sup> *Beard*, 548 U.S. at 529 (quoting *Turner*, 482 U.S. at 90).

<sup>330</sup> *See Beard*, 548 U.S. at 532, 533.

<sup>331</sup> *Id.* at 530, 531.

<sup>332</sup> *See id.* at 532.

the *Turner* test and thus proved that the prison policy was constitutional.<sup>333</sup>

*M. Garcetti v. Ceballos*<sup>334</sup>

A calendar deputy for the Los Angeles District Attorney's Office believed that he found significant misrepresentations within an affidavit that convinced a magistrate to issue a pivotal search warrant.<sup>335</sup> The deputy informed his supervisors about the misrepresentation and prepared a disposition memorandum in which he recommended dismissing the case.<sup>336</sup> When the supervising attorneys refused to dismiss the matter, the deputy told defense counsel of his beliefs regarding the misrepresentations in the affidavit.<sup>337</sup> Later, the defense counsel subpoenaed the deputy to testify on the defense's behalf.<sup>338</sup> The District Attorney's Office subsequently transferred the deputy to a different assignment and passed over him for a promotion.<sup>339</sup> The deputy sued, claiming that the District Attorney's Office had retaliated against him for speech that was constitutionally protected.<sup>340</sup> In response, the District Attorney's Office argued that the deputy spoke as a government employee, not as a private citizen, and thus his speech did not warrant First Amendment protection.<sup>341</sup>

In a 5-4 decision, the Court found in favor of the District Attorney's Office.<sup>342</sup> Writing for the majority, and utilizing a framework established in the case of *Pickering v. Board of Education*,<sup>343</sup> Kennedy determined that the deputy's speech occurred as part of his official duties as a public servant.<sup>344</sup> To Kennedy, the fact that the deputy wrote the memorandum pursuant to his job obligations for the District Attorney's Office demonstrated that the deputy did not speak "as a citizen," even though the speech focused on a matter of significant public concern.<sup>345</sup> According to Kennedy's analysis,

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<sup>333</sup> See *id.* at 528, 536 (quoting *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003)).

<sup>334</sup> *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

<sup>335</sup> *Id.* at 413-14.

<sup>336</sup> *Id.* at 414.

<sup>337</sup> *Id.* at 414-15.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.* at 415.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at 412, 415, 426.

<sup>343</sup> *Pickering v. Bd. of Educ.*, 225 N.E.2d 1 (Ill. 1967).

<sup>344</sup> See *Garcetti*, 547 U.S. at 413, 424.

<sup>345</sup> See *id.* at 422 ("When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to

speaking as a public employee did not necessarily trigger “any liberties [that] the employee might have enjoyed as a private citizen.”<sup>346</sup> Since the deputy spoke in the capacity of a public employee rather than a private citizen, and disrupted a government office in violation of his supervisor’s orders, the Court’s majority held that the First Amendment did not “insulate [the deputy’s] communications from employer discipline.”<sup>347</sup>

Souter (joined by Ginsburg) and Stevens wrote dissents.<sup>348</sup> Both Souter and Stevens criticized the majority’s holding for devaluing the potentially important speech of public employees.<sup>349</sup> To both of them, First Amendment protection for “exactly the same words” should not differ depending on whether expressing those words falls within a public official’s memorandum of duties.<sup>350</sup> Souter even stated that on balance, “comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee’s favor,” even if the employee spoke as an employee rather than as a private citizen.<sup>351</sup>

Breyer also dissented, utilizing a rationale that differed from the other three dissenters.<sup>352</sup> To him, the majority’s holding effectively eliminated constitutional protections for public employees speaking pursuant to their official duties.<sup>353</sup> Such a stance, he argued, was “too absolute.”<sup>354</sup> Furthermore, he concluded that the case at hand demonstrated the danger of the majority’s rigid stance.<sup>355</sup> A lawyer’s speech, he pointed out, “is subject to independent regulation by canons of the profession.”<sup>356</sup> Ethically, the deputy faced an obligation to disclose the alleged misrepresentations in the affidavit.<sup>357</sup> In addition, Breyer noted that the Constitution requires prosecutors “to

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speaking or writing does not mean his supervisors were prohibited from evaluating his performance.”).

<sup>346</sup> *Id.* at 421–22.

<sup>347</sup> *Id.* at 421.

<sup>348</sup> *Id.* at 426 (Stevens, J., dissenting); *id.* at 427 (Souter, J. dissenting).

<sup>349</sup> *See id.* at 427 (Stevens, J., dissenting); *id.* at 428 (Souter, J., dissenting).

<sup>350</sup> *Id.* at 427 (Stevens, J., dissenting); *see id.* at 430 (Souter, J., dissenting) (stating that the analysis of whether a public employee’s speech fell within the context of his or her job responsibilities was a peculiar and unjustified line for the Court to draw).

<sup>351</sup> *Id.* at 435 (Souter, J., dissenting).

<sup>352</sup> *See id.* at 444 (Breyer, J., dissenting).

<sup>353</sup> *Id.* at 446.

<sup>354</sup> *Id.*

<sup>355</sup> *See id.*

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* (citing *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001)) (“Those canons provide an obligation to speak in certain instances. And where that is so, the government’s own interest in forbidding that speech is diminished.”).

learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence in the government's possession."<sup>358</sup> Given that both the Constitution and the ethical obligations of the deputy's profession required disclosure, it was incongruous not to provide "special" First Amendment protection of the deputy's speech.<sup>359</sup>

However, Breyer also disagreed with the test that Souter developed in his dissent.<sup>360</sup> According to Breyer, Souter's test could not "screen out very much."<sup>361</sup> To Breyer, most government agencies deal routinely with issues involving "threats to health and safety" or "other serious wrongdoing."<sup>362</sup> While the majority opinion proscribed too much speech, Breyer feared that Souter's test could protect too much speech that gratuitously undermined effective agency management.<sup>363</sup> Ultimately, Breyer concluded that while the First Amendment can protect an individual's speech delivered in the capacity of a public employee, such protection exists "only in the presence of augmented need for constitutional protection and diminished risk of undue judicial interference with governmental management of the public's affairs."<sup>364</sup>

#### *N. Randall v. Sorrell*<sup>365</sup>

A Vermont state campaign finance law strictly limited the amounts of money individuals, political parties, and political groups could contribute during an election cycle.<sup>366</sup> The same law, Act 64, also provided boundaries on expenditures by statewide candidates for political office.<sup>367</sup> The petitioners sued the state's Attorney General, arguing that Act 64 violated the First Amendment by

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<sup>358</sup> *Garcetti*, 547 U.S. at 447 (Breyer, J., dissenting) (citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)).

<sup>359</sup> *Garcetti*, 547 U.S. at 447 (Breyer, J., dissenting) ("Where professional and special constitutional obligations are both present, the need to protect the employee's speech is augmented, the need for broad government authority to control that speech is likely diminished, and administrable standards are quite likely available.").

<sup>360</sup> *See id.* at 447–48.

<sup>361</sup> *Id.* at 448.

<sup>362</sup> *Id.* at 448–49 (listing police officers, firefighters, building inspectors, hospital workers, and environmental protection agents as examples of public employees whose job duties encompass these categories).

<sup>363</sup> *See id.*

<sup>364</sup> *Id.* at 449.

<sup>365</sup> *Randall v. Sorrell*, 548 U.S. 230 (2006).

<sup>366</sup> *Id.* at 237.

<sup>367</sup> *See id.*

unconstitutionally proscribing political speech.<sup>368</sup> In their arguments, the petitioners focused on the United States Supreme Court's earlier decision in *Buckley v. Valeo*, which had invalidated expenditure limits by political candidates.<sup>369</sup> They also claimed that the contribution ceilings in Act 64, which capped contributions around \$400 for statewide candidates, were unconstitutionally low.<sup>370</sup> Vermont's Attorney General asserted that the state had a compelling interest in fighting political corruption in elections, ensuring fairness in elections, and preventing candidates for state office from spending too much of their time soliciting campaign contributions.<sup>371</sup>

The Court sided with Randall, overturning Act 64 on First Amendment grounds.<sup>372</sup> Breyer authored the opinion of the Court's 6-3 majority, joined by a largely conservative lineup: Roberts, Scalia, Thomas, Alito, and Kennedy.<sup>373</sup> Utilizing a five-part test, Breyer wrote that the limitations within Act 64 were "disproportionate to the public purposes they were enacted to advance."<sup>374</sup> After stating that some political campaign contribution limits are constitutional, Breyer went on to conclude that Act 64's limits raised "danger signs" because they were extraordinarily low, and thus could prevent candidates for state office from campaigning effectively.<sup>375</sup> Vermont's justifications, while deemed "perfectly obvious" interests by Breyer, did not rise to the level of justifying such a broad-based restriction of speech by political candidates and the Vermont citizens who wished to support them through financial endorsements.<sup>376</sup>

#### *O. Morse v. Frederick*<sup>377</sup>

A public school maintained a policy banning students from displaying materials promoting the use of illegal drugs.<sup>378</sup> During a

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<sup>368</sup> *Id.* at 240 (citing *Buckley v. Valero*, 424 U.S. 1, 39 (1976)).

<sup>369</sup> *Randall*, 548 U.S. at 241.

<sup>370</sup> *See id.* at 238, 240, 248–49 (citing *Landell v. Sorrell*, 118 F. Supp. 2d 459, 470 (D. Vt. 2000)).

<sup>371</sup> *See Randall*, 548 U.S. at 243.

<sup>372</sup> *Id.* at 262.

<sup>373</sup> *See id.* at 236. Roberts joined Breyer's opinion fully. *Id.* Alito, Kennedy, Thomas, and Scalia agreed with Breyer regarding the ultimate outcome of the case, but issued their own concurring opinions differing to varying degrees regarding the rationale. *Id.* at 263 (Alito, J., concurring); *id.* at 264 (Kennedy, J., concurring); *id.* at 265 (Thomas, J., concurring).

<sup>374</sup> *Id.* at 253, 262 (majority opinion).

<sup>375</sup> *See id.* at 247, 248–249 (first quoting *Buckley v. Valero*, 424 U.S. 1, 25 (1976); and then citing *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984)).

<sup>376</sup> *See id.* at 246, 247, 253.

<sup>377</sup> *Morse v. Frederick*, 551 U.S. 393 (2007).

<sup>378</sup> *See id.* at 396.

school-supervised assembly, a student unfurled a large banner with the words “BONG HiTS 4 JESUS [sic].”<sup>379</sup> The school’s principal took away the banner and suspended the student for ten days.<sup>380</sup> The student sued, arguing that the school’s prohibition of pro-drug materials violated his constitutional free speech rights.<sup>381</sup>

In a 5-4 decision, the Court upheld the school’s policy.<sup>382</sup> Roberts’ majority opinion stated that students maintain certain freedom of speech rights while in school, but those rights do not extend to speech that can undermine the school’s educational mission.<sup>383</sup> While the meaning of the student’s message was nebulous at best, one could reasonably interpret the phrase to encourage or promote illicit drug usage.<sup>384</sup> According to the majority’s holding, schools may “take steps to safeguard” students from speech advocating illegal drug use without running afoul of the Constitution.<sup>385</sup>

Breyer concurred with the majority’s ultimate outcome.<sup>386</sup> However, he refused to reach a conclusion of any nature regarding the “difficult” First Amendment issue that these facts presented.<sup>387</sup> To Breyer, the Court’s past precedent regarding constitutional protections for student speech was unclear.<sup>388</sup> He added that the majority’s holding in this case provided no meaningful guidance for future judicial proceedings on student speech issues, noting that the majority opinion did not elaborate on how speech-restrictive a school’s anti-drug policies could become without violating the Constitution’s free speech protections.<sup>389</sup> Breyer feared that this could create a risk of potentially chilling more speech in this area than was necessary, including pure political speech by students about the alleged benefits of certain currently illegal drugs.<sup>390</sup>

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<sup>379</sup> *Id.* at 396, 397.

<sup>380</sup> *Id.* at 398.

<sup>381</sup> *Id.* at 399.

<sup>382</sup> *Id.* at 395, 409–10.

<sup>383</sup> *Id.* at 410 (“The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.”).

<sup>384</sup> *Id.* (“It was reasonable for her to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use.”).

<sup>385</sup> *Id.* at 397.

<sup>386</sup> *See id.* at 433 (Breyer, J., concurring in part and dissenting in part) (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936)).

<sup>387</sup> *See Morse*, 551 U.S. at 427–28 (Breyer, J., concurring in part and dissenting in part).

<sup>388</sup> *See id.* at 429, 430 (first citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969); then citing *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986); and then citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)).

<sup>389</sup> *See Morse*, 551 U.S. at 428 (Breyer, J., concurring in part and dissenting in part).

<sup>390</sup> *See id.* at 426 (“Moreover, it is unclear how far the Court’s rule regarding drug advocacy



Instead, Breyer stated that the Court should take the clearer, more direct route of deciding the case solely on qualified immunity grounds.<sup>391</sup> Under the qualified immunity doctrine, government employees are immune from liability “unless the employee’s conduct violates ‘clearly established statutory or constitutional rights of which a reasonable person would have known.’”<sup>392</sup> Given that even the Court itself was largely unclear about the state of the law in this area, the school principal could not reasonably be expected to know the constitutional boundaries regarding student speech.<sup>393</sup> Therefore, Breyer determined that qualified immunity protected the principal from the student’s lawsuit.<sup>394</sup> As this was enough to resolve the case, he wrote that the Court should have answered this easier question in its opinion and stopped there, leaving the First Amendment issue about student speech for another case when such a decision became absolutely necessary.<sup>395</sup>

*P. Federal Communications Commission v. Fox Television Stations, Inc. (2009 decision)*<sup>396</sup>

The Federal Communications Commission (FCC) maintains policies and promulgates regulations regarding the use of profanity in television broadcasts. During the 2002 and 2003 Fox Television broadcasts of the Billboard Music Awards, one musician used a profane word in her acceptance speech, and one presenter used two profane words.<sup>397</sup> The FCC issued notices of liability to Fox Television for broadcasting the expletives.<sup>398</sup> Fox objected, claiming that the FCC previously stated that it would not punish the use of “fleeting expletives” in broadcasts.<sup>399</sup> The FCC responded by stating that its previous “fleeting expletive” stances were only staff letters, and did not accurately represent the agency’s actual position on this issue.<sup>400</sup> Fox then sued the FCC, claiming that the FCC’s liability order was “arbitrary” and “capricious” due to a lack of notice about

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extends . . . [S]peech advocating change in drug laws might also be perceived of as promoting the disregard of existing drug laws.”).

<sup>391</sup> *Id.* at 428.

<sup>392</sup> *Id.* at 429 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

<sup>393</sup> *See id.* at 430.

<sup>394</sup> *Id.* at 429.

<sup>395</sup> *See id.* at 428 (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936)).

<sup>396</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

<sup>397</sup> *Id.* at 510.

<sup>398</sup> *Id.*

<sup>399</sup> *See id.* at 509–10.

<sup>400</sup> *Id.* at 512.

the agency's "fleeting expletive" policy.<sup>401</sup> Fox also argued that the FCC's policy censored television broadcasts in violation of the First Amendment.<sup>402</sup>

By a fragmented 5-4 vote, the Court decided in favor of the FCC.<sup>403</sup> In writing the opinion for the Court, Scalia determined that the agency's decision was neither arbitrary nor capricious, because "the pervasiveness of foul language" and "the coarsening of public entertainment" justified the "more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children."<sup>404</sup> Thus, the FCC managed to "articulate a satisfactory explanation for its action," satisfying the federal Administrative Procedure Act.<sup>405</sup> Already, the FCC's policies "drew distinctions between the offensiveness of particular words based on the context in which they appeared," meaning that the FCC's expanded stance on fleeting expletives was not an entirely novel concept.<sup>406</sup> In such a situation, Scalia wrote, the Court should not "substitute [its] judgment" for that of the experts in the federal agency.<sup>407</sup>

The Court's majority declined to decide the First Amendment questions raised within this case, refusing to do so because the United States Court of Appeals for the Second Circuit had not previously decided this dispute on First Amendment grounds.<sup>408</sup> "We see no reason to abandon our usual procedures in a rush to judgment without a lower court opinion," Scalia wrote.<sup>409</sup> Still, Scalia also provided an indication of his leanings if the Court had reached the case's First Amendment issues.<sup>410</sup> "[A]ny chilled references to excretory and sexual material 'surely lie at the periphery of First Amendment concern,'" he stated, implying that Fox likely would have a difficult task in convincing him of the First Amendment value within the speech at issue here.<sup>411</sup>

Ginsburg, however, encouraged the Court to consider the First

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<sup>401</sup> *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 454 (2d Cir. 2007), *rev'd and remanded*, 556 U.S. 502 (2009).

<sup>402</sup> *Fox Television*, 556 U.S. at 529.

<sup>403</sup> *Id.* at 504, 530.

<sup>404</sup> *Id.* at 529–30.

<sup>405</sup> *See id.* at 513, 516–17 (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

<sup>406</sup> *Fox Television*, 556 U.S. at 520.

<sup>407</sup> *See id.* at 530 (quoting *State Farm*, 463 U.S. at 43).

<sup>408</sup> *Fox Television*, 556 U.S. at 529 (citing *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

<sup>409</sup> *Fox Television*, 556 U.S. at 529.

<sup>410</sup> *See id.*

<sup>411</sup> *See id.* (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 743 (1978) (Stevens, J., plurality)).

Amendment issues within the FCC’s “fleeting expletive” policies.<sup>412</sup> “[T]here is no way to hide [behind] the long shadow the First Amendment casts over what the Commission has done,” Ginsburg wrote in a solo dissenting opinion.<sup>413</sup> “Today’s decision does nothing to diminish that shadow.”<sup>414</sup> According to Ginsburg, the FCC took a dangerous road in assessing what words held a higher value than other words in the marketplace of ideas.<sup>415</sup> Noting that the fleeting expletives at issue in this case were “neither deliberate nor relentlessly repetitive,” Ginsburg pointed out that the words may have merely “convey[ed] an emotion or intensif[ie]d a statement.”<sup>416</sup> Striking down such spontaneous speech, she argued, might not satisfy the First Amendment’s protections.<sup>417</sup>

Like Ginsburg, Breyer disagreed with the majority’s holding.<sup>418</sup> However, Breyer did not join Ginsburg’s assertion that the Court should consider the case’s First Amendment implications.<sup>419</sup> Instead, Breyer focused his opinion fully on administrative law concepts and the precedents surrounding “arbitrary and capricious” agency decisions.<sup>420</sup> Joined by Stevens, Souter, and Ginsburg for the entirety of his administrative law rationale, Breyer determined that the FCC never adequately explained why it changed its policy regarding fleeting expletives.<sup>421</sup> Although the FCC put forth several reasons as justifications for banning fleeting expletives, Breyer asserted that the agency already knew or reasonably should have known about these factors when it instituted the original policy permitting fleeting expletives.<sup>422</sup> Since the FCC did not define any change in circumstances that warranted a change in policy, Breyer concluded

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<sup>412</sup> *Fox Television*, 556 U.S. at 545, 546 (Ginsburg, J., dissenting).

<sup>413</sup> *Id.* at 545.

<sup>414</sup> *Id.*

<sup>415</sup> *See id.* (citing *Pacifica Found.*, 438 U.S. at 743).

<sup>416</sup> *Fox Television*, 556 U.S. at 546 (Ginsburg, J., dissenting) (first citing *Cohen v. California*, 403 U.S. 15, 26 (1971); and then citing *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 805 (1996) (Kennedy, J., concurring in part, concurring in judgment in part, and dissenting in part)).

<sup>417</sup> *See Fox Television*, 556 U.S. at 546 (Ginsburg, J., dissenting). “If the reserved constitutional question [about constitutionally protected speech] reaches this Court, we should be mindful that words unpalatable to some may be ‘commonplace’ for others, ‘the stuff of everyday conversations . . . .’” *Id.* (citation omitted) (quoting *Pacifica Found.*, 438 U.S. at 776 (Brennan, J., dissenting)).

<sup>418</sup> *See Fox Television*, 556 U.S. at 546–47 (Breyer, J., dissenting).

<sup>419</sup> *See id.* at 565, 566 (citing *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916)).

<sup>420</sup> *See Fox Television*, 556 U.S. at 546–47 (Breyer, J., dissenting) (first citing *Motor Vehicle Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–43 (1983); and then citing *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420–21 (1971)).

<sup>421</sup> *See Fox Television*, 556 U.S. at 554, 555–56 (Breyer, J., dissenting).

