CONNECTING THE MARKETPLACE OF IDEAS WITH DEMOCRATIC SELF-GOVERNANCE AND ACTIVE LIBERTY: FREE-SPEECH THEORIES AND VALUES UNDERPINNING JUSTICE BREYER'S PROPORTIONALITY APPROACH TO FIRST AMENDMENT SCRUTINY

Clay Calvert*

INTRODUCTION

Newcomers exploring the vast terrain of free expression rights safeguarded by the First Amendment to the United States Constitution likely detect two features dominating the legal landscape.[1] The first is doctrinal: A rather inelastic, categorical tiers-of-scrutiny methodology looming large over judicial review of speech-restricting and speech-compelling statutes.[2] Under this doctrinal approach, if the regulated speech does not initially fall into an unprotected category of expression, then "the broad default rule [is] that content-based restrictions . . . are evaluated under strict scrutiny."[3] In contrast, "content-neutral [laws] are

* Professor of Law, Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida in Gainesville, Fla.

[1] The First Amendment to the U.S. Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly 100 years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties governing the actions of state and local government entities and officials. Gitlow