<sup>422</sup> *See id.* at 564, 565.

that the regulatory alteration was indeed arbitrary and capricious.<sup>423</sup>

*Q. United States v. Stevens*<sup>424</sup>

A federal statute forbade “knowingly ‘creat[ing], sell[ing], or possess[ing] a depiction of animal cruelty,’ if done ‘for commercial gain’ in interstate or foreign commerce.”<sup>425</sup> Robert Stevens was convicted under this law for selling videos depicting dog fighting.<sup>426</sup> Stevens claimed that the conviction violated his First Amendment free speech rights.<sup>427</sup> In response, the federal government stated the social worth of depictions of animal cruelty was so minimal that it deserved no First Amendment safeguards whatsoever, and pointed out that the statute did contain a provision exempting materials that showed animal cruelty for some “serious religious, political, scientific, educational, journalistic, historical, or artistic value.”<sup>428</sup>

The Court’s 8-1 majority, which Breyer joined without filing a separate opinion, held that the statute violated the First Amendment.<sup>429</sup> Primarily, the majority rejected the government’s proposal to categorically refuse First Amendment protection to depictions of animal cruelty.<sup>430</sup> While the government claimed that depictions of animal cruelty in so-called “crush videos” that could allegedly cause sexual excitement for viewers were akin to child pornography, a category of speech which the Court had deemed exempt from First Amendment protection, Chief Justice Roberts’s majority opinion called child pornography “a special case.”<sup>431</sup> Unlike animal cruelty, he wrote, the market for child pornography is “‘intrinsically related’ to the underlying abuse.”<sup>432</sup>

Roberts’s majority opinion clearly opened the door for Congress to

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<sup>423</sup> *See id.* at 567. In particular, Breyer focused on a lack of empirical evidence from the FCC providing new information that justified the agency’s change in policy. *See id.* at 564 (citing *State Farm*, 463 U.S. at 43). Furthermore, Breyer pointed out that the FCC itself indicated in various ways that “it did not believe it was changing prior policy in any major way.” *Fox Television*, 556 U.S. at 565 (Breyer, J., dissenting). “To the extent that the FCC minimized that fact when considering the change, it did not fully focus on the fact of change,” Breyer wrote. *Id.* “And any such failure would make its decision still less supportable.” *Id.* (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

<sup>424</sup> *United States v. Stevens*, 559 U.S. 460 (2010).

<sup>425</sup> *Id.* at 464–65.

<sup>426</sup> *Id.* at 466.

<sup>427</sup> *Id.* at 467.

<sup>428</sup> *Id.* at 469–70, 477–78.

<sup>429</sup> *Id.* at 482.

<sup>430</sup> *Id.* at 468.

<sup>431</sup> *Id.* at 465, 466, 470, 471.

<sup>432</sup> *Id.* at 471 (quoting *New York v. Ferber*, 458 U.S. 747, 759 (1982)).

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enact a new statute regarding depictions of animal cruelty, one that was more narrowly tailored in nature.<sup>433</sup> For instance, Roberts noted that the current law could ban hunting videos, as such films depicted the killing of animals.<sup>434</sup> Such an overly broad statute, according to the Court's majority, violated the freedom of speech rights contained within the First Amendment.<sup>435</sup>

*R. Citizens United v. Federal Election Commission*<sup>436</sup>

The federal Bipartisan Campaign Reform Act stopped corporations and unions from making independent expenditures for “electioneering communications” using general treasury funds.<sup>437</sup> Under the law, an “electioneering communication” was “‘any broadcast, cable, or satellite communication’ that ‘refers to a clearly identified candidate for Federal office’ and is made within 30 days of a primary or 60 days of a general election.”<sup>438</sup> Citizens United, a not-for-profit corporation, funded a documentary advocating against Hillary Clinton, and sought to make this documentary publically available using video-on-demand within 30 days of the 2008 primary elections.<sup>439</sup> Fearing that the Bipartisan Campaign Reform Act would bar this documentary as an “electioneering communication,” Citizens United sought declaratory and injunctive relief against the Federal Election Commission on the grounds that the Bipartisan Campaign Reform Act unduly restricted political speech and thus violated the First Amendment.<sup>440</sup> The district court granted summary judgment in favor of the Federal Election Commission, setting up Citizens United's eventual appeal to the Supreme Court.<sup>441</sup>

In a multi-faceted, widely disparate set of opinions, the Court ultimately ruled in favor of Citizens United.<sup>442</sup> The controlling plurality opinion from Kennedy declared that the First Amendment prevented statutory limitations on corporate funding for independent

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<sup>433</sup> See *Stevens*, 559 U.S. at 482 (“We therefore need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional. We hold only that §48 is not so limited but is instead substantially overbroad, and therefore invalid under the First Amendment.”).

<sup>434</sup> *Id.*

<sup>435</sup> *Id.*

<sup>436</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>437</sup> *Id.* at 320–21 (first citing *McConnell v. FEC*, 540 U.S. 93, 204, n.87 (2003); and then citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986)).

<sup>438</sup> *Citizens United*, 558 U.S. at 321.

<sup>439</sup> *Id.* at 319–20, 321.

<sup>440</sup> *Id.* at 321, 322.

<sup>441</sup> *Id.* at 322 (citing *Citizens United v. FEC*, 530 F. Supp. 2d 274, 275 (D.C. Cir. 2008)).

<sup>442</sup> See *Citizens United*, 558 U.S. at 372.

politically motivated broadcasts during the periods surrounding an election.<sup>443</sup> While the Court upheld federal law's existing prohibition on direct corporate contributions to political candidates, Kennedy's opinion emphasized the importance of allowing free political discourse in democratic elections.<sup>444</sup> Under Kennedy's rationale, such speech does not lose its constitutional importance when it comes from a corporation rather than a traditional "person."<sup>445</sup> To Kennedy, failing to honor the high value afforded to speech about political candidates in this case could easily pave the way for other restrictions on political speech affecting newspaper editors, television documentarians, political bloggers, and authors of political advocacy books.<sup>446</sup>

Employing strict scrutiny, Kennedy's opinion concluded that the government had asserted a compelling interest in encouraging widespread democratic participation and preventing corporate-induced corruption within elections.<sup>447</sup> However, given the wide range of independent political speech from corporations that the Bipartisan Campaign Reform Act proscribed, Kennedy's opinion held that the law was far from the least restrictive means of accomplishing this goal.<sup>448</sup>

In one concurring opinion, Roberts focused on the fact that the Court reached a constitutional decision even though *Citizens United* originally brought the case on statutory grounds.<sup>449</sup> According to Roberts, no narrower grounds were available, as the government raised arguments about limits on political expenditures that did not

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<sup>443</sup> See *id.* at 371–72.

<sup>444</sup> See, e.g., *id.* at 356 ("When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves."); *id.* at 371 ("The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.").

<sup>445</sup> See *id.* at 370–71 (first citing *McConnell v. FEC*, 540 U.S. 93, 259 (2003); and then citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 261 (1986)).

<sup>446</sup> See *Citizens United*, 558 U.S. at 364; *id.* at 372–73 (Roberts, C.J., concurring).

<sup>447</sup> *Id.* at 340, 341 (majority opinion).

<sup>448</sup> See *id.* at 320–21, 361. In particular, Kennedy rejected the fear of corporate contributions to political campaigns undermining the democratic process. *Id.* at 360. Instead of devaluing the democratic process, Kennedy wrote that such a system actually emphasized democratic precepts, proving that political leaders relied upon the people for support rather than inheriting their offices through a monarchical lineage. See *id.* ("The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy . . . . The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.").

<sup>449</sup> *Id.* at 374 (Roberts, C.J., concurring).

appear in any past precedent that the Court had issued.<sup>450</sup> Additionally, Roberts noted, the Court's prior rulings that the government cited as precedent were, upon reexamination, erroneous in permitting such wide restrictions upon the First Amendment rights of corporations.<sup>451</sup> Therefore, Roberts wrote, this case presented a situation where "fidelity to [the cited precedents] . . . does more to damage this constitutional ideal than to advance it," justifying the Court's grave action of deciding the case on constitutional grounds.<sup>452</sup>

Scalia also wrote a separate concurring opinion.<sup>453</sup> Noting that corporations already existed at the time when the Framers drafted the First Amendment, and that these corporations engaged in political advocacy on multiple occasions, Scalia stated that the lack of a textual provision removing corporations from the First Amendment's free speech rights implied that no such exception was intended.<sup>454</sup> The First Amendment's plain text, Scalia argued, "offers no foothold for excluding any category of speaker."<sup>455</sup>

In a nearly 90-page dissent, Stevens disagreed with all of these positions.<sup>456</sup> Joined by Breyer, as well as Ginsburg and Sotomayor, Stevens stated that "it was the free speech of individual Americans that [the Framers] had in mind" when they drafted the First Amendment, leading to a logical exclusion of corporations from certain speech safeguards.<sup>457</sup> Looking back to the Tillman Act in 1907, Stevens traced Congress's history of establishing limits on corporate spending in political campaigns.<sup>458</sup> More importantly, Stevens argued, permitting corporations to make independent expenditures in political campaigns "threatens to undermine the integrity of elected institutions across the Nation," affirming citizens' fears that the entities with the deepest pockets ultimately control candidate visibility and information distribution and, by extension,

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<sup>450</sup> *See id.* at 384–85.

<sup>451</sup> *See id.* at 382–83.

<sup>452</sup> *See id.* at 378, 385.

<sup>453</sup> *Id.* at 385 (Scalia, J., concurring).

<sup>454</sup> *See id.* at 386, 388–90, 392–93. Scalia also engaged in a historical analysis about the presence of corporations at the time of the First Amendment's inception, ultimately concluding that corporations played a significant role in American commercial life during this era. *Id.* at 386. Based on this, Scalia determined that one could not legitimately claim that corporations deserved exclusion from full First Amendment protection simply because the Framers were unfamiliar with the corporate form and the potential consequences of granting speech rights to such entities. *See id.* at 388, 390.

<sup>455</sup> *Id.* at 392–93.

<sup>456</sup> *See id.* at 478–79 (Stevens, J., dissenting).

<sup>457</sup> *Id.* at 393, 428.

<sup>458</sup> *Id.* at 394–95 (quoting *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209–10 (1982)).

electoral outcomes and post-election favoritism.<sup>459</sup> “[T]he difference between selling a vote and selling access is a matter of degree, not kind,” Stevens wrote “[a]nd selling access is not qualitatively different from giving special preference to those who spent money on one’s behalf.”<sup>460</sup>

Stevens also criticized the majority of justices for reaching a constitutional conclusion in the case.<sup>461</sup> “Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law,” he stated.<sup>462</sup> To resolve the case at hand, Stevens asserted that the Court could have held only “that a feature-length film distributed through video-on-demand” was not an “electioneering communication” under the Bipartisan Campaign Reform Act.<sup>463</sup> He added that other narrower rationales were available to the majority, too.<sup>464</sup> While none of these grounds were necessarily ideal, Stevens stated that all of them were worthy paths for a Court that was serious about judicial restraint to take, demonstrating the lack of necessity for the Court to overturn its own precedent and issue a First Amendment ruling in this matter.<sup>465</sup>

*S. Holder v. Humanitarian Law Project*<sup>466</sup>

A federal statute outlawed “knowingly provid[ing] material support or resources to a foreign terrorist organization.”<sup>467</sup> The law defined material support to include “training, expert advice or assistance.”<sup>468</sup> Groups and individuals who wanted to assist the Kurdistan Workers’ Party and the Liberation Tigers of Tamil Eelam, groups that the United States Secretary of State had designated as “foreign terrorist organizations,” with training “on how to use humanitarian and international law to peacefully resolve disputes” sued the federal government on First Amendment grounds, claiming

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<sup>459</sup> See *Citizens United*, 558 U.S. at 396 (Stevens, J., dissenting).

<sup>460</sup> *Id.* at 447–48.

<sup>461</sup> See *id.* at 398.

<sup>462</sup> *Id.*

<sup>463</sup> *Id.* at 406.

<sup>464</sup> *Id.*

<sup>465</sup> See *id.* at 408, 479 (“Our colleagues have arrived at the conclusion that *Austin* must be overruled and that § 203 is facially unconstitutional only after mischaracterizing both the reach and rationale of those authorities, and after bypassing or ignoring rules of judicial restraint used to cabin the Court’s lawmaking power.”).

<sup>466</sup> *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

<sup>467</sup> *Id.* at 8.

<sup>468</sup> *Id.*



that Congress “banned their pure political speech.”<sup>469</sup> The plaintiffs further claimed that this federal statute was unconstitutionally vague.<sup>470</sup> The government countered with the claim that this law was the least restrictive means to achieve the compelling state interest of domestic safety from foreign terrorist organizations.<sup>471</sup>

The Court’s 6-3 majority ruled in favor of the federal government, upholding the constitutionality of the statute.<sup>472</sup> In the majority opinion, Roberts adopted the government’s argument that “[t]he statute does not prohibit independent advocacy or expression of any kind.”<sup>473</sup> If the plaintiffs spoke before the United Nations or wrote editorials advocating for these groups, the statute would not inhibit their activities.<sup>474</sup> Only when the plaintiffs crossed the line of actually providing assistance for these groups did this federal law bar their activities.<sup>475</sup>

To a degree, Roberts wrote, the government overstated their position by claiming that the case involved only conduct, not speech.<sup>476</sup> Much of the material support at issue in the case involved speech and expression from the advocates to the organizations.<sup>477</sup> However, Roberts continued, “[e]veryone agrees that the Government’s interest in combating terrorism is an urgent objective of the highest order.”<sup>478</sup> The two organizations in question “are deadly groups.”<sup>479</sup> Thus, even though the material support from the plaintiffs was designed to promote peaceful conflict resolution and compliance with international law, this support could ultimately “lend legitimacy” to these groups and their violent acts, improving their recruiting and fundraising efforts.<sup>480</sup> Additionally, this support could “free[] up other resources within the organization that may be put to violent ends.”<sup>481</sup> Therefore, taking into account the potentially dire consequences of these groups gathering any further support, power, and leverage to work their violent acts, Roberts concluded

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<sup>469</sup> *Id.* at 9, 14, 25 (quoting *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 921 n.1 (9th Cir. 2007)).

<sup>470</sup> *Holder*, 561 U.S. at 11 (citing *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1184–85 (C.D. Cal. 1998)).

<sup>471</sup> *See Holder*, 561 U.S. at 46 (Breyer, J., dissenting).

<sup>472</sup> *Id.* at 40 (majority opinion).

<sup>473</sup> *Id.* at 26.

<sup>474</sup> *Id.* at 25–26.

<sup>475</sup> *Id.* at 26.

<sup>476</sup> *Id.*

<sup>477</sup> *See id.* at 27.

<sup>478</sup> *Id.* at 28.

<sup>479</sup> *Id.* at 29.

<sup>480</sup> *Id.* at 30.

<sup>481</sup> *Id.*

that Congress did not violate the First Amendment in enacting this law banning all forms of material support to terrorist organizations.<sup>482</sup>

Breyer not only authored a dissent, but read a summation of his dissent aloud from the bench, a sign of adamant disagreement with the majority's findings.<sup>483</sup> According to Breyer, the majority opinion extended the potential effects of the plaintiffs' advocacy beyond the bounds of reasonableness.<sup>484</sup> "Here the plaintiffs seek to advocate peaceful, *lawful* action to secure *political* ends; and they seek to teach others how to do the same," Breyer wrote.<sup>485</sup> This speech, he continued, did not free up resources for a group to engage in additional terrorist activities in the way that a donation of money or supplies might.<sup>486</sup> Nor could such speech qualify as incitement to riot or any other traditionally unprotected category of speech.<sup>487</sup> "Not even the 'serious and deadly problem' of international terrorism can require *automatic* forfeiture of First Amendment rights," he concluded.<sup>488</sup>

Breyer stated that strict scrutiny was the proper test to apply in this case, given that the law imposed content-based restrictions that carried criminal sanctions.<sup>489</sup> While the government easily proved its compelling interest in combating terrorism, the government failed to show that this law was narrowly tailored to meet this objective.<sup>490</sup> Breyer noted that the government failed to provide any empirical evidence showing that the support from these advocacy groups promoting non-violent solutions was likely to free up resources for greater terrorist activity or give the group greater legitimacy for their recruitment or fundraising efforts.<sup>491</sup> Banning all forms of expression that in some way legitimized a particular group would ban far too much speech.<sup>492</sup> To Breyer, completely prohibiting "the peaceful teaching of international human rights law on the ground that a little

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<sup>482</sup> *Id.* at 36, 40.

<sup>483</sup> Adam Liptak, *Court Affirms Ban on Aiding Groups Tied to Terror*, N.Y. TIMES (June 21, 2010), <http://www.nytimes.com/2010/06/22/us/politics/22scotus.html>.

<sup>484</sup> *See Holder*, 561 U.S. at 52, 53 (Breyer, J., dissenting).

<sup>485</sup> *Id.* at 44.

<sup>486</sup> *See id.* at 47, 48.

<sup>487</sup> *Id.* at 43–44 (first citing *United States v. Stevens*, 559 U.S. 460, 468–69 (2010); and then quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

<sup>488</sup> *Holder*, 561 U.S. at 44 (Breyer, J., dissenting).

<sup>489</sup> *Id.* at 45.

<sup>490</sup> *Id.* at 46.

<sup>491</sup> *Id.* at 47, 48 ("[The Government's] statements do not, however, explain in any detail how the plaintiffs' political-advocacy-related activities might actually be 'fungible' and therefore capable of being diverted to terrorist use.").

<sup>492</sup> *See id.* at 49.

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knowledge about ‘the international legal system’ is too dangerous a thing” was not a narrowly tailored measure.<sup>493</sup> Thus, despite the extremely high value of the government’s interest in preserving national security, the law in question, in Breyer’s opinion, violated the First Amendment.<sup>494</sup>

*T. Snyder v. Phelps*<sup>495</sup>

The Westboro Baptist Church picketed a military member’s funeral, standing on a public road and holding signs with slogans that included “God Hates Fags” and “Thank God for Dead Soldiers.”<sup>496</sup> Members of the deceased servicemember’s family sued Westboro Baptist Church for intentional infliction of emotional distress and other related offenses.<sup>497</sup> Westboro objected, claiming that their protest constituted speech on a matter of public concern “expressed solely through hyperbolic rhetoric,” and thus received First and Fourteenth Amendment protection.<sup>498</sup>

The Court’s 8-1 majority ruled in favor of the Westboro Church.<sup>499</sup> Roberts’s opinion for the Court focused heavily on the fact that Westboro’s protest focused on topics of public concern, including issues regarding “the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy . . . .”<sup>500</sup> The church members displayed the signs while lawfully standing on public land adjoining a public street.<sup>501</sup> Furthermore, they remained approximately 1,000 feet from the actual site of the funeral service, meaning that the deceased military member’s family was not a “captive audience” to the protest.<sup>502</sup>

Breyer provided a separate concurring opinion.<sup>503</sup> He agreed that

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<sup>493</sup> *Id.* at 52.

<sup>494</sup> *Id.* at 46, 61.

<sup>495</sup> *Snyder v. Phelps*, 562 U.S. 443 (2011).

<sup>496</sup> *Id.* at 448.

<sup>497</sup> *Id.* at 449–50.

<sup>498</sup> *Id.* at 450–51 (citing *Snyder v. Phelps*, 580 F.3d 206, 222–24 (4th Cir. 2009), *aff’d*, 562 U.S. 443 (2011)); *id.* at 214.

<sup>499</sup> *Snyder*, 562 U.S. at 460, 461, 463.

<sup>500</sup> *Id.* at 454 (citing *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 759 (1985)).

<sup>501</sup> *Snyder*, 562 U.S. at 456, 457 (“Simply put, the church members had the right to be where they were.”).

<sup>502</sup> *Id.* at 457, 459. In addition, the majority opinion noted that the protestors never posed a direct threat of harm to the people around them. *Id.* at 457 (“The protest was not unruly; there was no shouting, profanity, or violence.”).

<sup>503</sup> *Id.* at 461 (Breyer, J., concurring).

Westboro's speech addressed matters of public concern.<sup>504</sup> However, he felt that the majority erred in essentially stopping its analysis with this conclusion.<sup>505</sup> Expressing concern that the majority opinion could render all laws forbidding intentional infliction of emotional distress toothless, Breyer took pains to point out that a government could ban certain types of speech without violating the First and Fourteenth Amendments, even if that speech focused on matters of public concern.<sup>506</sup>

Within the specific facts of this case, however, Breyer wrote that he agreed with the majority's conclusion.<sup>507</sup> Given that Westboro's protest occurred in a public place and in full compliance with all law enforcement directives, and considering that funeral attendees could not actually see or hear the protestors, Breyer concluded that punishing Westboro for stating its views on matters of public concern in this instance would violate the First Amendment.<sup>508</sup> However, he carefully stated that his holding applied only to this specific set of facts, and should set no sweeping precedent for anything further.<sup>509</sup>

*U. Brown v. Entertainment Merchants Association*<sup>510</sup>

A California state statute banned "the sale or rental of 'violent video games' to minors."<sup>511</sup> The plaintiffs, companies that created, published, sold, or rented video games, argued that this law violated their First and Fourteenth Amendment free speech rights.<sup>512</sup> In a 7-2 decision, the Court's majority held that the California law did indeed violate the First and Fourteenth Amendment free speech guarantees.<sup>513</sup>

Drawing multiple comparisons between video games and works of literature, including Brothers Grimm fairy tales, Scalia's opinion for the Court's majority determined that video games could communicate

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<sup>504</sup> *Id.*

<sup>505</sup> *Id.* (citing *Frisby v. Schultz*, 487 U.S. 474, 479 (1988)) ("A State can sometimes regulate picketing, even picketing on matters of public concern.").

<sup>506</sup> *See Snyder*, 552 U.S. at 462 (Breyer, J., concurring).

<sup>507</sup> *Id.* at 461, 462.

<sup>508</sup> *Id.* at 462-63 ("To uphold the application of state law in these circumstances would punish Westboro for seeking to communicate its views on matters of public concern without proportionately advancing the State's interest in protecting its citizens against severe emotional harm. Consequently, the First Amendment protects Westboro.").

<sup>509</sup> *See id.* at 461, 463.

<sup>510</sup> *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

<sup>511</sup> *Id.* at 2732.

<sup>512</sup> *Id.* at 2733; *Video Software Ass'n v. Schwarzenegger*, 556 F.3d 950, 952-53 (9th Cir. 2009), *aff'd*, 131 S. Ct. 2729 (2011).

<sup>513</sup> *See id.* at 2732, 2742.

ideas and “social messages” through attributes unique to the medium, including the interactive role of the game’s player.<sup>514</sup> Citing prior case law that afforded constitutional protection to books, movies, and theatrical performances containing violent imagery, Scalia concluded that the Court should not depart from this precedent simply because video games provided different features than traditional media.<sup>515</sup> Furthermore, Scalia wrote that the California statute actually intruded upon the First Amendment free speech rights “of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime.”<sup>516</sup>

Breyer issued a solo dissent.<sup>517</sup> In 1968, the Court had determined in *Ginsberg v. New York*<sup>518</sup> that states could forbid the sale of nude images to minors.<sup>519</sup> To Breyer, the majority’s holding in *Brown* was completely incongruous with the *Ginsberg* ruling.<sup>520</sup> “What kind of First Amendment would permit the government to protect children by restricting sales of [an] extremely violent video game *only* when the woman—bound, gagged, tortured, and killed—is also topless?” Breyer asked rhetorically.<sup>521</sup> He went on to state that extreme violence could become at least as harmful to minors as nudity, if not more so, providing a seven-page appendix of behavioral and psychological studies linking violent video games with minors acting violently.<sup>522</sup> While conceding that no study in this area was absolutely conclusive, Breyer argued that the Court should defer to the California legislature’s determination that violent video games cause psychological harm, along with the legislature’s conclusion that banning these games was the least restrictive means of preventing this psychological harm.<sup>523</sup>

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<sup>514</sup> See *id.* at 2733, 2736 (“California’s argument would fare better if there were a longstanding tradition in this country of specially restricting children’s access to depictions of violence, but there is none.”).

<sup>515</sup> See *id.* at 2733, 2734, 2735 (first quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952); and then citing *Winters v. New York*, 333 U.S. 507, 519–20 (1948)).

<sup>516</sup> *Brown*, 131 S. Ct. at 2742.

<sup>517</sup> *Id.* at 2761 (Breyer, J., dissenting).

<sup>518</sup> *Ginsberg v. New York*, 390 U.S. 629 (1968).

<sup>519</sup> See *id.* at 631, 633.

<sup>520</sup> See *Brown*, 131 S. Ct. at 2764, 2771 (Breyer, J., dissenting) (“What, then, is the difference between *Ginsberg* and *Miller* on the one hand and the California law on the other?”).

<sup>521</sup> *Id.* at 2771.

<sup>522</sup> *Id.*; see also *id.* 2772–78 (providing a bibliography of published studies supporting a link between minors exposed to violent video games and propensity to violence among those minors).

<sup>523</sup> See *id.* at 2770 (citing *Reno v. ACLU*, 521 U.S. 844, 874 (1997)).

V. *United States v. Alvarez*<sup>524</sup>

The Stolen Valor Act, a law that Congress enacted in 2005, made it a misdemeanor offense for any person to lie about earning a military medal.<sup>525</sup> Alvarez, a candidate for political office, falsely declared that he received the Medal of Honor and was convicted under this statute.<sup>526</sup> The Court's majority, however, concluded that the Stolen Valor Act violated the First Amendment.<sup>527</sup> Writing for a plurality of the justices, Kennedy held that while the government maintained a compelling interest in honoring the bravery of legitimate recipients of military honors, the Stolen Valor Act's absolute language is far broader than necessary to protect this compelling interest.<sup>528</sup> The government, according to Kennedy, could have utilized other reasonable and less-restrictive approaches while still promoting this compelling interest, including creating a database that would "list Congressional Medal of Honor winners" and help "expose false claims."<sup>529</sup> Thus, the statute could not survive strict scrutiny.<sup>530</sup>

Breyer concurred with the controlling plurality's conclusion.<sup>531</sup> However, he did not join Kennedy's plurality.<sup>532</sup> Instead, Breyer wrote his own concurring opinion, with which only Kagan joined.<sup>533</sup> In his opinion, Breyer rejected the "strict categorical analysis" of Kennedy's plurality.<sup>534</sup> Strict scrutiny, he wrote, meant "near-automatic condemnation" for the statute at issue, just as a law undergoing rational basis review practically guaranteed the Court's approval.<sup>535</sup> However, he continued, such a blunt and absolute analysis was not always warranted for many laws that in some manner implicated individual speech interests.<sup>536</sup>

A better option, Breyer wrote, would involve applying a simpler and more flexible "proportionality" approach: measuring "whether the statute works speech-related harm that is out of proportion to its

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<sup>524</sup> *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

<sup>525</sup> *See id.* at 2542.

<sup>526</sup> *Id.* (quoting *United States v. Alvarez*, 617 F.3d 1198, 1200–01 (9th Cir. 2010)).

<sup>527</sup> *Alvarez*, 132 S. Ct. at 2543, 2551.

<sup>528</sup> *See id.* at 2542, 2549, 2551 (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)).

<sup>529</sup> *Id.* at 2551.

<sup>530</sup> *Id.*

<sup>531</sup> *Id.* (Breyer, J., concurring).

<sup>532</sup> *See id.*

<sup>533</sup> *Id.*

<sup>534</sup> *Id.*

<sup>535</sup> *Id.* at 2552.

<sup>536</sup> *See id.* at 2555–56.

justifications.”<sup>537</sup> Utilizing this approach, he noted that although false statements receive only minimal First Amendment protections, a statute that categorically banned every instance of a particular type of lie produced an extremely heavy-handed chilling effect on speech and expression.<sup>538</sup> Such an unlimited statute could become a tool that the government could conceivably wield selectively to criminalize the expression of certain speakers whose views the government rejected.<sup>539</sup> While the government’s justifications were important, other reasonable means of achieving those goals existed.<sup>540</sup> Thus, the potential harm on individual speech interests was “disproportionate” to the government interests that the law protected, demonstrating that the statute violated the First Amendment.<sup>541</sup>

*W. McCutcheon v. Federal Election Commission*<sup>542</sup>

The federal Bipartisan Campaign Reform Act contained a provision limiting an individual’s total contribution to political campaigns during a two-year election cycle.<sup>543</sup> An Alabama resident gave money to the Republican National Committee, several individual candidates, and other Republican committees during the 2011-12 election cycle, and claimed that the Bipartisan Campaign Reform Act prevented him from giving more to these individuals and groups.<sup>544</sup> Along with other plaintiffs, the Alabama resident sued the Federal Election Commission on First Amendment grounds, arguing that the two-year aggregate limit on individual campaign spending was prohibitively low and failed to serve a “cognizable government interest.”<sup>545</sup> The Federal Election Commission responded by stating that the aggregate limit guarded against *quid pro quo* corruption in elections, and promoted the democratic process by preventing donors with deep pockets from always maintaining the greatest influence

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<sup>537</sup> *Id.* at 2551.

<sup>538</sup> *Id.* at 2555 (“The statute before us lacks any such limiting features. It may be construed to prohibit only knowing and intentional acts of deception about readily verifiable facts within the personal knowledge of the speaker, thus reducing the risk that valuable speech is chilled. But it still ranges very broadly. And that breadth means that it creates a significant risk of First Amendment harm.” (internal citation omitted)).

<sup>539</sup> *Id.* (“And so the prohibition may be applied where it should not be applied, for example, to bar stool braggadocio or, in the political arena, subtly but selectively to speakers that the Government does not like.”).

<sup>540</sup> *See id.* at 2555–56.

<sup>541</sup> *See id.* at 2556.

<sup>542</sup> *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

<sup>543</sup> *Id.* at 1442–43.

<sup>544</sup> *Id.* at 1443; *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 136 (D.C. Cir. 2012).

<sup>545</sup> *McCutcheon*, 893 F. Supp. 2d at 137.

upon election outcomes.<sup>546</sup>

In a 5-4 decision, the Court struck down the two-year aggregate limit as unconstitutional.<sup>547</sup> Writing for the Court's controlling plurality, Roberts stated that the aggregate limit proscribed participation in the democratic process while providing little relief for individuals concerned about corruption in elections.<sup>548</sup> "There is no right more basic in our democracy than the right to participate in electing our political leaders," Roberts declared at the outset of his opinion.<sup>549</sup> That vital right, he continued, included making campaign contributions to promote the candidates of a citizen's choice.<sup>550</sup> Donating money to political campaigns can cause candidates to pay more attention to a significant donor's interests if elected, Roberts noted, but such a result is not inherently corrupt.<sup>551</sup> Instead, Roberts called this potential outcome of large campaign contributions "a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns."<sup>552</sup>

Furthermore, Roberts wrote, less-restrictive alternatives were available to Congress in addressing their alleged corruption concerns, such as limiting a political party's ability to transfer money from the party's funds to an individual candidate's funds.<sup>553</sup> Therefore, Roberts concluded, the aggregate funds provision was not narrowly tailored nor the least restrictive alternative to accomplish Congress's stated objectives.<sup>554</sup>

Breyer dissented, joined by Ginsburg, Sotomayor, and Kagan.<sup>555</sup> In a dissent that he summarized from the bench on the day when the Court announced its decision, Breyer stated that the majority's holding "eviscerates our Nation's campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic

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<sup>546</sup> See *id.* at 139.

<sup>547</sup> See *McCutcheon*, 134 S. Ct. at 1440, 1462, 1465.

<sup>548</sup> See *id.* at 1442.

<sup>549</sup> *Id.* at 1440–41.

<sup>550</sup> See *id.* at 1448 ("[T]he First Amendment safeguards an individual's right to participate in the public debate through political expression and political association. When an individual contributes money to a candidate, he exercises both of those rights: The contribution 'serves as a general expression of support for the candidate and his views' and 'serves to affiliate a person with a candidate.'" (internal citations omitted) (citing and quoting *Buckley v. Valeo*, 424 U.S. 1, 15, 21, 22 (1976))).

<sup>551</sup> *McCutcheon*, 134 S. Ct. at 1450.

<sup>552</sup> *Id.* at 1441.

<sup>553</sup> *Id.* at 1458–59.

<sup>554</sup> *Id.* at 1457, 1458, 1462.

<sup>555</sup> *Id.* at 1465 (Breyer, J., dissenting).



legitimacy that those laws were intended to resolve.”<sup>556</sup> Unlike Roberts, Breyer viewed the use of money to gain greater access and potential favors from political candidates as a threat to the democratic process, undermining the government’s compelling “interest in maintaining the integrity of our public governmental institutions.”<sup>557</sup> If elected officials are beholden only to the donors with the deepest pockets, Breyer wrote, one could reasonably expect the average American voter to lose interest in the political process, believing that his or her views were meaningless to the people in power.<sup>558</sup>

To Breyer, the Court’s holding would greatly diminish “the constitutionally necessary ‘chain of communication’ between the people and their representatives.”<sup>559</sup> Citing Justice Brandeis’s concurring opinion in *Whitney v. California*,<sup>560</sup> Breyer stated that the Constitution protects speech—particularly political speech—because such speech is “essential to effective democracy.”<sup>561</sup> Thanks to the free “marketplace of ideas” preserved through the First Amendment’s Speech Clause, “public opinion [can] be channeled into effective governmental action.”<sup>562</sup> According to Breyer, a system where only the wealthiest donors gain the ear of political candidates “cuts the link between political thought and political action.”<sup>563</sup> In such a scenario, Breyer continued, the foundational concept of “a free marketplace of political ideas loses its point.”<sup>564</sup> Through three hypothetical examples, he illustrated his point, demonstrating how, in his opinion, removing the two-year aggregate limit could

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<sup>556</sup> *Id.*; Adam Liptak, *Supreme Court Strikes Down Overall Political Donation Cap*, N.Y. TIMES (Apr. 2, 2014), <http://www.nytimes.com/2014/04/03/us/politics/supreme-court-ruling-on-campaign-contributions.html>.

<sup>557</sup> *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting).

<sup>558</sup> *See id.* at 1467, 1468. “What has this to do with corruption?,” Breyer asked. *Id.* at 1467. “It has everything to do with corruption.” *Id.* In Breyer’s view, the “appearance of corruption” in the electoral process “can lead the public to believe that its efforts to communicate with its representatives or to help sway public opinion have little purpose. And a cynical public can lose interest in political participation altogether.” *Id.* at 1468 (citing *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 390 (2000)).

<sup>559</sup> *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting).

<sup>560</sup> *Whitney v. California*, 274 U.S. 357 (1927).

<sup>561</sup> *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting) (quoting *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring)). Interestingly, many commentators link the “progressive” judicial viewpoints of Brandeis and Breyer, with Brandeis’s concurring opinion in *Whitney* providing a commonly cited illustration of the “progressive” views about constitutionally protected freedom of speech rights. Breyer himself has stated his admiration for Brandeis’s approach to judging difficult cases. *See supra* notes 6, 12 and accompanying text.

<sup>562</sup> *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting).

<sup>563</sup> *Id.*

<sup>564</sup> *Id.*

disadvantage less affluent voters.<sup>565</sup> To Breyer, preventing such disparity and corresponding harm to the democratic process overcame the restrictions on political speech inherent in this law.<sup>566</sup>

*X. Reed v. Town of Gilbert*<sup>567</sup>

The Town of Gilbert, Arizona, maintained an ordinance restricting the size, number, location, and permanence of a different variety of signs.<sup>568</sup> A local pastor was charged with violating this ordinance after he set up more signs than were allowed under the “directional signs” category of this local sign ordinance.<sup>569</sup> The pastor’s church brought an action against the town, and the town responded by listing a number of “safety” and “aesthetic” concerns that it felt justified the ordinance.<sup>570</sup>

A unanimous United States Supreme Court ruled in favor of the church.<sup>571</sup> Applying strict scrutiny, Thomas’s opinion for the Court stated that none of the town’s purported “safety and aesthetic” concerns justifying regulating certain categories of signs more than others rose to the level of a “compelling interest.”<sup>572</sup> The town’s ordinance, Thomas pointed out, was a purely content-based restriction.<sup>573</sup> The First Amendment, according to the Court, did not favor government censorship of all speech on a particular topic, such as restrictions on all signs providing directions to a temporary event, and the town could not meet the high burden to justify this wide-ranging limitation on specific categories of speech.<sup>574</sup>

Breyer wrote a separate concurring opinion in which he largely joined Kagan’s separate opinion.<sup>575</sup> Like Kagan, Breyer argued that the Court’s majority erred in applying strict scrutiny to this dispute.<sup>576</sup> Instead, Breyer believed that the Court should focus its

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<sup>565</sup> *Id.* at 1472–75.

<sup>566</sup> *Id.* at 1479 (“In sum, the explanation of why aggregate limits are needed is complicated, as is the explanation of why other methods will not work. But the conclusion is simple: There is no ‘substantial mismatch’ between Congress’ legitimate objective and the ‘means selected to achieve it.’”).

<sup>567</sup> *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

<sup>568</sup> *Id.* at 2224, 2225, 2231–32.

<sup>569</sup> *Id.* at 2225.

<sup>570</sup> *Id.* at 2226, 2231.

<sup>571</sup> *Id.* at 2223–24.

<sup>572</sup> *Id.* at 2231–32.

<sup>573</sup> *Id.* at 2227.

<sup>574</sup> *Id.* at 2230, 2232 (quoting *Consol. Edison Co. of N.Y., Inc. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 530, 537 (1980)).

<sup>575</sup> *Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring).

<sup>576</sup> *See id.*

analysis on the specific details of ordinance's content-based discrimination.<sup>577</sup> Strict scrutiny's inherent presumption against a law's constitutionality was too strong a weapon to use in this case, he argued, given that a more specific and nuanced means of analysis was readily available.<sup>578</sup> "[T]o hold that such content discrimination [always] triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity," he stated.<sup>579</sup> Better to limit strict scrutiny's usage for blatant situations where content-based restrictions becomes the government's method for suppressing a particular viewpoint, Breyer concluded, than to inject this "strong presumption against constitutionality" into every content-based discrimination case.<sup>580</sup> However, even under this less-stringent test, Breyer still found that the sign ordinance violated the First Amendment, as the town could assert no logical concern to justify their restrictions for certain categories of signs under the ordinance.<sup>581</sup>

*Y. Williams-Yulee v. Florida Bar*<sup>582</sup>

The Florida Bar's ethical code for judges and attorneys forbade candidates for judicial office from engaging in certain forms of campaign communications.<sup>583</sup> One judicial candidate wrote a letter soliciting campaign donations, posted it on the Internet, and mailed it to local voters.<sup>584</sup> The Florida Bar declared that these measures violated the ethical provisions that limited the campaign speech of judicial office-seekers.<sup>585</sup> When the candidate claimed that the ethical provision unconstitutionally abridged her constitutional freedom of speech rights, the Florida Bar asserted that the restriction of speech was necessary to uphold the public's confidence in the integrity of the state's judicial branch.<sup>586</sup>

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<sup>577</sup> See *id.* at 2235–36.

<sup>578</sup> See *id.* at 2234, 2235–36.

<sup>579</sup> *Id.* at 2234.

<sup>580</sup> *Id.* at 2234 (first citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, 829 (1995); and then citing *Boos v. Barry*, 485 U.S. 312, 318, 319 (1988) (plurality opinion)).

<sup>581</sup> See *Reed*, 135 S. Ct. at 2236 (Breyer, J., concurring); see also *id.* at 2236, 2239 (Kagan, J., concurring) (agreeing with the majority's ultimate result in the case, but arguing that the majority's holding left a potentially sweeping constitutional impact upon every local sign ordinance in the nation, thus producing a lasting widespread imprint that was far broader than this case necessitated).

<sup>582</sup> *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015).

<sup>583</sup> *Id.* at 1663.

<sup>584</sup> *Id.*

<sup>585</sup> *Id.* at 1663–64.

<sup>586</sup> See *id.* at 1664 (citing *Fla. Bar v. Williams-Yulee*, 138 So. 3d 379, 384 (Fla. 2014)).

In a 5-4 decision, the Court upheld the constitutionality of the ethical provision.<sup>587</sup> Applying strict scrutiny, the majority determined that the Florida Bar's restriction on the speech of judicial candidates was sufficiently narrowly tailored to meet the compelling state interest of "preserving public confidence" in the judicial branch.<sup>588</sup> "A State's decision to elect judges does not compel it to compromise public confidence in their integrity," Roberts concluded in his majority opinion for the Court.<sup>589</sup>

Breyer fully agreed with the majority's holding, joining Roberts, Sotomayor, Kagan, and Ginsburg.<sup>590</sup> However, he issued a separate concurring opinion to make a short but pointed statement: strict scrutiny is a guideline, not a concrete legal test for all matters concerning freedom of speech.<sup>591</sup> In all other matters, he sided with Roberts's opinion.<sup>592</sup>

### Z. *Elonis v. United States*<sup>593</sup>

A federal law prohibited people from transmitting threats in interstate commerce.<sup>594</sup> Anthony Elonis was arrested for violating this statute when he posted on Facebook remarks about injuring his ex-wife, his co-workers, the police, a kindergarten class, and an FBI agent.<sup>595</sup> Elonis claimed that this violent language did not amount to an actual threat against any of these parties, stating that he possessed no intent to harm anyone when he posted these words.<sup>596</sup> In response, the government argued that Elonis's speech constituted a "true threat," a category of speech that traditionally received no First Amendment protection, and that Elonis's mental state about actually carrying out any of these attacks did not matter as long as he understood the plain meaning of the words that he wrote.<sup>597</sup>

In an 8-1 decision, the Court's majority overturned Elonis's

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<sup>587</sup> *Williams-Yulee*, 135 S. Ct. at 1661, 1664, 1673.

<sup>588</sup> *Id.* at 1666.

<sup>589</sup> *Id.* at 1673.

<sup>590</sup> *See id.* at 1662, 1673, 1675.

<sup>591</sup> *Id.* at 1673 (Breyer, J., concurring) (first citing *United States v. Alvarez*, 132 S. Ct. 2537, 2550–51 (2012) (Breyer, J., concurring); and then citing *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400–03 (2000) (Breyer, J., concurring)) ("As I have previously said, I view this Court's doctrine referring to tiers of scrutiny as guidelines informing our approach to the case at hand, not tests to be mechanically applied.")

<sup>592</sup> *Williams-Yulee*, 135 S. Ct. at 1673 (Breyer, J., concurring).

<sup>593</sup> *Elonis v. United States*, 135 S. Ct. 2001 (2015).

<sup>594</sup> *Id.* at 2004.

<sup>595</sup> *Id.* at 2007.

<sup>596</sup> *See id.*

<sup>597</sup> *Id.* (citing *United States v. Elonis*, 730 F.3d 321, 332 (3d Cir. 2013)).

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conviction.<sup>598</sup> According to Roberts’s opinion, which Breyer joined, the prosecution fell short of its burden to prove that Elonis’s Facebook posts were threats.<sup>599</sup> Since the crime centered on the threat itself, not the mere act of posting, Roberts wrote that the prosecution needed to prove Elonis’ “subjective intent” to threaten the parties named in his posts.<sup>600</sup> Simply demonstrating that a reasonable person would consider the text of these postings to be threats was not enough to meet the standard contained within the federal law.<sup>601</sup>

Conspicuous in their absence were the answers to any of this case’s underlying First Amendment questions, including but not limited to issues regarding individuals using abusive language on social media platforms.<sup>602</sup> Instead of addressing any of these matters, the majority dispatched of them quickly and without much ceremony.<sup>603</sup> “[G]iven our disposition [on the burden of proof issue],” Roberts wrote, “it is not necessary to consider any First Amendment issues.”<sup>604</sup>

AA. *Walker v. Texas Division, Sons of Confederate Veterans*<sup>605</sup>

Texas’s Department of Motor Vehicles allowed proposals from individuals and groups for new specialty license plates that Texas drivers could obtain.<sup>606</sup> The Texas Department of Motor Vehicles Board held the responsibility for approving or disapproving proposed designs.<sup>607</sup> When Texas’ Division of the Sons of Confederate Veterans applied for the Texas Department of Motor Vehicles to issue a specialty plate that contained two Confederate flags, the Motor

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<sup>598</sup> See *Elonis*, 135 S. Ct. at 2004, 2007, 2013.

<sup>599</sup> See *id.* at 2012.

<sup>600</sup> See *id.* at 2011, 2012. Although the statute in question did not explicitly state the *mens rea* required for criminal culpability, Roberts’s majority opinion read into the law “only that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’” *Id.* at 2010 (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000)). In this case, Roberts determined that “the crucial element separating legal innocence from wrongful conduct” is the threatening nature of the communication,” and thus a *mens rea* higher than mere negligence needed to apply. *Elonis*, 135 S. Ct. at 2011 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994)).

<sup>601</sup> See *Elonis*, 135 S. Ct. at 2011 (first quoting *Staples v. United States*, 511 U.S. 600, 606–07 (1994); and then quoting *United States v. Jeffries*, 692 F.3d 473, 484 (6th Cir. 2012) (Sutton, J., *dubitante*) (stating that while such a standard was a common feature of tort law, it was a threshold too low for deciding a criminal case of this magnitude).

<sup>602</sup> See *Elonis*, 135 S. Ct. at 2012 (failing to address various First Amendment issues).

<sup>603</sup> See *id.* (citing *Dep’t of Treasury, IRS v. FLRA*, 494 U.S. 922, 933 (1990)) (stating that the Court could not resolve this issue until a lower court decision gave rise to a challenge specifically on constitutional grounds).

<sup>604</sup> *Elonis*, 135 S. Ct. at 2012.

<sup>605</sup> *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015).

<sup>606</sup> *Id.* at 2243.

<sup>607</sup> See *id.*

Vehicles Board rejected the proposal.<sup>608</sup> In doing so, the Board cited an agency-wide policy allowing (but not mandating) them to “refuse to create a new specialty license plate . . . if the design might be offensive to any member of the public.”<sup>609</sup> The Texas Division of the Sons of Confederate Veterans sued, claiming that the Department of Motor Vehicles had violated their First and Fourteenth Amendment rights by engaging in viewpoint discrimination.<sup>610</sup>

The Court, however, disagreed with this claim.<sup>611</sup> Breyer authored the opinion for the Court’s 5-4 majority, with which Thomas, Ginsburg, Sotomayor, and Kagan joined.<sup>612</sup> In his opinion, Breyer emphasized that the speech in question was government-issued speech.<sup>613</sup> When a government agency speaks on the government’s behalf, according to Breyer’s rationale, that agency has the right to select what messages and views it wishes to publically disseminate in the government’s name.<sup>614</sup> To Breyer, such expression represented the outcome of the democratic electoral process.<sup>615</sup> “[T]he Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate,” he wrote.<sup>616</sup> Thus, because this societal exchange of political opinions produces the decisions of whom to elect to office, statements from that democratically elected government “do not normally trigger the First Amendment rules designed to protect the marketplace of ideas,” as the marketplace of ideas brought the government’s leaders to office in the first place.<sup>617</sup>

The government, Breyer wrote, bears no burden to provide statements of contrary ideals whenever it wishes to advance a certain program in the public’s interest.<sup>618</sup> “How could a city government

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<sup>608</sup> *Id.* at 2243–44, 2245.

<sup>609</sup> *Id.* at 2244–45.

<sup>610</sup> *Id.* at 2245; Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff, 759 F.3d 388, 391 (5th Cir. 2014).

<sup>611</sup> *See Walker*, 135 S. Ct. at 2245, 2253.

<sup>612</sup> *See id.* at 2243.

<sup>613</sup> *Id.* at 2246.

<sup>614</sup> *See id.* at 2245 (citing *Pleasant Grove v. Summum*, 555 U.S. 460, 467–68 (2009)) (“When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”).

<sup>615</sup> *Walker*, 135 S. Ct. at 2245. (citing *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235 (2000)) (“That freedom [for the government to engage in viewpoint discrimination] in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech.”).

<sup>616</sup> *Id.* at 2246 (citing *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

<sup>617</sup> *See id.* at 2245–46 (citing *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 559 (2005)).

<sup>618</sup> *See id.* at 2246.

create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary?,” Breyer asked.<sup>619</sup> “How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization?”<sup>620</sup>

In a situation where the government attempts to compel private parties to speak for the government, the First Amendment’s Free Speech Clause can substantially limit the government’s actions.<sup>621</sup> Here, however, Breyer held that the government spoke of its own accord by denying the specialty plate design with the Confederate flag.<sup>622</sup> The fact that private parties submitted designs to the Department of Motor Vehicles for review did not rise to the level of the state compelling private parties to speak on the state’s behalf.<sup>623</sup>

Comparing a government-issued license plate with a government-constructed monument,<sup>624</sup> Breyer’s opinion noted a license plate is essentially a type of state ID,<sup>625</sup> and that a reasonable person could perceive a message on a state license plate as being a message proclaimed directly by the state itself.<sup>626</sup> Given that the government may limit its own speech to a particular viewpoint, Breyer held that the Texas Department of Motor Vehicles was within its

<sup>619</sup> *Id.*

<sup>620</sup> *Id.*

<sup>621</sup> *See id.* Additionally, Breyer noted that other “[c]onstitutional and statutory provisions outside of the Free Speech Clause may limit government speech.” *Id.* (citing *Pleasant Grove v. Summum*, 555 U.S. 460, 468 (2009)).

<sup>622</sup> *See Walker*, 135 S. Ct. at 2253.

<sup>623</sup> *See id.* at 2250 (citing *Pleasant Grove*, 555 U.S. at 472).

<sup>624</sup> *Walker*, 135 S. Ct. at 2246. Breyer devoted considerable attention to this analogy, allowing him to draw parallels between the facts of this case and the situation before the Court in *Pleasant Grove v. Summum*, a case where the Court upheld a city government’s decision rejected a religious organization’s request to build a monument displaying various religious symbols in a city park. *Id.* at 2247 (citing *Pleasant Grove v. Summum*, 555 U.S. 460, 464–65, 470, 476). Governments traditionally use both monuments and license plates to speak to the general public, Breyer concluded. *See Walker*, 135 S. Ct. at 2246, 2247. Furthermore, a government maintains the ability to select which monuments they will permit on public lands and the ability to select what messages to allow on government-issued license plates, as both are public displays of messages that are inherently attached to the government. *See id.* at 2247, 2250 (citing *Pleasant Grove*, 555 U.S. at 470, 472). Thus, while the medium of providing the message in *Walker* was not identical to the medium at issue in *Summum*, Breyer held that the facts and principles were close enough for the Court’s rationale in *Summum* to govern this case as well. *Walker*, 135 S. Ct. at 2249.

<sup>625</sup> *See Walker*, 135 S. Ct. at 2249.

<sup>626</sup> *Id.* (quoting *Pleasant Grove*, 555 U.S. at 471) (“Consequently, ‘persons who observe’ designs on IDs ‘routinely—and reasonably—interpret them as conveying some message on the issuer’s behalf.’”).

constitutionally protected rights to reject the proposed Sons of Confederate Veterans license plate.<sup>627</sup> By doing so, Breyer concluded, the State of Texas was purely “represent[ing] its citizens and . . . carr[ying] out its duties on their behalf.”<sup>628</sup>

### III. CONNECTING THE DOTS: DISCERNING TRENDS AND PATTERNS WITHIN JUSTICE BREYER’S FREEDOM OF SPEECH JURISPRUDENCE

The preceding section reviewed some of the most challenging, controversial, and divisive freedom of speech disputes to come before the Court during Justice Breyer’s tenure on the bench. While it is impossible to gain a perfect picture of any jurist’s jurisprudence within twenty-seven cases, the decisions examined here provide at least a representative sampling of Breyer’s voting and writing within this area of the law. This article now moves to a discussion of Breyer’s noticeable trends, patterns, and inclinations within these cases, and an evaluation of the significance of these tendencies in the Court’s freedom of speech picture as a whole.

#### A. Overall Record

In the cases examined here, Breyer voted fourteen times in favor of upholding the government’s stated interests in restricting speech.<sup>629</sup> He voted twelve times in favor of upholding the speech at issue over the government’s asserted interests in stopping that speech.<sup>630</sup> Lastly, he voted once to not address the speech issue at all,

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<sup>627</sup> *Walker*, 135 S. Ct. at 2253.

<sup>628</sup> *Id.* at 2246.

<sup>629</sup> Looking at Breyer’s voting regarding only the outcome of the case, without delving into the nuances of his opinions yet, Breyer voted in favor of the asserted government interests in a number of cases. See *Walker*, 135 S. Ct. at 2243–44; *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1673 (2015) (Breyer, J., concurring); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1465 (2014) (Breyer, J., dissenting); *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2761 (2011) (Breyer, J., dissenting); *Citizens United v. FEC*, 558 U.S. 310, 371 (2010) (Stevens, J., dissenting); *Beard v. Banks*, 548 U.S. 521, 525 (2006); *Ashcroft v. ACLU*, 542 U.S. 656, 677 (2004) (Breyer, J., dissenting); *United States v. Am. Library Ass’n*, 539 U.S. 194, 215–16 (2003) (Breyer, J., concurring); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 378 (2002) (Breyer, J., dissenting); *United States v. United Foods, Inc.*, 533 U.S. 405, 419 (2001) (Breyer, J., dissenting); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 847 (2000) (Breyer, J., dissenting); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 282 (2000) (plurality opinion); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 225 (1997) (Breyer, J., concurring). For background information on these cases, see *supra* Part II.

<sup>630</sup> Again looking solely at Breyer’s voting regarding the ultimate result in the case, Breyer voted that the asserted free speech interest(s) trumped the purported interest(s) in restricting speech. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring); *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015); *United States v. Alvarez*, 132 S. Ct. 2537,



but rather to decide the case on grounds that did not require a judgment on the speech interests versus regulatory interests debate.<sup>631</sup>

Of his fourteen votes in which Breyer determined that the regulatory interests outweighed the speech interests in the case at hand, seven of those votes sided with the dissenters in that decision.<sup>632</sup> Four of those votes were concurring opinions.<sup>633</sup> Only three of those votes were with the majority or controlling plurality holding in the case.<sup>634</sup>

Of his twelve votes upholding the speech interest over the purported regulatory interests, four were dissents.<sup>635</sup> Four were concurring opinions,<sup>636</sup> and four were with the majority or controlling plurality's opinion in the case.<sup>637</sup>

For a justice whom some commentators deem to be clearly “liberal” and whom other commentators deem to be clearly “conservative,”<sup>638</sup>

2551 (2012) (Breyer, J., concurring); *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (Breyer, J., concurring); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 40–41 (2010) (Breyer, J., dissenting); *United States v. Stevens*, 559 U.S. 460, 482 (2010); *FCC v. Fox Television Studios, Inc.*, 556 U.S. 502, 546–47 (2009) (Breyer, J., dissenting); *Randall v. Sorrell*, 548 U.S. 230, 236–37 (2006); *Garcetti v. Ceballos*, 547 U.S. 410, 446 (2006) (Breyer, J., dissenting); *Nike, Inc. v. Kasky*, 539 U.S. 654, 684 (2003) (Breyer, J., dissenting); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 258 (2002); *Bartnicki v. Vopper*, 532 U.S. 514, 536 (2001) (Breyer, J., concurring). For background information on these cases, see *supra* Part II.

<sup>631</sup> The remaining case studied here, *Morse v. Frederick*, does not fall into either the “pro-speech” category or the “pro-restriction” category. See *Morse v. Frederick*, 551 U.S. 393, 433 (2007) (Breyer, J., concurring) (inferring that since Justice Breyer did not address the constitutional issue, that the decision could not possibly fall into either category). Breyer avoided making any conclusive statements regarding the student's speech, instead focusing entirely on the question of whether the school principal deserved qualified immunity. See *id.*

<sup>632</sup> See *McCutcheon*, 134 S. Ct. at 1465 (Breyer, J., dissenting); *Brown*, 131 S. Ct. at 2761 (Breyer, J., dissenting); *Citizens United*, 558 U.S. at 393 (Stevens, J., dissenting); *Ashcroft*, 542 U.S. at 676 (Breyer, J., dissenting); *Thompson*, 535 U.S. at 378 (Breyer, J., dissenting); *United Foods*, 533 U.S. at 419 (Breyer, J., dissenting); *Playboy Entm't Grp.*, 529 U.S. at 835 (Breyer, J., dissenting).

<sup>633</sup> *Williams-Yulee*, 135 S. Ct. at 1673 (Breyer, J., concurring); *Am. Library Ass'n*, 539 U.S. at 215 (Breyer, J., concurring); *Nixon*, 528 U.S. at 399 (Breyer, J., concurring); *Turner Broad. Sys.*, 520 U.S. at 225 (Breyer, J., concurring).

<sup>634</sup> *Walker*, 135 S. Ct. at 2243; *Beard*, 548 U.S. at 524; *City of Erie*, 529 U.S. at 282 (plurality opinion).

<sup>635</sup> See *Holder*, 561 U.S. at 40 (Breyer, J., dissenting); *Fox Television Stations*, 556 U.S. at 546 (Breyer, J., dissenting); *Garcetti*, 547 U.S. at 444 (Breyer, J., dissenting); *Nike*, 539 U.S. at 665 (Breyer, J., dissenting).

<sup>636</sup> See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring); *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (Breyer, J., concurring); *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (Breyer, J., concurring); *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (Breyer, J., concurring).

<sup>637</sup> See *Elonis v. United States*, 135 S. Ct. 2001, 2004 (2015); *United States v. Stevens*, 559 U.S. 460, 463 (2010); *Randall v. Sorrell*, 548 U.S. 230, 236 (2006); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 238 (2002).

<sup>638</sup> See *supra* notes 2–3 and accompanying text.

this is a surprisingly even voting distribution as to the results in cases where freedom of speech is at issue. This demonstrates that Breyer is no absolutist when it comes to evaluating freedom of speech matters. Certain Supreme Court justices, such as Hugo Black and William O. Douglas, routinely stated that the first words of the First Amendment—“Congress shall make no law”—indeed restricted Congress from passing legislation limiting the freedoms guaranteed within this amendment, including the freedom of speech, in most circumstances.<sup>639</sup> Some scholars observe a similar trend toward absolutism regarding freedom of speech within the present-day Roberts Court.<sup>640</sup> Yet Breyer, based on this sampling, does not fall into this category, although the fact that half of his “pro-restriction” votes studied here were dissents indicates that some of his fellow justices do indeed take a far more absolutist stance regarding protecting the freedoms of speech and expression.<sup>641</sup>

On the other hand, Breyer frequently found situations in which, in his estimation, individual liberties outweighed the government’s interests in restricting speech. Therefore, a more nuanced discussion of when Breyer determined that freedom of speech rights outweighed governmental interests is necessary to fully understand this justice’s jurisprudence.

### *B. An Outspoken Voice on Free Speech*

Breyer authored a signed opinion in twenty-two of the twenty-seven cases studied in this article.<sup>642</sup> Eleven of these signed opinions

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<sup>639</sup> See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 234 (1998); 2 OTIS H. STEPHENS, JR. & JOHN M. SCHEB II, *AMERICAN CONSTITUTIONAL LAW: CIVIL RIGHTS AND LIBERTIES* 142, 149 (5th ed. 2012); L.A. Powe, Jr., *Evolution to Absolutism: Justice Douglas and the First Amendment*, 74 COLUM. L. REV. 371, 402 (1974).

<sup>640</sup> Ronald K.L. Collins, *Exceptional Freedom—The Roberts Court, The First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 413 (2013); see, e.g., David H. Gans, *Roberts at 10: The Strongest Free Speech Court in History?*, CONSTITUTIONAL ACCOUNTABILITY CTR. 1 (2015), <http://theusconstitution.org/sites/default/files/briefs/Roberts-at-10-First-Amendment-Snapshot.pdf>.

<sup>641</sup> See *supra* note 632 and accompanying text (noting in each of these cases, Breyer was part of the minority voting bloc holding that the societal benefits of restricting speech in that particular circumstance outweighed the value of constitutionally protecting the speech or expression in question).

<sup>642</sup> The only cases studied here in which Breyer did not issue a signed opinion are *Elonis*, 135 S. Ct. at 2004; *United States v. Stevens*, 559 U.S. 460, 463 (2010); *Citizens United v. FEC*, 558 U.S. 310, 317 (2010); *Ashcroft*, 535 U.S. at 239; and *Erie v. Pap’s A.M.*, 529 U.S. 277, 281 (2000).

were dissents.<sup>643</sup> Eight were concurring opinions.<sup>644</sup> Only three represented the majority or controlling plurality opinion of the Court.<sup>645</sup>

From these numbers, one can reasonably infer that freedom of speech is a topic that Breyer finds particularly important. Assuming that a justice will generally author a signed opinion—particularly a dissent or a concurring opinion—only on those issues about which he or she feels particularly fervent, the fact that Breyer wrote signed opinions in all but five of these twenty-seven cases demonstrates that this is an area in which he holds especially strong views.<sup>646</sup> Breyer’s decision to devote his own time and resources, and his staff’s time and resources, to “go public” in his disagreements with the majority holding and develop dissents or concurring opinions in nineteen of these twenty-seven cases underscores his particular interest in this

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<sup>643</sup> See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1465 (2014) (Breyer, J., dissenting); *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2761 (2011) (Breyer, J., dissenting); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 40 (2010) (Breyer, J. dissenting); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 546 (2009) (Breyer, J., dissenting); *Morse v. Frederick*, 551 U.S. 393, 425 (2007) (Breyer, J., dissenting); *Garcetti v. Ceballos*, 547 U.S. 410, 444 (2006) (Breyer, J., dissenting); *Ashcroft v. ACLU*, 542 U.S. 656, 676 (2004) (Breyer, J., dissenting); *Nike, Inc. v. Kasky*, 539 U.S. 654, 665 (2003) (Breyer, J., dissenting); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 378 (2002) (Breyer, J., dissenting); *United States v. United Foods, Inc.*, 533 U.S. 405, 419 (2001) (Breyer, J., dissenting); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 835 (2000) (Breyer, J., dissenting).

<sup>644</sup> See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring); *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1673 (2015) (Breyer, J., concurring); *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (Breyer, J., concurring); *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (Breyer, J., concurring); *United States v. Am. Library Ass’n*, 539 U.S. 194, 215 (2003) (Breyer, J., concurring); *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (Breyer, J., concurring); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 399 (2000) (Breyer, J., concurring); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 225 (1997) (Breyer, J., concurring).

<sup>645</sup> *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2243 (2015); *Beard v. Banks*, 548 U.S. 521, 524 (2006); *Randall v. Sorrell*, 548 U.S. 230, 236 (2006).

<sup>646</sup> See *supra* notes 238–40 and accompanying text. Discussing the devotion that a judge must have to a particular legal issue in order to write a dissent, Justice Benjamin Cardozo described a dissenting jurist as “the gladiator making a last stand against the lions.” BENJAMIN N. CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* 34 (1931). Charles Evans Hughes stated that dissents were an adamant judge’s “appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.” CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS: AN INTERPRETATION* 68 (1928). Dean Robert Post stated that a judge’s dissents are aimed at “the people” rather than at the Court itself, and are both “addressed to particular audiences, and designed to accomplish particular ends.” Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1289, 1356 (2001). One could say the same for a concurring opinion as well, given that a judge’s easier course of action is to simply agree with the majority’s rationale rather than drafting a separate opinion putting forth a different framework for ultimately reaching the same holding as the majority’s result.

field of the law.<sup>647</sup>

One can also glean from these statistics an inference regarding Breyer's position among his brethren on the Court. Given that half of Breyer's signed opinions were dissents, one can reasonably conclude that his particular inclinations about freedom of speech often do not echo the viewpoints of his fellow justices.<sup>648</sup> The fact that Breyer wrote the majority holding in only three of the cases studied within this article seems to emphasize this point.<sup>649</sup> Even when Breyer agreed with the Court's ultimate conclusion in a decision, regardless of whether the outcome favored the individual speech interest or the asserted governmental interest, he was more likely to write his own concurring opinion than to join the majority's holding.<sup>650</sup> In fact, Breyer wrote some dissents or concurring opinions in which no other justices or only one other justice joined his rationale in a surprisingly significant number of decisions studied here.<sup>651</sup>

As with all of the deductions drawn in this article, one cannot assume that a twenty-seven case sample size provides infallible answers. Nevertheless, based on the cases studied here, one can reasonably speculate that Breyer commonly finds himself at odds with the Court's other justices in freedom of speech disputes. Additionally, the frequency of his dissents and concurring opinions in these cases suggest that Breyer has not persuaded a majority of his judicial colleagues to adopt his viewpoints on freedom of speech, despite his twenty-one-year tenure on the Court. This neither

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<sup>647</sup> See *supra* note 647 and accompanying text; Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 7 (2010) (stressing the importance of justices reserving their dissents for the most important issues rather than publishing dissents in every case with which they disagree with the majority's opinion). Additionally, Breyer's frequent dissents in this area underscores his willingness to embrace uncertainty within the law rather than forcing through a concrete conclusion. See *supra* note 18 and accompanying text. For instance, frequently dissenting Justice William O. Douglas specifically noted that "philosophers of the democratic faith . . . rejoice in the uncertainty of the law and find strength and glory in [the law's uncertainty]" and that dissents represent the truth that the state of the law is always at least somewhat in flux. See William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE SOC'Y 104, 105 (1949).

<sup>648</sup> See *supra* text accompanying notes 642–43.

<sup>649</sup> See *supra* text accompanying notes 642, 645.

<sup>650</sup> Of the cases studied here, Breyer voted with the majority seven times. See *supra* notes 637, 645. He authored eight concurring opinions. See *supra* note 644.

<sup>651</sup> See *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1673 (2015) (Breyer, J., concurring); *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2761 (2011) (Breyer, J., dissenting); *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (Breyer, J., concurring); *Morse v. Frederick*, 551 U.S. 393, 425 (2007) (Breyer, J., concurring in part, dissenting in part); *Garcetti v. Ceballos*, 547 U.S. 410, 444 (2006) (Breyer, J., dissenting); *United States v. Am. Library Ass'n*, 539 U.S. 194, 215 (2003) (Breyer, J., concurring); *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (Breyer, J., concurring); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 225 (1997) (Breyer, J., concurring).

vindicates nor condemns Breyer's opinions on these issues, as it will take many years before the jury of history can truly render judgments about the effects of Breyer's ideas in this area. For now, however, one can safely conclude that throughout his time on the Supreme Court's bench, Breyer often stood on an island when the Court decided freedom of speech cases, at times even staking out a position separate from any other jurist on the Court.

*C. Amid The Brethren: A Snapshot of Breyer's Freedom of Speech Voting Among His Supreme Court Colleagues*

Only four justices other than Breyer rendered decisions in each of the twenty-seven cases studied here: Scalia, Thomas, Ginsburg, and Kennedy.<sup>652</sup> Of these four jurists, Ginsburg echoed Breyer's basic positions with the greatest frequency, voting for the same result as Breyer seventeen times.<sup>653</sup> Kennedy, the justice typically considered the Court's "swing" vote, joined Breyer regarding the result in the case thirteen times.<sup>654</sup> Scalia and Thomas each voted with Breyer regarding the case's ultimate outcome nine times.<sup>655</sup>

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<sup>652</sup> See *supra* Part II.

<sup>653</sup> Of the cases studied here, Ginsburg voted with Breyer regarding the ultimate result in seventeen cases. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2223 (2015); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2243 (2015); *Elonis v. United States*, 135 S. Ct. 2001, 2004 (2015); *Williams-Yulee*, 135 S. Ct. at 1673 (Breyer, J., concurring); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1465 (2014) (Breyer, J., dissenting); *United States v. Alvarez*, 132 S. Ct. 2537, 2542 (2012); *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2310–11 (2012); *Snyder*, 562 U.S. at 446; *Holder v. Humanitarian Law Project*, 561 U.S. 1, 40 (2010) (Breyer, J., dissenting); *United States v. Stevens*, 559 U.S. 460, 463 (2010); *Citizens United v. FEC*, 558 U.S. 310, 393 (2010) (Stevens, J., dissenting); *Garcetti*, 547 U.S. at 412; *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 378 (2002) (Breyer, J., dissenting); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 238 (2002); *United States v. United Foods, Inc.*, 533 U.S. 405, 419 (2001) (Breyer, J., dissenting); *Bartnicki*, 532 U.S. at 516; *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 399 (2000) (Breyer, J., concurring). Given that Breyer's separate opinion in *Morse*, 551 U.S. at 425, was so distant from every other justice (e.g., basing his decision solely on qualified immunity rather than making a freedom of speech determination), this section does not count any other justice as ruling with Breyer even as to the ultimate result in *Morse*.

<sup>654</sup> See *Reed*, 135 S. Ct. at 2223; *Elonis*, 135 S. Ct. at 2004; *Alvarez*, 132 S. Ct. at 2542; *Snyder*, 562 U.S. at 446; *Stevens*, 559 U.S. at 463; *Beard v. Banks*, 548 U.S. 521, 524 (2006); *Randall v. Sorrell*, 548 U.S. 230, 235 (2006); *Nike, Inc. v. Kasky*, 539 U.S. 654, 655 (2003) (Kennedy, J., dissenting); *Am. Library Ass'n*, 539 U.S. at 214–15 (Breyer, J., concurring) (Kennedy, J., concurring); *Ashcroft*, 535 U.S. at 238; *Bartnicki*, 532 U.S. at 516; *City of Erie v. Pap's A.M.*, 529 U.S. 277, 282 (2000); *Turner Broad. Sys.*, 520 U.S. at 184.

<sup>655</sup> Scalia voted with Breyer as to the result in nine cases. See *Reed*, 135 S. Ct. at 2223; *Elonis*, 135 S. Ct. at 2004; *Snyder*, 562 U.S. at 446; *Stevens*, 559 U.S. at 463; *Beard*, 548 U.S. at 523; *Randall*, 548 U.S. at 235; *Ashcroft v. ACLU*, 542 U.S. 656, 658 (2004); *Am. Library Ass'n*, 539 U.S. at 197; *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 805 (2000). Thomas voted with Breyer as to the result in nine cases. See *Reed*, 135 S. Ct. at 2223; *Walker*, 135 S. Ct. at 2243; *Brown*, 131 S. Ct. at 2732; *Snyder*, 562 U.S. at 446; *Stevens*, 559 U.S. at 463; *Beard*, 548 U.S. at 523; *Randall*, 548 U.S. at 235; *Am. Library Ass'n*, 539 U.S. at 197; *Ashcroft*,

Stevens sat on the bench for eighteen of the cases examined in this article, and voted for the same outcome as Breyer in nine of those decisions.<sup>656</sup> O'Connor heard twelve of these cases, and voted for the same result as Breyer eight times.<sup>657</sup> Rehnquist also heard twelve of these cases, voting for the same outcome as Breyer seven times,<sup>658</sup> while Roberts cast a vote in seventeen of these decisions and voted with Breyer as to the ultimate result eight times.<sup>659</sup> Souter and Breyer decided sixteen of these disputes together, with Souter joining Breyer regarding the outcome on seven occasions.<sup>660</sup> Alito and Breyer also heard sixteen of these cases together, with Alito casting his vote for the same outcome as Breyer in three decisions.<sup>661</sup> Sotomayor and Breyer called for the same outcome in ten of the twelve cases studied here for which they were both on the Court.<sup>662</sup> Kagan cast a vote in ten of these cases, and agreed with Breyer regarding the result seven times.<sup>663</sup>

Evaluating these numbers, a couple of trends stand out. First, on

535 U.S. at 238.

<sup>656</sup> See *Stevens*, 559 U.S. at 463; *Citizens United*, 558 U.S. at 317; *Fox Television Stations*, 556 U.S. at 504; *Garcetti*, 547 U.S. at 412; *Thompson*, 535 U.S. at 378 (Breyer, J., dissenting); *Ashcroft*, 535 U.S. at 238; *Bartnicki*, 532 U.S. at 516; *Nixon*, 528 U.S. at 380; *Turner Broad. Sys.*, 520 U.S. at 225 (Breyer, J., concurring) (Stevens, J., concurring).

<sup>657</sup> See *Ashcroft*, 542 U.S. at 676 (Breyer, J., dissenting); *Nike*, 539 U.S. at 665 (Breyer, J., dissenting); *Am. Library Ass'n*, 539 U.S. at 197; *United Foods*, 533 U.S. at 419 (Breyer, J., dissenting); *Bartnicki*, 532 U.S. at 535 (Breyer, J., concurring); *Playboy Entm't Grp.*, 529 U.S. at 805; *City of Erie*, 529 U.S. at 281; *Nixon*, 528 U.S. at 380.

<sup>658</sup> See *Ashcroft*, 542 U.S. at 676 (Breyer, J., dissenting); *Am. Library Ass'n*, 539 U.S. at 215 (Breyer, J., concurring); *Thompson*, 535 U.S. at 378 (Breyer, J., dissenting); *Playboy Entm't Grp.*, 529 U.S. at 835 (Breyer, J., dissenting); *City of Erie*, 529 U.S. at 281; *Nixon*, 528 U.S. at 380; *Turner Broad. Sys.*, 520 U.S. at 184.

<sup>659</sup> See *Reed*, 135 S. Ct. at 2223; *Elonis*, 135 S. Ct. at 2004; *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1661 (2015); *Alvarez*, 132 S. Ct. at 2542; *Snyder*, 562 U.S. at 446; *Stevens*, 559 U.S. at 463; *Beard*, 548 U.S. at 523; *Randall*, 548 U.S. at 235.

<sup>660</sup> See *Fox Television Stations*, 556 U.S. at 546 (Breyer, J., dissenting); *Beard*, 548 U.S. at 523; *Garcetti*, 547 U.S. at 412; *Ashcroft*, 535 U.S. at 238; *Bartnicki*, 532 U.S. at 516; *Nixon*, 528 U.S. at 380; *Turner Broad. Sys.*, 520 U.S. at 184.

<sup>661</sup> See *Reed*, 135 S. Ct. at 2223; *Elonis*, 135 S. Ct. at 2004; *Randall*, 548 U.S. at 235. Of these three cases, *Reed* was a unanimous decision regarding the outcome, *Elonis* was an 8-1 decision regarding the outcome, and *Randall* was a 6-3 decision regarding the outcome; thus, none of these cases produced a deeply divided Court regarding the result. *Reed*, 135 S. Ct. at 2223; *Elonis*, 135 S. Ct. at 2004; *Randall*, 548 U.S. at 235.

<sup>662</sup> See *Reed*, 135 S. Ct. at 2223; *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2243 (2015); *Elonis*, 135 S. Ct. at 2004; *Williams-Yulee*, 135 S. Ct. at 1661; *McCutcheon v. FEC*, 134 S. Ct. 1434, 1465 (2014) (Breyer, J., dissenting); *Alvarez*, 132 S. Ct. at 2542; *Snyder*, 562 U.S. at 446; *Holder v. Humanitarian Law Project*, 561 U.S. 1, 40 (2010) (Breyer, J., dissenting); *Stevens*, 559 U.S. at 463; *Citizens United v. FEC*, 558 U.S. 310, 393 (2010) (Stevens, J., dissenting).

<sup>663</sup> See *Reed*, 135 S. Ct. at 2236 (Kagan, J., concurring); *Walker*, 135 S. Ct. at 2243; *Elonis*, 135 S. Ct. at 2004; *Williams-Yulee*, 135 S. Ct. at 1661; *McCutcheon*, 134 S. Ct. at 1465 (Breyer, J., dissenting); *Alvarez*, 132 S. Ct. at 2551 (Breyer, J., concurring); *Snyder*, 562 U.S. at 446.

the extreme poles, the justices who agreed with Breyer regarding the results in these cases most frequently, in terms of percentages, are Ginsburg, Sotomayor, Kagan, and O'Connor.<sup>664</sup> Alito disagreed with Breyer more often than any other justice, followed by Scalia and Thomas.<sup>665</sup> These statistics appear to validate commentators' claims about Breyer typically voting with the "liberals" of the Court;<sup>666</sup> Ginsburg, Sotomayor, and Kagan are broadly considered part of the Court's "liberal" wing, while Scalia, Thomas, and Alito are generally recognized as some of the Court's most "conservative" justices.<sup>667</sup>

A deeper look, however, reveals some disruptions to assertions of Breyer's "liberal" tendencies. Of the justices who decided at least sixteen of the cases studied here with Breyer, only Ginsburg voted for the same result as Breyer more than 50 percent of the time.<sup>668</sup> Put another way, Breyer was at odds at least half the time not only with Scalia, Thomas, Alito, and Roberts, but also with the considerably more liberal Stevens and Souter.<sup>669</sup> On the other hand, in the twelve cases examined here in which Rehnquist and Breyer were on the bench at the same time, Breyer and the famously conservative Chief Justice reached the same ultimate outcome in 58 percent of these disputes.<sup>670</sup>

Muddying the waters further are several cases in which Breyer voted with a dominantly conservative bloc. Breyer wrote the opinion for a mostly conservative majority that upheld a prison system's denial of newspapers, magazines, and photographs to inmates placed in a high-risk area of the correctional facility in *Beard v. Banks*.<sup>671</sup> He wrote the majority opinion for a group that included Roberts, Scalia, Thomas, and Alito—and against a bloc of Ginsburg, Stevens, and Souter—in *Randall v. Sorrell*, holding that Vermont's campaign contribution limits were unconstitutionally low.<sup>672</sup> He joined Rehnquist, Scalia, and O'Connor in dissent in *United States v. Playboy Entertainment Group*, arguing in favor of a federal law dramatically restricting cable television channels "primarily

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<sup>664</sup> See *supra* notes 653–63 and accompanying text.

<sup>665</sup> See *supra* notes 653–63 and accompanying text.

<sup>666</sup> See *supra* note 2 and accompanying text.

<sup>667</sup> Adam Liptak, *Right Divided, a Disciplined Left Steered the Supreme Court*, N.Y. TIMES (June 30, 2015), <http://www.nytimes.com/2015/07/01/us/supreme-court-tacks-left-with-push-from-disciplined-liberals.html>.

<sup>668</sup> See *supra* notes 653–63 and accompanying text.

<sup>669</sup> See *supra* notes 653–63 and accompanying text.

<sup>670</sup> See *supra* note 658 and accompanying text.

<sup>671</sup> *Beard v. Banks*, 548 U.S. 521, 524–25 (2006).

<sup>672</sup> *Randall v. Sorrell*, 548 U.S. 230, 235–37 (2006) (citing *Buckley v. Valeo*, 424 U.S. 1, 25–30 (1976)).

dedicated to sexually-oriented programming.”<sup>673</sup> He joined conservatives Rehnquist, Scalia, and Thomas, as well as Kennedy and O’Connor, in the *City of Erie v. Pap’s A.M.* majority, upholding a local ordinance banning public nudity.<sup>674</sup> He concurred with the judgment of Rehnquist, Scalia, Thomas, Kennedy, and O’Connor to uphold the Children’s Internet Protection Act in *United States v. American Library Association*.<sup>675</sup> He sided with Rehnquist, Scalia, and O’Connor—and against Ginsburg, Souter, and Stevens—in *Ashcroft v. American Civil Liberties Union*, voting to uphold a federal statute outlawing the “knowing posting” of online materials that were “harmful” to individuals under age 17.<sup>676</sup>

Lastly, Breyer frequently authored separate opinions in which he disagreed even with those justices with whom he agreed as to the ultimate result. For example, although he agreed with Ginsburg, Stevens, Souter, Kennedy, and O’Connor regarding the outcome in *Bartnicki v. Vopper*, only O’Connor joined Breyer’s separate concurring opinion.<sup>677</sup> While he sided with Ginsburg, O’Connor, Souter, Stevens, and Rehnquist in *Nixon v. Shrink Missouri Government PAC*, only Ginsburg joined the rationale in Breyer’s concurring opinion.<sup>678</sup> While he joined Ginsburg, Souter, and Stevens in dissenting from the majority holding in *Garcetti v. Ceballos*, Breyer wrote his own solo dissent that none of the other justices accepted in full.<sup>679</sup> While he agreed with Ginsburg, Sotomayor, Kagan, Roberts, and Kennedy in *United States v. Alvarez*, Breyer wrote a concurring opinion with which only Kagan joined.<sup>680</sup> Similarly, while he voted with every justice but Alito regarding the outcome in *Snyder v. Phelps*, Breyer authored a concurring opinion that none of the other justices joined.<sup>681</sup>

All of this information emphasizes Breyer’s apparent unpredictability in this area of the law. Based on this sampling of cases, Breyer comes across as neither a reliable “liberal bloc” vote nor

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<sup>673</sup> *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 835, 847 (2000) (Breyer, J., dissenting).

<sup>674</sup> See *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 282–83 (2000).

<sup>675</sup> See *United States v. Am. Library Ass’n*, 539 U.S. 194, 215–16, 220 (2003) (Breyer, J., concurring).

<sup>676</sup> See *Ashcroft v. ACLU*, 542 U.S. 656, 661–62 (2004); *id.* at 676–77 (Breyer, J., dissenting).

<sup>677</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 516 (2001); *id.* at 535–36 (Breyer, J., concurring).

<sup>678</sup> *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 380 (2000); *id.* at 399 (Breyer, J., concurring).

<sup>679</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 412 (2006); *id.* at 444 (Breyer, J., dissenting).

<sup>680</sup> *United States v. Alvarez*, 132 S. Ct. 2537, 2542 (2012); *id.* at 2551 (Breyer, J., concurring).

<sup>681</sup> *Snyder v. Phelps*, 562 U.S. 443, 446 (2011); *id.* at 461 (Breyer, J., concurring).



a reliable “conservative bloc” vote.<sup>682</sup> While Breyer seems more likely than not to vote with Ginsburg in a free speech dispute, and appears more likely than not to vote against Alito in a case where freedom of speech is at issue, neither of these tendencies appear to be virtual guarantees.<sup>683</sup> Instead, Breyer seems perfectly willing to join any compilation of justices, or even to write an opinion with which no one else joins. Typical ideological leanings, therefore, do not appear especially germane to predicting Breyer’s free speech voting. Deeper, more nuanced issues appear to be more relevant here.

#### D. *Narrowly Concurring*

This article studied eight cases in which Breyer authored a concurring opinion.<sup>684</sup> In virtually all of these concurring opinions, Breyer argued for a noticeably narrower holding than what the Court’s majority provided.<sup>685</sup>

For instance, in *Snyder v. Phelps*, Breyer argued that the majority overstated the First Amendment protections afforded to speech on a matter of public concern.<sup>686</sup> In his concurring opinion, Breyer described several circumstances where, on balance, restricting such speech would not violate the Constitution.<sup>687</sup> The Court’s ultimate decision in favor of Westboro Baptist Church’s protests, he concluded, was strictly limited to the facts of the instant case and should not be extended any further than the matter at hand.<sup>688</sup>

In *United States v. American Library Association*, Breyer agreed

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<sup>682</sup> This statement accepts the commonly stated assertions of Rehnquist, Roberts, Scalia, Thomas, and Alito as consistent voters for “conservative” positions on issues coming before the Court, and Ginsburg, Stevens, Souter, Sotomayor, and Kagan as consistent voters for “liberal” positions on issues coming before the Court. Geoffrey Stone, *The Supreme Court and the Election: Making a Difference*, SCOTUSBLOG (Aug. 13, 2012, 11:41 AM), <http://www.scotusblog.com/2012/08/the-supreme-court-and-the-election-making-a-difference/>.

<sup>683</sup> For instance, in the sampling of twenty-seven cases explored here, Breyer and Ginsburg agreed more often than any of the justices who had served during Breyer’s entire career on the Court. *See supra* notes 653–63 and accompanying text. Nevertheless, Breyer and Ginsburg disagreed on the ultimate outcome of the case—to say nothing of the nuances of the proper rationale in reaching the Court’s judgment—nearly 40 percent of the time. *But see supra* note 653 and accompanying text. His voting became even less alliance-based with regard to the other justices of the Court. *See supra* notes 654–63 and accompanying text. Perhaps the most consistent component of his voting were his disagreements with Scalia and Thomas, a fact unsurprising given Breyer’s frequently stated disdain for Originalist and Textualist approaches to constitutional interpretation. *See supra* note 655; *see supra* text accompanying notes 104–05.

<sup>684</sup> *See supra* note 645 and accompanying text.

<sup>685</sup> *See supra* note 645.

<sup>686</sup> *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (Breyer, J., concurring).

<sup>687</sup> *See id.* at 461, 462.

<sup>688</sup> *Id.* at 462–63.

with the majority's decision to uphold the contested provisions of the Children's Internet Protection Act.<sup>689</sup> However, his solo concurring opinion rejected the use of strict scrutiny, stating that this test would impose too heavy a presumption against constitutionality in this case, where competing constitutional interests existed on both sides.<sup>690</sup> Similarly, in *Turner Broadcasting v. FCC*, Breyer sided with the majority's decision about the compelling state interests within the Cable Television Consumer Protection and Competition Act.<sup>691</sup> Yet Breyer's concurring opinion rejected at least one of the government's arguments as not clearly stating a compelling interest, and openly acknowledged that this statute significantly constrained the speech of cable system directors.<sup>692</sup> It was the fact that 40 percent of American households did not subscribe to cable television, coupled with Breyer's conclusion that the government needed to ensure that these households received "a rich mix of over-the-air programming," that ultimately swayed his opinion in favor of the government in this case.<sup>693</sup>

Breyer continued his efforts to promote narrower decisions in *Reed v. Town of Gilbert*.<sup>694</sup> In a case where the justices agreed unanimously about the outcome, Breyer nevertheless criticized the Court's majority for jumping too quickly to the difficult-to-overcome strict scrutiny test whenever they encountered a statute that engaged in content-based discrimination.<sup>695</sup> Instead, Breyer encouraged a more detail-oriented approach to deciding these cases, stating that in certain situations, laws requiring content-based discrimination needed to stand.<sup>696</sup> The Court, Breyer stated, needed to avoid "writ[ing] a recipe for judicial management of ordinary government regulatory activity."<sup>697</sup>

Likewise, in *United States v. Alvarez*, Breyer objected to the majority's decision to engage in "near-automatic condemnation" of the statute at issue.<sup>698</sup> Using a more evenhanded, fact-specific "proportionality" test would, in Breyer's opinion, better consider the

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<sup>689</sup> *United States v. Am. Library Ass'n*, 539 U.S. 194, 215–16 (2003) (Breyer, J., concurring).

<sup>690</sup> *See id.* at 217 (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256–58 (1974)).

<sup>691</sup> *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 185 (1997); *id.* at 225 (Breyer, J., concurring).

<sup>692</sup> *See id.* at 226 (Breyer, J., concurring).

<sup>693</sup> *Id.* at 221 (majority opinion); *id.* at 226 (Breyer, J., concurring).

<sup>694</sup> *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2235–36 (2015) (Breyer, J., concurring).

<sup>695</sup> *See id.* at 2234.

<sup>696</sup> *See id.* at 2234, 2235–36.

<sup>697</sup> *Id.* at 2234.

<sup>698</sup> *See United States v. Alvarez*, 132 S. Ct. 2537, 2552 (2012) (Breyer, J., concurring).

true interests on both sides of the dispute.<sup>699</sup> In *Bartnicki v. Vopper*, Breyer wrote that the Court again failed to give proper credence to the “important competing constitutional interests” on both sides of the dispute.<sup>700</sup> While speech on a matter of public concern deserved constitutional respect, Breyer argued that the individual privacy rights at issue in this case required proper attention and a more detailed analysis than what he believed the majority provided.<sup>701</sup> Ultimately, he concluded that he agreed with the majority, but only under the specific facts of *Bartnicki*, in which “the speakers’ legitimate privacy expectations are unusually low [because they were limited public figures issuing a threat to another party’s safety], and the public interest in defeating those expectations is unusually high.”<sup>702</sup>

Breyer’s emphasis on narrower holdings extended beyond his concurring opinions, too. For instance, in *Garcetti v. Ceballos*, Breyer dissented, but also disagreed with the other dissenters regarding the extent of constitutional protection for speech made as a public employee.<sup>703</sup> To Breyer, the majority’s opinion wrongfully censored virtually all speech made as a public employee.<sup>704</sup> However, the test that Souter developed in his dissent went to the other extreme, developing a framework in which government agencies would not have enough power to stop speech that harmed the functioning of their offices.<sup>705</sup> Breyer sought a middle ground, stating that under the unique circumstances in this case, the deputy district attorney’s speech deserved constitutional protection, as both the Constitution and the ethical standards of his profession required disclosure of apparent prosecutorial wrongdoing.<sup>706</sup> Once again, Breyer called for a holding that distinctly limited the opinion’s impact to the facts of the present case, and that avoided a sweeping judgment about categorical types of speech that the First Amendment did or did not protect.<sup>707</sup>

Perhaps nowhere was Breyer’s belief in reducing the scale of the Court’s holding more apparent than in *Morse v. Frederick*, where Breyer’s opinion essentially served as a concurring opinion to the

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<sup>699</sup> *Id.* at 2551–52.

<sup>700</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 536 (2001) (Breyer, J., concurring).

<sup>701</sup> *See id.* at 537–38.

<sup>702</sup> *Id.* at 540.

<sup>703</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 447–48, 449 (2006) (Breyer, J., dissenting).

<sup>704</sup> *See id.* at 446.

<sup>705</sup> *See id.* at 447–48, 449.

<sup>706</sup> *See id.* at 446, 447–48 (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

<sup>707</sup> *See Garcetti*, 547 U.S. at 449–50 (Breyer, J., dissenting).

dissent.<sup>708</sup> Rather than rendering a decision on the free speech issue on which the other justices based their opinions, Breyer focused solely on the matter of whether the public school's principal deserved qualified immunity from the student's lawsuit.<sup>709</sup> After determining that the principal was entitled to qualified immunity, Breyer stopped his opinion there, stating that the Court had no need to resolve the First Amendment question and should refrain from doing so.<sup>710</sup>

On the whole, Breyer's opinions demonstrate a tendency to seek the narrowest possible judgment in a free speech decision. More than many of the other justices, Breyer seems likely to specifically limit his holding in a free speech case to the facts of that specific dispute, reducing the precedential effect of his opinions.<sup>711</sup> He tends to avoid decisions declaring that a particular category of speech usually receives or does not receive constitutional protection, preferring to leave such questions open for further review.<sup>712</sup> In the examples studied here, Breyer also revealed a propensity for paying significant attention to the interests opposing his ultimate decision, at times even appearing to provide fertile material for future jurists to overrule his holdings.<sup>713</sup> Whether this represents maddening indecision on Breyer's part, or whether this trend honors a tradition of deciding cases on the narrowest possible grounds, is a question for other commentators to debate.<sup>714</sup> Suffice it to say that for the most

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<sup>708</sup> See *Morse v. Frederick*, 551 U.S. 393, 428 (2007) (Breyer, J., concurring in judgment in part, dissenting in part).

<sup>709</sup> *Id.* at 425.

<sup>710</sup> *Id.* at 433.

<sup>711</sup> See *supra* notes 685–710 and accompanying text.

<sup>712</sup> See *supra* notes 680–705 and accompanying text.

<sup>713</sup> See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 461, 462 (2011) (Breyer, J., concurring) (describing circumstances in which the government could lawfully restrict speech on a matter of public concern before ultimately holding that the speech on a matter of public concern in this particular case merited constitutional protection); *Garcetti v. Ceballos*, 547 U.S. 410, 445, 449–50 (2006) (Breyer, J., dissenting) (discussing the need for public employers to curtail the speech of employees in certain circumstances before ultimately ruling in favor of the free speech rights of the attorney in this particular case); *Bartnicki v. Vopper*, 532 U.S. 514, 536, 541 (2001) (Breyer, J., concurring) (describing in detail the important privacy interests implicated in this case before ultimately ruling in favor of the free speech rights of the broadcasters); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 226, 229 (1997) (Breyer, J., concurring) (declaring that the statute unquestionably burdened the speech of cable television operators and describing these burdens in detail before ultimately ruling to uphold the speech-restricting statute in question).

<sup>714</sup> Breyer's narrow, fact-specific opinions have indeed frustrated other jurists and judicial commentators who sought greater precedential guidance from the Supreme Court. See, e.g., Toobin, *supra* note 5, at 39–40 (“Applying Breyer’s ruling to cases involving similar issues isn’t easy. In a decision last month excluding the words ‘under God’ from the Pledge of Allegiance, Lawrence K. Karlton, a federal judge in Sacramento, wrote that Breyer’s method in the Commandments cases was ‘utterly standardless . . . leaving those of us who work in the vineyard without guidance.’”). Other commentators, however, have praised Breyer’s narrow

part, if a group of justices issue a sweeping opinion in a freedom of speech dispute, a separate opinion from Breyer calling for a more limited holding is likely, even if Breyer agrees with that group's ultimate conclusion.

*E. Upholding Laws and Regulations—But Not Always*

In most of the cases studied here, Breyer voted to uphold the existing laws and regulations at issue in the dispute.<sup>715</sup> Frequently, he chided other justices for writings which, in his opinion, failed to properly respect the expertise of the other two branches of government. For instance, in *United States v. United Foods, Inc.*, Breyer declared that the majority's views on the constitutionality of the Mushroom Act were misguided, and that "collective promotion and research is a perfectly traditional form of government intervention in the marketplace."<sup>716</sup> The statute, to Breyer, was a logical example of governmental economic regulation, and thus posed no First Amendment problems whatsoever.<sup>717</sup>

In *Thompson v. Western States Medical Center*, Breyer adamantly objected to the majority's decision that less-restrictive alternatives were available to meet the goal of protecting people from unsafe medications.<sup>718</sup> To Breyer, this decision failed to properly afford enough importance to the government's safety-motivated regulatory scheme, and improperly second-guessed experts from the legislative and executive branches who deemed the strict advertising restrictions on pharmacies selling compounded drugs necessary.<sup>719</sup> Likewise, in *Ashcroft v. American Civil Liberties Union*, Breyer's dissent criticized the majority for spending too much time trying to come up with alternative measures that might not prove particularly effective in practice, and too little time comprehending the importance of the government's interest in protecting minors from "legally obscene material" on the Internet.<sup>720</sup> In *United States v.*

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opinions as an exercise in high-quality "judicial restraint." See, e.g., Gewirtz, *supra* note 7, at 1677, 1679; Rosen, *Breyer Restraint*, *supra* note 5, at 20.

<sup>715</sup> See *supra* notes 629–37 and accompanying text. Other observers of the Court have asserted that Breyer has an overall propensity to uphold existing statutes whenever possible. See, e.g., Gewirtz & Golder, *supra* note 5; Kramer et al., *supra* note 5, at 184; Rosen, *A Conservative Activist Court*, *supra* note 5.

<sup>716</sup> *United States v. United Foods, Inc.*, 533 U.S. 405, 419, 421 (2001) (Breyer, J., dissenting).

<sup>717</sup> *Id.* at 419–20 (quoting *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 468, 469–70 (1997)).

<sup>718</sup> *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 385–86 (2002) (Breyer, J., dissenting).

<sup>719</sup> *Id.* at 386–87.

<sup>720</sup> *Ashcroft v. ACLU*, 542 U.S. 656, 677–78 (2004) (Breyer, J., dissenting).

*Playboy Entertainment Group*, Breyer again argued in dissent that the majority, in addition to mischaracterizing Section 505 of the Communications Decency Act as a total ban on speech, neglected to provide a “realistic assessment of the alternatives” available to the government in determining that less speech-restrictive alternative measures were available.<sup>721</sup>

Breyer issued a similar dissent in *Brown v. Entertainment Merchants Association*, in which he granted significant weight to the expert opinions that California’s legislature sought regarding the effects of violent video games on minors.<sup>722</sup> Since the legislature, after detailed research, decided that violent video games cause psychological harm and that they needed to avoid such harm for the children of their state, Breyer held that the Court improperly meddled with legislative judgments by overturning the California statute in this case.<sup>723</sup> Breyer even added a seven-page appendix of scientific studies linking violent video games to violent behaviors, and while he stated that none of these studies were infallible, the California legislature’s decision to use such studies as the rationale for passing this law deserved greater deference from the Court’s majority.<sup>724</sup>

Still another example of Breyer’s propensity to uphold existing statutes emerged in *Nixon v. Shrink Missouri Government PAC*, where Breyer stated that the Court needed to grant Missouri’s legislators sufficient latitude to govern “the integrity of the electoral process” in their own state.<sup>725</sup> In another campaign finance decision, *McCutcheon v. Federal Election Commission*, Breyer wrote that the Court’s majority did not properly account for the government’s interest in limiting campaign contributions.<sup>726</sup> According to Breyer, the government had reasonably determined that contribution limits were necessary to prevent the wealthiest individuals from gaining the greatest access to political candidates and discouraging the average citizen from democratic participation.<sup>727</sup> Removing these contribution caps, Breyer concluded, could wreak considerable damage upon the democratic process that the government itself was

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<sup>721</sup> *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 846–47 (2000) (Breyer, J., dissenting).

<sup>722</sup> *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2770 (2011) (Breyer, J., dissenting).

<sup>723</sup> *See id.* at 2768, 2770.

<sup>724</sup> *See id.* at 2772–79.

<sup>725</sup> *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 401, 403–04 (2000) (Breyer, J., concurring).

<sup>726</sup> *McCutcheon v. FEC*, 134 S. Ct. 1434, 1465–66 (2014) (Breyer, J., dissenting).

<sup>727</sup> *See id.* at 1466–68.

trying to protect.<sup>728</sup>

Breyer also gave substantial weight to existing laws and regulations when siding with the Court's majority. For example, in *Beard v. Banks*, he emphasized that the Court needed to defer to state correctional experts regarding the necessity of certain prison policies.<sup>729</sup> In *Williams-Yulee v. The Florida Bar*, in which he joined virtually every facet of the majority's rationale, Breyer upheld the state's ethical provisions limiting the speech of candidates for statewide judicial positions, agreeing with Roberts's conclusion that the state had a right to enforce measures to uphold the integrity of its judiciary.<sup>730</sup> In *Walker v. Sons of Confederate Veterans*, he stated that a government may engage in viewpoint discrimination in its own speech without triggering any First Amendment problems, as such decisions to ban certain messages merely represented the government "carr[ying] out its duties on their [citizens'] behalf."<sup>731</sup>

Given Breyer's background as both a high-ranking government attorney and an administrative law scholar whose writings demonstrated significant faith in government's ability to police itself, this penchant for upholding the work of the legislative and executive branches is perhaps unsurprising.<sup>732</sup> Indeed, past evaluators of Breyer's overall jurisprudence have noted that he tends to defer to Congress more often than the Court's other justices.<sup>733</sup>

Equally revealing, however, are the rarer cases in which Breyer decided that the facts necessitated overturning an existing statute or regulation. In the decisions studied here, this category includes *Holder v. Humanitarian Law Project*, in which Breyer held that the federal law in question required virtually "automatic forfeiture of First Amendment rights" in the name of preventing international terrorism.<sup>734</sup> To Breyer, while such an interest was certainly compelling, a statute that struck down even a good faith attempt to teach terrorist groups non-violent, lawful resolution of disputes was blatantly overbroad.<sup>735</sup>

In *United States v. Alvarez*, Breyer voted to overturn the Stolen

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<sup>728</sup> *Id.* at 1480–81.

<sup>729</sup> *Beard v. Banks*, 548 U.S. 521, 535 (2006).

<sup>730</sup> *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1662 (2015); *id.* at 1673, 1675 (Breyer, J., concurring) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 821 (2002)).

<sup>731</sup> *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015).

<sup>732</sup> For a discussion of Breyer's past government service in his career as a practicing attorney, as well as his administrative law scholarship in his academic life, see *supra* Part I.

<sup>733</sup> Gewirtz & Golder, *supra* note 5.

<sup>734</sup> *Holder v. Humanitarian Law Project*, 561 U.S. 1, 41, 44 (2010) (Breyer, J., dissenting).

<sup>735</sup> *Id.* at 46, 52, 53, 61.

Valor Act because the law, in his estimation, granted the government a potentially dangerous tool by completely banning all forms of a certain type of lie.<sup>736</sup> Similarly, in *United States v. Stevens*, Breyer voted with the Court's majority in rejecting the government's argument for a categorical ban on speech depicting cruelty toward animals.<sup>737</sup> In *Ashcroft v. Free Speech Coalition*, he sided with the majority's finding that the Child Pornography Prevention Act of 1996 was so broadly worded that it threatened to ban not only unprotected pornographic speech, but also speech with potential "literary, artistic, political, or scientific value."<sup>738</sup>

Like the other justices in *Reed v. Town of Gilbert*, Breyer found no logical link between limiting certain categories of signs and the town's purported interests in aesthetics and safety, leading him to conclude that the local ordinance violated the First Amendment.<sup>739</sup> In the 2009 case of *Federal Communications Commission v. Fox Television Stations*, Breyer found that the FCC never justified its "fleeting expletives" policy changes, thus demonstrating that these regulatory alterations were arbitrary and capricious.<sup>740</sup> And in *Randall v. Sorrell*, Breyer wrote that while important reasons existed for capping political campaign contributions, the extraordinarily low limits that the Vermont statute imposed could prevent candidates from running an effective campaign that informed the people of their messages.<sup>741</sup>

Considering these holdings, Breyer's distaste for extreme positions regarding freedom of speech again becomes apparent. In most of the cases where he voted to overturn an existing law or regulation, Breyer focused his rationale on the apparent broadness, overreaching, or excessiveness of the statute or regulation at issue.<sup>742</sup> With the possible exception of *Reed* and *Fox*, Breyer acknowledged or joined opinions that acknowledged the strength of the government's interests in all of these cases, indicating that more narrowly tailored measures could satisfy the First Amendment.<sup>743</sup> Only the extent of

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<sup>736</sup> *United States v. Alvarez*, 132 S. Ct. 2537, 2555, 2556 (2012) (Breyer, J., concurring).

<sup>737</sup> *United States v. Stevens*, 559 U.S. 460, 463, 481–82 (2010).

<sup>738</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 238, 246–47, 248, 258 (2002).

<sup>739</sup> *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2236 (2015) (Breyer, J., concurring).

<sup>740</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 564–65, 567 (2009) (Breyer, J., dissenting).

<sup>741</sup> *Randall v. Sorrell*, 548 U.S. 230, 253 (2006).

<sup>742</sup> See e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2555, 2556 (2012) (Breyer, J., concurring); *Ashcroft*, 535 U.S. at 246–47, 248.

<sup>743</sup> Compare *Fox Television Stations*, 556 U.S. at 546–47 (Breyer, J., concurring) (noting that Breyer declines to use a First Amendment analysis), and *Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring) (conceding that strict scrutiny should be used to demonstrate weakness in the



the restrictions at issue, and Breyer's views that these restrictions would likely invalidate far more speech than what was necessary to meet the asserted state interest, led Breyer to take a step that he considers extreme in voting to fully overturn an existing provision.<sup>744</sup>

### F. Avoiding Strict Scrutiny

Breyer frequently criticized the Court's widespread use of the strict scrutiny test in the cases discussed here.<sup>745</sup> Instead, these cases show that Breyer typically prefers employing a less stringent test in freedom of speech disputes.<sup>746</sup> Avoiding the Court's traditional requirements of finding that the statute is justified by a "compelling state interest" that is the "least restrictive alternative" for achieving this interest, Breyer calls his favored framework an examination of "fit."<sup>747</sup> Essentially, it demands resolution of one question: "[W]hether the statute works speech-related harm that is out of proportion to its justifications."<sup>748</sup> To Breyer, this alternative test—which he often calls "proportionality" or "intermediate scrutiny," but frequently avoids labeling at all—provides a more realistic assessment of the interests on both sides of the case, refraining from the "near-automatic condemnation" of the statute that Breyer feels is inherent to strict scrutiny.<sup>749</sup>

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government's rationale where a rule limits speech), *with Alvarez*, 132 S. Ct. at 2555 (Breyer, J., concurring) (stating that the Stolen Valor Act's broad provisions granted too much speech-prohibiting power to the government, but noting that the governmental interests in defending the legitimacy of medals awarded for valorous military service were important), *Holder v. Humanitarian Law Project*, 561 U.S. 1, 41, 46, 55 (2010) (Breyer, J., dissenting) (noting that the government's interest in combating international terrorism is certainly compelling, but the absolute bans on even non-violent speech under the laws in question violated the First Amendment), *United States v. Stevens*, 559 U.S. 460, 464, 467, 474, 478, 480–82 (2010) (pointing out that the content-based speech-restrictive federal statute was too broad to satisfy the First Amendment, but expressly noting that the Court did not eliminate the possibility of more narrowly tailored legislation outlawing depictions of extreme cruelty toward animals), *Randall*, 548 U.S. at 253 (stating that some political campaign limits are constitutional, but Vermont's limit was too low and too restrictive to pass constitutional muster), and *Ashcroft*, 535 U.S. at 240, 246–48, 250, 256–58 (stating that guarding against child pornography is a compelling state interest, but the wide breadth of the law at issue struck down too many forms of protected speech to go along with the legitimate targets of the statute).

<sup>744</sup> See *Stevens*, 559 U.S. at 478, 480, 482; *Ashcroft*, 535 U.S. at 256, 258.

<sup>745</sup> See *supra* notes 689–90, 693–702 and accompanying text.

<sup>746</sup> See *supra* notes 689–90, 693–702 and accompanying text.

<sup>747</sup> See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 227 (1997) (Breyer, J., concurring) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799–800 (1989)).

<sup>748</sup> *Alvarez*, 132 S. Ct. at 2551 (Breyer, J., concurring).

<sup>749</sup> See *id.* at 2251–52. For a sampling of the variety of phrases that Breyer uses regarding this more malleable test in the freedom of speech context, see *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring); *Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring); *Bartnicki v. Vopper*, 532 U.S. 514, 536 (2001) (Breyer, J., concurring); *Nixon v.*

For example, Breyer's concurring opinion with the unanimous Court in *Reed v. Town of Gilbert* argued that the Court unnecessarily applied strict scrutiny when a less-onerous standard of review was warranted, even though the case centered on a content discrimination issue.<sup>750</sup> "[T]o hold that such content discrimination [always] triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity," he declared.<sup>751</sup> According to Breyer, strict scrutiny was advisable only in cases where the government enacted a content-discriminatory law that took direct aim at a particular viewpoint or belief.<sup>752</sup>

Writing a concurring opinion in *United States v. Alvarez*, Breyer again grappled with the question of a content-based speech-restricting statute.<sup>753</sup> Breyer devoted the entire first section of his opinion to promoting an "intermediate scrutiny" or "proportionality" test rather than strict scrutiny.<sup>754</sup> Spending very little time discussing the Court's prior history of applying strict scrutiny to content-based laws, Breyer focused instead on his assertion that the regulation of false factual statements "can nonetheless threaten speech-related harms."<sup>755</sup> Therefore, Breyer concluded, a statute restricting false statements demanded greater deference than what the "near-automatic condemnation" of the strict scrutiny test could possibly provide.<sup>756</sup>

In *Bartnicki v. Vopper*, Breyer criticized the majority for applying strict scrutiny even though compelling constitutional interests existed on both sides of the dispute.<sup>757</sup> The radio broadcaster's speech interests were certainly important, Breyer wrote, but so were the privacy interests of individual citizens that the anti-wiretapping statutes were designed to protect.<sup>758</sup> Therefore, Breyer concluded, the more evenhanded approach of simply asking "whether the

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Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (quoting *Turner*, 520 U.S. at 227 (Breyer, J., concurring)); and *Turner*, 520 U.S. at 229. Notably, Breyer has also advocated for a "proportionality" approach to evaluate other cases in different areas of the law, such as individual gun ownership rights. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 682, 690 (2008) (Breyer, J., dissenting).

<sup>750</sup> See *Reed*, 135 S. Ct. at 2234, 2235–36 (Breyer, J., concurring).

<sup>751</sup> *Id.* at 2234.

<sup>752</sup> See *id.*

<sup>753</sup> *Alvarez*, 132 S. Ct. at 2551, 2552, 2555 (Breyer, J., concurring).

<sup>754</sup> *Id.* at 2551–52.

<sup>755</sup> *Id.* at 2552.

<sup>756</sup> *Id.*

<sup>757</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 536 (2001) (Breyer, J., concurring).

<sup>758</sup> *Id.* at 536–37 (first quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); and then citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 227 (1997) (Breyer, J., concurring)).

statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences” provided a considerably fairer test than strict scrutiny.<sup>759</sup>

Breyer stated that strict scrutiny was an inappropriate test for campaign finance cases in *Nixon v. Shrink Missouri Government PAC*.<sup>760</sup> Instead of the “mechanical application” of strict scrutiny, Breyer wrote that his proportionality test closely studied the interests on both sides without imposing the “strong presumption against constitutionality, of the sort often thought to accompany the words ‘strict scrutiny.’”<sup>761</sup> In this opinion, he invoked the words of Justice Felix Frankfurter, who objected in the 1949 case of *Kovacs v. Cooper* to judging First Amendment cases with “oversimplified formulas.”<sup>762</sup>

Breyer also overtly spoke out against applying “rigid” tests in *Williams-Yulee v. The Florida Bar*,<sup>763</sup> *United States v. American Library Association*,<sup>764</sup> *Thompson v. Western States Medical Center*,<sup>765</sup> *Turner Broadcasting System v. Federal Communications Commission*,<sup>766</sup> and *United States v. United Foods*.<sup>767</sup> Once again, Breyer advocated a “proportionality” approach for evaluating these cases.<sup>768</sup> In most of these opinions, Breyer addressed the existence of important interests on both sides of the dispute, and concluded that strict scrutiny or, in the case of the commercial speech cases, the traditional *Central Hudson* test would impose too significant of a presumption against the statute’s constitutionality.<sup>769</sup>

However, Breyer was not uniformly opposed to strict scrutiny in the cases examined here. For instance, Breyer applied strict scrutiny in his *Brown v. Entertainment Merchants Association* dissent, ultimately deciding that the statute preventing the sale of violent video games to minors satisfied this heightened burden.<sup>770</sup> In *United*

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<sup>759</sup> *Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring).

<sup>760</sup> *Nixon v. Shrink Mo Gov’t PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring).

<sup>761</sup> *Id.*

<sup>762</sup> *Id.* (quoting *Kovacs v. Cooper*, 336 U.S. 77, 96 (1949) (Frankfurter, J., concurring)).

<sup>763</sup> *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1673 (2015) (Breyer, J., concurring).

<sup>764</sup> *United States v. Am. Library Ass’n*, 539 U.S. 194, 217 (2003) (Breyer, J., concurring).

<sup>765</sup> See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 389 (2002) (Breyer, J., dissenting).

<sup>766</sup> See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 227 (1997) (Breyer, J., concurring) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799–800 (1989)).

<sup>767</sup> *United States v. United Foods, Inc.*, 533 U.S. 405, 425 (2001) (Breyer, J., dissenting).

<sup>768</sup> See *supra* notes 698–702 and accompanying text.

<sup>769</sup> See, e.g., *Am. Library Ass’n*, 539 U.S. at 216, 217, 218, 220 (Breyer, J., concurring); *Thompson*, 535 U.S. at 378, 379, 388, 389 (Breyer, J., dissenting); *United Foods*, 533 U.S. at 425, 429 (Breyer, J., dissenting); *Turner Broad. Sys.*, 520 U.S. at 227, 229 (Breyer, J., concurring).

<sup>770</sup> *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2761, 2762, 2771 (2011) (Breyer, J.,

*States v. Playboy Entertainment Group*, Breyer applied the strict scrutiny test without ever formally using the words “strict scrutiny,” writing that the Court needed to find that the statute was “narrowly tailor[ed]” to justify the government’s “compelling interest” in restricting a certain variety of speech, eventually holding in favor of the government.<sup>771</sup> Similarly, in *Ashcroft v. American Civil Liberties Union*, Breyer required “the Government to show that any restriction of nonobscene expression is ‘narrowly drawn’ to further a ‘compelling interest’ and that the restriction amounts to the ‘least restrictive means’ available to further that interest.”<sup>772</sup> As with *Brown* and *Playboy Entertainment*, however, Breyer determined that the government met these burdens, and voted to uphold the statute in question.<sup>773</sup>

In *Holder v. Humanitarian Law Project*, however, Breyer actually criticized the Court’s majority for applying a test that was not strict enough.<sup>774</sup> While the majority claimed to apply a “demanding” standard in evaluating this decision, Breyer stated that the Court in actuality “failed to examine the Government’s justifications with sufficient care” and “failed to require tailoring of means to fit compelling ends.”<sup>775</sup> Due to what Breyer considered an extraordinarily lax application of strict scrutiny in a situation that involved “pure political speech,” he concluded that the Court’s majority “deprive[d] the individuals before [the Court] of the protection that the First Amendment demands.”<sup>776</sup>

Ultimately, though, Breyer’s opinions applying strict scrutiny rather than proportionality analysis in a free speech case are, if this sampling is any indication, quite rare. Ironically, Breyer held for the government in three of the four cases examined here where he applied the “heightened” strict scrutiny standard of review, demonstrating that convincing Breyer to apply strict scrutiny still

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dissenting).

<sup>771</sup> *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 836, 846 (2000) (Breyer, J., dissenting).

<sup>772</sup> *Ashcroft v. ACLU*, 542 U.S. 656, 677 (2004) (Breyer J., dissenting) (citing *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

<sup>773</sup> See *Brown*, 131 S. Ct. at 2771 (Breyer, J., dissenting); *Ashcroft*, 542 U.S. at 677 (Breyer J., dissenting) (“I cannot accept [the majority’s] conclusion that Congress could have accomplished its statutory objective—protecting children from commercial pornography on the Internet—in other, less restrictive ways.”); *Playboy Entm’t Grp.*, 529 U.S. at 836, 846 (Breyer, J., dissenting).

<sup>774</sup> See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 45–46 (2010) (Breyer, J., dissenting).

<sup>775</sup> *Id.* at 62.

<sup>776</sup> *Id.*

does not guarantee a vote against the government's speech-restricting measure.<sup>777</sup> Overall, however, Breyer seems far likelier to accept an argument that utilizes his preferred "proportionality" analysis, even in a case involving content-based restrictions, unless the statute at issue widely bans an entire category of high-value speech.<sup>778</sup> Once again, Breyer appears to emphasize the moderate's role, utilizing a more flexible test than what the Court typically employs to decide these cases and generally insisting on avoiding "presumptions" for or against either side of the dispute.

*G. A Few Categorical Discussions: Breyer on Commercial Speech, Campaign Finance, and Protecting Minors*

1. Commercial Speech

The three commercial speech cases studied here indicate that Breyer possesses a robust skepticism toward this area of the law. First, he seems quite willing to abandon the four-part *Central Hudson* test that the Court has generally employed in commercial speech cases for more than thirty years, declining to utilize this test in both *United States v. United Foods* and *Thompson v. Western States Medical Center* and declining to apply the test in *Nike v. Kasky*.<sup>779</sup> In *Thompson*, he issued a specific warning against the Court interfering in areas that, in Breyer's opinion, should remain in the hands of Congress and the executive branch's agencies: "[A]n overly rigid 'commercial speech' doctrine will transform what ought to be a legislative or regulatory decision about the best way to protect

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<sup>777</sup> See *supra* notes 770–73 and accompanying text.

<sup>778</sup> See *supra* notes 750–69 and accompanying text. To an extent, Breyer's preference for proportionality rather than strict scrutiny echoes his overall tendencies toward scrutinizing details, closely evaluating case-specific empirical data, and generally rejecting rigid statements regarding the Constitution. See, e.g., Loewy, *supra* note 18, at 1205–06, 1207; *supra* notes 7, 763–68 and accompanying text. Additionally, Breyer's dislike for a test with an inbuilt presumption against a statute's constitutionality correlates with his overall respect for the work of the branches of government, the need for the judiciary to work within the total system of government rather than working entirely independently from other governmental institutions, and the importance of judicial deference to the products of the other branches unless the law or regulation in question clearly undermines the democratic process. See, e.g., BREYER, *supra* note 24, at 106–07, 110–11, 119 (discussing the necessity, in Breyer's opinion, for courts to function as part of the whole governmental system and presenting a framework for courts to decide when to defer to judgments from Congress and from executive branch agencies); *supra* note 8 and accompanying text (describing Breyer's technocratic-like respect for the machinations of government).

<sup>779</sup> *Nike, Inc. v. Kasky*, 539 U.S. 654, 676 (2003) (Breyer, J., dissenting); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 389 (2002) (Breyer, J. dissenting); *United States v. United Foods, Inc.*, 533 U.S. 405, 425–29 (2001) (Breyer, J., dissenting).

the health and safety of the American public into a constitutional decision prohibiting the legislature from enacting necessary protections.”<sup>780</sup>

Breyer wrote dissents in each of the three commercial speech cases reviewed in this article.<sup>781</sup> In both *United Foods* and *Thompson*, Breyer voted to uphold the statutes in question, writing that the Court’s majority needlessly attempted to second-guess Congress and the executive agencies; he went further in *Thompson* by criticizing the Court’s reliance on hypothetically less-restrictive alternatives with no real research about whether such measures could actually function.<sup>782</sup> As for *Nike v. Kasky*, Breyer voted that Nike’s speech deserved full First Amendment protection, but only because Nike’s public rebuttals to criticism of its business practices qualified as political speech.<sup>783</sup> To Breyer, mingling the commercial message with the political statement brought Nike’s speech beyond the ambit of pure commercial speech analysis and into the realm of “heightened scrutiny.”<sup>784</sup> Thus, the questions of how Breyer would have evaluated Nike’s speech under a traditional commercial speech analysis remain unanswered.

On the whole, however, Breyer appears to take a view toward commercial speech that is limited at best. His dislike of the *Central Hudson* test indicates that here, as with other areas explored already, Breyer prefers to give both sides of the case a long look before rendering a decision.<sup>785</sup> Overall, he seems inclined to let restrictive measures stand when the government asserts an interest in protecting health and safety of the public or economic success of a

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<sup>780</sup> *Thompson*, 535 U.S. at 389 (Breyer, J., dissenting).

<sup>781</sup> See *Nike*, 539 U.S. at 665 (Breyer, J., dissenting); *Thompson*, 535 U.S. at 378 (Breyer, J., dissenting); *United Foods*, 533 U.S. at 419 (Breyer, J., dissenting).

<sup>782</sup> See *Thompson*, 535 U.S. at 385–86, 388, 390 (Breyer, J., dissenting); *United Foods*, 533 U.S. at 420–21, 428–430.

<sup>783</sup> *Nike*, 539 U.S. at 676 (Breyer, J., dissenting) (“[T]he communications at issue are not purely commercial in nature. They are better characterized as involving a mixture of commercial and noncommercial (public-issue-oriented) elements.”).

<sup>784</sup> *Id.* (“In my view, a proper resolution here favors application of the last mentioned public-speech principle, rather than the first mentioned commercial-speech principle. Consequently, I would apply a form of heightened scrutiny to the speech regulations in question, and I believe that those regulations cannot survive that scrutiny.”).

<sup>785</sup> Compare *supra* notes 779–84 and accompanying text (discussing Breyer’s dissents in commercial speech cases which he rejected or refused to apply the applicable constitutional test), with *supra* notes 686–714 and accompanying text (discussing Breyer’s propensity to seek the narrowest possible holding and give credence to the competing constitutional interests raised in a case), and *supra* notes 750–69 and accompanying text (describing Breyer’s preference for a proportionality test that he considers more evenhanded than the more traditional strict scrutiny analysis).

particular industry.<sup>786</sup> If a company's speech touches political matters, however, Breyer seems perfectly willing to employ a test that provides considerably more deference to the speech interests of the business.<sup>787</sup>

## 2. Campaign Finance

Breyer's dissent in *McCutcheon v. Federal Election Commission* features surprisingly definite and absolute language from the typically temperate justice.<sup>788</sup> Within its pages, Breyer strongly disagrees with Roberts's assertion about the role of campaign contributions in a democratic society.<sup>789</sup> Roberts held that large campaign donations are "a central feature of democracy" and represent the ability of individuals to support the candidates of their choice.<sup>790</sup> In response, Breyer argued that unrestricted contributions could undermine the entire democratic process, causing voters to lose interest in participating if they lacked the deep pockets necessary to have any effect on political leaders.<sup>791</sup> Without campaign contribution limits to give all citizens a voice, regardless of their financial worth, Breyer argued that "a free marketplace of political ideas loses its point."<sup>792</sup>

This emphatic dissent, coupled with Breyer's decision to join Stevens's equally emphatic dissent in *Citizens United v. Federal Election Commission*, seems to fully reveal Breyer's inclinations in favor of campaign contribution restrictions.<sup>793</sup> Furthermore, Breyer's concurring opinion in *Nixon v. Shrink Missouri Government PAC* about the importance of letting state legislatures defend "the

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<sup>786</sup> See, e.g., *Thompson*, 535 U.S. at 389 (Breyer, J., dissenting); *United Foods*, 533 U.S. at 428 (Breyer, J., dissenting).

<sup>787</sup> See, e.g., *Nike*, 539 U.S. at 676 (Breyer, J., dissenting).

<sup>788</sup> For a review of the language in Breyer's dissent, see *supra* notes 555–66 and accompanying text. As noted a number of times already, Breyer generally prefers reaching a narrower, fact-specific, less-absolute conclusion in cases—particularly the freedom of speech cases studied in this article—rather than issuing broad statements with sweeping constitutional consequences. See, e.g., *Greenhouse*, *supra* note 18, at 249, 250; *Loewy*, *supra* note 18, at 1205–06, 1208; *Gewirtz*, *supra* note 7, at 1677, 1697; *Toobin*, *supra* note 5, at 39; see also *supra* notes 686–714 and accompanying text (discussing Breyer's propensity to seek the narrowest possible holding and give credence to the competing constitutional interests raised in a case); *supra* notes 750–69 and accompanying text (describing Breyer's preference for a proportionality test that he considers more evenhanded than the more traditional strict scrutiny analysis).

<sup>789</sup> See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1466–67 (2014) (Breyer, J., dissenting).

<sup>790</sup> *Id.* at 1441 (majority opinion) (quoting *Citizens United v. FEC*, 558 U.S. 310, 360 (2010)).

<sup>791</sup> See *McCutcheon*, at 1467–68 (Breyer, J., dissenting).

<sup>792</sup> *Id.* at 1467.

<sup>793</sup> See *supra* notes 457–65, 555–66 and accompanying text.

integrity of the electoral process” in their own states reinforces the fact that Breyer is not reticent to uphold campaign contribution limits against constitutional challenges.<sup>794</sup>

Only if a statute imposes an unreasonably low campaign limit does Breyer appear willing to overturn the law on First Amendment grounds. He did so in *Randall v. Sorrell*,<sup>795</sup> and left open the door in *Nixon* to invalidate laws with contribution caps so limited that they ended up “insulating” incumbents from facing bona fide outside challenges.<sup>796</sup> Beyond this, however, the cases studied here strongly indicate that Breyer is unlikely to use any other grounds to overturn campaign contribution limits as unconstitutional.<sup>797</sup>

### 3. Protecting Minors

In several cases explored in this article, the government asserted an interest in protecting minors from certain allegedly damaging forms of speech.<sup>798</sup> Such assertions frequently received significant support from Breyer. For instance, his solo dissenting opinion in *Brown v. Entertainment Merchants Association* focused largely on the need for the California legislature to implement measures that protected children in ways they deemed proper.<sup>799</sup> While noting that the statute preventing the sale of violent video games to minors clearly did restrict speech, Breyer determined that the law survived strict scrutiny.<sup>800</sup> Likewise, Breyer held that the restrictive statutes in *United States v. Playboy Entertainment Group* and *Ashcroft v.*

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<sup>794</sup> *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 401, 402 (2000) (Breyer, J., concurring).

<sup>795</sup> *Randall v. Sorrell*, 548 U.S. 230, 236–37 (2006) (citing *Buckley v. Valeo*, 424 U.S. 1, 25–30, 54–58 (1976)).

<sup>796</sup> *Nixon*, 528 U.S. at 402, 403–04 (Breyer, J., concurring).

<sup>797</sup> In particular, Breyer's dissent in *McCutcheon* and his willingness to join Stevens' equally adamant dissent in *Citizens United* demonstrates Breyer's belief that restrictions on political campaign contributions help preserve key elements of the democratic electoral process. See *supra* notes 789–93 and accompanying text; *supra* Part II. And Breyer has declared in his published writings that a Supreme Court justice has not only the right, but the obligation, to intercede when a statute or regulation blatantly threatens the democratic process, as preserving the democratic process for the American people is the Constitution's core function. See, e.g., *supra* notes 99–117 and accompanying text; *infra* notes 809–36 and accompanying text.

<sup>798</sup> The cases studied here that confront this issue are *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2732 (2011); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 506–07 (2009); *Ashcroft v. ACLU*, 542 U.S. 656, 661 (2004); *United States v. American Library Ass'n*, 539 U.S. 194, 200 (2003); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241 (2002); *United States v. Playboy Entertainment Group*, 529 U.S. 803, 806 (2000); and, less directly, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 291 (2000).

<sup>799</sup> *Brown*, 131 S. Ct. at 2761, 2770, 2771 (Breyer, J., dissenting).

<sup>800</sup> *Id.* at 2771.



*American Civil Liberties Union* withstood the strict scrutiny test.<sup>801</sup> In all of these cases, the government asserted its need to protect minors from obscene or violent content as a “compelling interest” justifying the statute’s continued existence.<sup>802</sup>

Breyer also voted to uphold the Children’s Internet Protection Act in *United States v. American Library Association*, another case where the government’s primary interests focused on protecting children.<sup>803</sup> And while the welfare of minors was not one of the key rationales asserted by the City of Erie in *City of Erie v. Pap’s A.M.*, one can reasonably assume that preventing minors from exposure to erotic dancing and its purported residual effects of “violence, sexual harassment, public intoxication, prostitution” and other similar consequences was part of the unwritten rationale behind the Court’s majority allowing this ordinance to stand.<sup>804</sup>

Breyer did join Kennedy’s majority opinion in *Ashcroft v. Free Speech Coalition*, which overturned components of the Child Pornography Prevention Act.<sup>805</sup> However, Kennedy’s holding left the door open for Congress to enact a more narrowly tailored statute to regulate speech in this area.<sup>806</sup> And while Breyer voted against the

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<sup>801</sup> *Ashcroft*, 542 U.S. at 689 (Breyer, J., dissenting); *Playboy Entm’t Grp.*, 529 U.S. at 845–46 (Breyer, J., dissenting).

<sup>802</sup> *See Broun*, 131 S. Ct. at 2762 (Breyer, J., dissenting) (“[T]he special First Amendment category I find relevant is not (as the Court claims) the category of ‘depictions of violence,’ but rather the category of ‘protection of children.’ This Court has held that the ‘power of the state to control the conduct of children reaches beyond the scope of its authority over adults.’” (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944))); *Ashcroft*, 542 U.S. at 687 (Breyer, J., dissenting) (“The upshot is that Congress could reasonably conclude that, despite the current availability of filtering software, a child protection problem exists. It also could conclude that a precisely targeted regulatory statute, adding an age-verification requirement for a narrow range of material, would more effectively shield children from commercial pornography.”); *Playboy Entm’t Grp.*, 529 U.S. at 838 (Breyer, J., dissenting) (“This Court has also recognized that material the First Amendment guarantees adults the right to see may not be suitable for children. And it has consequently held that legislatures maintain a limited power to protect children by restricting access to, but not banning, adult material.” (first citing *Ginsberg v. New York*, 390 U.S. 629, 631, 634 (1968); then citing *Butler v. Michigan*, 352 U.S. 380, 381, 384 (1957); then citing *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (plurality decision); then citing *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978); and then citing *Reno v. ACLU*, 521 U.S. 844, 888 (1997) (O’Connor, J., concurring in part, dissenting in part))).

<sup>803</sup> *Am. Library Ass’n*, 539 U.S. at 215, 218, 220 (Breyer, J., concurring).

<sup>804</sup> *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 290, 291 (2000) (quoting *Pap’s A.M. v. City of Erie*, 719 A.2d 273, 279 (Pa. 1998)). One could reasonably infer that adverse consequences upon children could be among the list of “other deleterious effects” that the drafters of this regulation attributed to public nudity, particularly public nudity that contained an “erotic message.” *See City of Erie*, 529 U.S. at 290 (quoting *Pap’s A.M.*, 719 A.2d at 279).

<sup>805</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 238, 258 (2002).

<sup>806</sup> *See id.* at 246–47, 248 (providing illustrations of the statute’s overbreadth); *id.* at 250–51, 252, 258 (stating that child pornography received very little First Amendment protection, but that the Child Pornography Prevention Act was simply too broad to satisfy the Court’s

“fleeting expletive” regulations in *Federal Communications Commission v. Fox Television Stations*, he did so solely on the grounds that the changes in the regulations were “arbitrary [and] capricious.”<sup>807</sup> Had he reached the First Amendment questions in this case, and dealt with Fox’s assertions of the need to protect children from hearing obscene language, his ultimate decision might have been quite different.<sup>808</sup>

The cases reviewed in this article indicate that Breyer considers the governmental interest in protecting minors from obscene or violent speech to be particularly compelling. While he frequently found himself in dissent in these cases, Breyer repeatedly determined that speech-restrictive statutes based on the need to protect children survived even the Court’s most rigorous form of scrutiny. Although his record in this area was not uniformly in favor of the government, these cases demonstrate that safeguarding minors is a justification that commonly finds favor with Breyer in these matters.

#### H. *Highlighting the Democratic Process*

Breyer’s emphasis on protecting and nurturing the democratic process is well-documented in recent writings, particularly his books *Active Liberty* and *Making Democracy Work*.<sup>809</sup> As discussed earlier, Breyer asserts in these books that the Constitution guarantees all

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requirements for narrow tailoring in content-based laws restricting speech).

<sup>807</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 546–47 (2009) (Breyer, J., dissenting) (first citing *Motor Vehicle Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–43 (1983); and then citing *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420–21 (1971)).

<sup>808</sup> *See supra* notes 798–802 and accompanying text. In his decisions where the government asserted the protection of minors as a compelling interest, Breyer devoted particular support to the concept of the government’s role as a guardian against obscenity for children whose parents are simply not present in their daily lives. *See, e.g.*, *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2767 (2011) (Breyer, J., dissenting) (internal citation omitted) (“Today, 5.3 million grade-school-age children of working parents are routinely home alone. Thus, it has, if anything, become more important to supplement parents’ authority to guide their children’s development.”); *Ashcroft v. ACLU*, 542 U.S. 656, 685 (2004) (Breyer, J., dissenting) (“[F]iltering software depends upon parents willing to decide where their children will surf the Web and able to enforce that decision. As to millions of American families, that is not a reasonable possibility. More than 28 million school age children have both parents or their sole parent in the work force, at least 5 million children are left alone at home without supervision each week, and many of those children will spend afternoons and evenings with friends who may well have access to computers and more lenient parents.”); *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 842 (2000) (Breyer, J., dissenting) (“Where over 28 million school age children have both parents or their only parent in the work force, where at least 5 million children are left alone at home without supervision each week, and where children may spend afternoons and evenings watching television outside of the home with friends, § 505 offers independent protection for a large number of families.”).

<sup>809</sup> *See supra* notes 98–117 and accompanying text.

Americans “an active and constant participation in collective power,” and empowers the judicial branch to preserve this feature of American governance.<sup>810</sup> Providing a system of “self-government” is, in Breyer’s view, the Constitution’s central purpose, the focal point from which all of its statements radiate and the broad mission statement under which judges should interpret these provisions.<sup>811</sup> Predictably, such assertions continue to draw both heavy praise and heavy criticism from legal commentators.<sup>812</sup>

The key question here, however, is how Breyer applies this viewpoint to his freedom of speech jurisprudence. In the decisions studied in this article, Breyer’s discussions of actively preserving democratic participation are particularly pronounced in his campaign finance holdings.<sup>813</sup> For instance, these principles form the backbone of his dissent in *McCutcheon*, underscoring the reasons why he considers unlimited campaign contributions a threat to the democratic process rather than an inherent feature of a democracy.<sup>814</sup> On balance, according to Breyer, the danger of chilling the democratic

<sup>810</sup> BREYER, *supra* note 10, at 5.

<sup>811</sup> See, e.g., *supra* notes 103, 106–07, 117, and accompanying text.

<sup>812</sup> For a sampling of some of these responses, see Cory L. Andrews, *Judicial Immodesty*, INTERCOLLEGIATE STUD. INST., 72, 72–74 (2007) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR CONSTITUTION (2005)), [https://isistatic.org/journal-archive/ma/49\\_01/andrews.pdf](https://isistatic.org/journal-archive/ma/49_01/andrews.pdf); Kersch, *supra* note 7, at 763–64; Damien M. Schiff, *Purposivism and the “Reasonable Legislator”*: A Review Essay of Justice Stephen Breyer’s *Active Liberty*, 33 WM. MITCHELL L. REV. 1081, 1082, 1086, (2007) (book review); Ilya Somin, “*Active Liberty*” and *Judicial Power: What Should Courts do to Promote Democracy?*, 100 NW. U. L. REV. 1827, 1829, 1830, 1861–62 (2006) (book review); Michael A. Livermore & D. Theodore Rave, Book Note, *Conversation, Representation, and Allocation: Justice Breyer’s Active Liberty*, 81 N.Y.U. L. REV. 1505, 1506, 1507, 1508, 1517 (2006); Chanakya Sethi, Book Note, *Making Our Democracy Work: A Judge’s View*, by Stephen Breyer, 48 OSGOODE HALL L.J. 731, 731–732, 733 (2010); Anthony Lewis, *How the Supreme Court Should and Should Not Work*, N.Y. REV. BOOKS (Nov. 11, 2010), <http://www.nybooks.com/articles/archives/2010/nov/11/how-supreme-court-should-and-should-not-work/>; Sanford Levinson, *Trial by Breyer*, AUSTIN AM. STATESMAN, Sept. 4, 2005, at K5; Dahlia Lithwick, *Giving Back Your Constitution*, SLATE (Oct. 13, 2010, 10:37 AM), [http://www.slate.com/articles/arts/books/2010/10/giving\\_back\\_your\\_constitution.html](http://www.slate.com/articles/arts/books/2010/10/giving_back_your_constitution.html); Stephen F. Rohde, *Active Liberty: Interpreting Our Democratic Constitution*, L.A. LAWYER, Dec. 2005, at 36–37; Jeffrey Rosen, *Pragmatism Strikes Back*, NEW REPUBLIC (Sept. 28, 2010), <http://www.newrepublic.com/book/review/pragmatism-strikes-back-stephen-breyer-democracy-supreme-court>; Jeff Shesol, *Evolving Circumstances, Enduring Values*, N.Y. TIMES (Sept. 17, 2010), <http://www.nytimes.com/2010/09/19/books/review/Shesol-t.html?pagewanted=all&r=0>; Toobin, *supra* note 5, at 36, 43.

<sup>813</sup> See *supra* notes 788–97 and accompanying text; see also *Randall v. Sorrell*, 548 U.S. 230, 248–49 (2006) (“[C]ontribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability. Were we to ignore that fact, a statute that seeks to regulate campaign contributions could itself prove an obstacle to the very electoral fairness it seeks to promote.”).

<sup>814</sup> See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1465, 1466–67 (2014) (Breyer, J., dissenting) (citing *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976)).

participation and political access of the average citizen is a far graver affront to the Constitution than curtailing political contributions from the nation's wealthiest donors.<sup>815</sup>

Yet this is hardly a new position for Breyer to espouse. Indeed, Breyer vigorously advocated for the Court's majority to adopt this mindset fifteen years ago, using his concurring opinion in *Nixon v. Shrink Missouri Government PAC* to agree with Souter's warning that "the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance," praising the statute under review for striving to "democratize the influence that money itself may bring to bear upon the electoral process" and "encouraging the public participation and open discussion that the First Amendment itself presupposes."<sup>816</sup> A public that loses faith in democratic participation—the type of steady input and contribution to government bodies that surrounded Breyer's life from his childhood years onward<sup>817</sup>—would be, in his view, the product of an American government that had lost its way, divorced from the fundamental purpose of its founding legal document.<sup>818</sup>

Breyer does not deny that the First Amendment safeguards "the individual's right to engage in political speech," a category that includes contributing money to a preferred political candidate's campaign.<sup>819</sup> Yet he emphasizes that the First Amendment, when viewed through the lens of the Constitution's objectives in upholding democratic government, also protects "the public's interest in preserving a democratic order in which collective speech *matters*."<sup>820</sup> Proportionately, Breyer holds that this collective interest in keeping open the channels of democratic government for all citizens trumps the individual speech interest in limitless donations.<sup>821</sup>

Beyond campaign finance, however, Breyer repeated similar

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<sup>815</sup> *Id.* at 1467–68.

<sup>816</sup> *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (2000); *id.* at 401 (Breyer, J., concurring).

<sup>817</sup> See *supra* notes 30–33 and accompanying text.

<sup>818</sup> See *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting); *Randall*, 548 U.S. at 247, 248–49 (quoting *Buckley*, 424 U.S. at 21); see *supra* notes 114–17 and accompanying text.

<sup>819</sup> *McCutcheon*, 134 S. Ct. at 1467–68 (Breyer, J., dissenting) (citing *Buckley*, 424 U.S. at 26–27).

<sup>820</sup> *McCutcheon*, 134 S. Ct. at 1467; see *supra* note 117 and accompanying text.

<sup>821</sup> *McCutcheon*, 134 S. Ct. at 1466–67, 1468 (Breyer, J., dissenting) ("The upshot is that the interests the Court has long described as preventing 'corruption' or the 'appearance of corruption' . . . are rooted in the constitutional effort to create a democracy responsive to the people—a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects.").

principles in other cases reviewed here. In *Alvarez*, he argued that even false statements deserve constitutional protection because falsehoods can still provide “a valuable contribution to [the] public debate” in the marketplace of ideas that eventually leads people to decide whom they want to elect as their political leaders.<sup>822</sup> In *Turner Broadcasting*, he determined that providing households with a wide variety of informational channels, thus increasing the ability of people to participate in the democratic process in an informed manner, outweighed the free speech interests of cable television companies.<sup>823</sup> In *Reed*, he wrote about the importance of preserving “an individual’s ability to express thoughts and ideas that can help that individual determine the kind of society in which he wishes to live, help shape that society, and help define his place within it.”<sup>824</sup>

Even in commercial speech cases, Breyer paid substantial attention to the existence or non-existence of key democratic interests. For example, in *United Foods*, Breyer criticized the notion of applying the highest level of scrutiny in every First Amendment case, alleging that by doing so, the Court would create “a serious obstacle to the operation of well-established, legislatively created, regulatory programs, thereby seriously hindering the operation of that democratic self-government that the Constitution seeks to create and to protect.”<sup>825</sup> Furthermore, Breyer argued that a First Amendment analysis in this case was unnecessary, as the statute in question did not prevent the affected mushroom growers from “doing anything else more central to the First Amendment’s concern with democratic self-government.”<sup>826</sup> Similarly, in *Thompson*, Breyer pointed out in his dissent that commercial speech cases generally “reflect a democratically determined governmental decision to regulate a commercial venture in order to protect, for example, the

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<sup>822</sup> *United States v. Alvarez*, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring) (first citing *United States v. Alvarez*, 638 F.3d 666, 673–75 (9th Cir. 2011) (Kozinski, J., concurring in denial of rehearing en banc); and then quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964)).

<sup>823</sup> *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 226–27 (1994) (Breyer, J., concurring) (internal citations omitted) (“This purpose reflects what ‘has long been a basic tenet of national communications policy,’ namely that ‘the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.’ That policy, in turn, seeks to facilitate the public discussion and informed deliberation, which, as Justice Brandeis pointed out many years ago, democratic government presupposes and the First Amendment seeks to achieve.” (first quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) (plurality opinion); and then citing *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring))).

<sup>824</sup> *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring).

<sup>825</sup> *United States v. United Foods, Inc.*, 533 U.S. 405, 425 (2001) (Breyer, J., dissenting).

<sup>826</sup> *Id.* at 426.

consumer, the public health, individual safety, or the environment.”<sup>827</sup>

Perhaps the best example of Breyer’s views on the democratic process and its relationship to freedom of speech emerged in his recent opinion for the Court in *Walker v. Sons of Confederate Veterans*. In his majority opinion, Breyer described why the government could, when it spoke, censor viewpoints from certain groups without implicating any First Amendment problems.<sup>828</sup> Once again, he linked this principle with the democratic process, stating that “the Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate.”<sup>829</sup> Since the government’s speech reflected the will of the citizens who elected the political leaders into office, Breyer determined that many conventional First Amendment requirements did not apply when the government was the speaker.<sup>830</sup>

Under such a framework, one can plainly see the reason why, to Breyer, the threats of chilling the average citizen’s speech through unlimited campaign contributions by entities with deep pockets are so ominous. Without a truly free marketplace of ideas to discuss political matters, and without a fully engaged citizenry, the people will neither obtain necessary information about political matters nor participate fully in the electoral process, potentially leading to the election of new leaders who are ill-suited to wield the significant powers afforded to them.<sup>831</sup>

There are, of course, plenty of decisions in which Breyer mentioned nothing specifically about the democratic process, including most of the cases discussed above involving protecting children from obscene content.<sup>832</sup> The one outlier here is *Brown*, in which Breyer stated that “choices are made for children . . . by the people acting democratically through their governments.”<sup>833</sup> Such language, while brief, once again reveals Breyer’s substantial trust in the government to fulfill

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<sup>827</sup> *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 388 (2002) (Breyer, J., dissenting).

<sup>828</sup> *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245–46 (2015) (first citing *Pleasant Grove v. Summum*, 555 U.S. 460, 467–68 (2009); then citing *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000); then citing *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 559 (2005); then quoting *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); then quoting *id.*; and then quoting *Southworth*, 529 U.S. at 229).

<sup>829</sup> *Walker*, 135 S. Ct. at 2246 (citing *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

<sup>830</sup> *See Walker*, 135 S. Ct. at 2245–46 (first citing *Summum*, 555 U.S. at 467–68; then citing *Southworth*, 529 U.S. at 235; and then citing *Johanns*, 544 U.S. at 559).

<sup>831</sup> *See supra* notes 96–116, 780–87, 797–99 and accompanying text.

<sup>832</sup> *See supra* Part III.G.3.

<sup>833</sup> *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2771 (2011) (Breyer, J., dissenting).

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its “electoral mandate” and represent the interests of the citizens who brought them to power.<sup>834</sup>

Overall, the cases studied here echo the paramount importance that Breyer assigns to this concept in his writings. To him, it seems that freedom of speech’s principal role centers on promoting a marketplace of political ideas generated through rational discussion, which the people will utilize as a tool for discerning their primary priorities and identifying the political candidates who are most likely to advance those priorities. This is consistent with the principles that Breyer has described in his recent writings about the Constitution’s overarching goal of keeping the democratic process vibrant.<sup>835</sup> While other cases indicate that Breyer does not consider this the only purpose for which the First Amendment exists, he certainly seems to consider it a fundamental objective which, in his opinion, the other justices of the Court do not recognize often enough.<sup>836</sup>

#### IV. FINAL THOUGHTS

After two decades on the Court, Justice Breyer remains a surprisingly enigmatic figure in many respects. He continues to draw adamant and often-conflicting observations from commentators on both sides of the aisle, with many individuals still uncertain about whether to call him a liberal or a conservative, a practitioner of judicial restraint or an activist judge. This article’s sampling of cases indicates that his record is particularly difficult to discern in freedom of speech decisions, with a virtually even distribution between holding in favor of the asserted individual speech interest and ruling in favor of the purported governmental interest for restricting the speech. Still, the fact that Breyer so frequently authors dissents and concurring opinions in this area that are joined by no other justice or only one other justice implies that he has carved out a particularly unique set of viewpoints in this realm, ideas which his colleagues on the Court’s bench do not necessarily share. On a Court that remains

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<sup>834</sup> *Walker*, 135 S. Ct. at 2246 (citing *Stromberg v. California*, 283 U.S. 359, 369 (1931)). By this rationale, therefore, the government is justified in restricting certain types of speech to safeguard minors against obscenity, as the citizens who brought governmental leaders to power expect the government to provide a certain level of protection to their children. *See supra* Part III.G.3.

<sup>835</sup> *See, e.g., supra* notes 96–116.

<sup>836</sup> *See, e.g., supra* notes 96–116; *see also* Bauer, *supra* note 12, at 237, 238, 240–41, 247 (describing that Breyer’s theory is that preserving free speech is essential to a democratic form of government); Cass R. Sunstein, *Justice Breyer’s Democratic Pragmatism*, 115 *YALE L.J.* 1719, 1722, 1723–24 (2006) (describing Justice Breyer’s organizing theory of justice as “active liberty”).

extremely active in hearing and deciding freedom of speech cases, trying to better grasp Breyer's jurisprudence in this field becomes an important task for litigators arguing before the Court.

Reviewing these twenty-seven randomly selected cases, some patterns do become apparent. Most of the time, Breyer strongly prefers to find the narrowest possible grounds for resolving a case, often criticizing other justices for taking a tact that he considers more expansive than necessary. Overturning statutes appears to be a last result. Commonly, he places significant trust with the legislative and executive branches of government, an aspect that is consistent with the high level of faith that he generally displays toward the actions and institutions of government as a whole. Often, he defers to their research and expertise regarding areas in which these branches deem regulation necessary. At the same time, however, he is willing to deem a measure unconstitutional if the government fails to provide sufficient empirical evidence regarding the problem stated and the means employed to resolve or prevent that problem.

He appears to distrust the Court's typical strict scrutiny framework for evaluating freedom of speech cases, including certain disputes where viewpoint discrimination is at issue. Frequently, he prefers employing a "proportionality" balancing test for the vast majority of cases, refusing to place a heightened burden upon the statute at issue. In using this "proportionality" test, he will often devote considerable attention to the merits of the side for which he does not ultimately hold. However, he will use strict scrutiny in certain cases where he deems the existing law's provisions particularly harmful and widespread.

Breyer does not appear to belong to any particular cohort of justices in deciding freedom of speech cases. In fact, his high number of dissenting opinions and solo concurring opinions suggests that many of his colleagues are not in favor of his views about freedom of speech. Still, he remains outspoken in this area, writing a signed opinion in most of the cases studied here.

In cases where the government's interest in restricting speech deals with protecting minors from obscene content, Breyer seems inclined to uphold the restrictive measure. In commercial speech cases, he seems skeptical about "imposing" the Court's determinations and viewpoints upon a typical government regulatory program, even if that program does limit speech in some way. In matters involving laws that set limits to political campaign contributions, he appears fully convinced that the First Amendment not only tolerates, but encourages, the existence of such statutes.



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Based on the cases studied here, he will vote to overturn a campaign contribution limit only if the cap is so low that political challengers will not have a reasonable opportunity to spread their messages and maintain a fair chance of unseating the incumbent for that office.

As his recent books imply, Breyer is quite concerned with preserving the democratic process as a system in which all Americans can fully participate. To him, the constitutional protections of freedom of speech primarily allow for a marketplace of ideas in which people freely and rationally discuss the events of the day, gaining enough knowledge to eventually elect the right leaders to represent their views properly in government. When the government speaks, it can engage in viewpoint discrimination without disturbing the First Amendment, because the government's speech represents the work with which, after gaining the requisite knowledge from the marketplace of ideas, the majority of the people entrusted them. This falls in line with Breyer's ardent belief that the Constitution's primary purpose centers on preserving a system of self-government in the United States, and that courts should interpret constitutional provisions with this principle in mind.

Mostly, however, freedom of speech viewed through Breyer's eyes is a malleable concept, adhering to the specific facts of the case at hand and often establishing very little precedential effect. To him, the First Amendment is an elastic amendment, expanding and contracting depending on the interests that each side asserted for the dispute currently before the Court. Through proportionality testing, Breyer typically will determine if, in his estimation, the government's ends justify the means employed to achieve these goals, and he likely will not be shy about issuing an opinion stating why, even if no other justice joins him. Without a doubt, such flexibility can make his inclinations in this area extremely challenging to predict. Still, one can reasonably assume that Breyer would argue that the ever-evolving democratic society that the Framers designed the Constitution to protect demands nothing less.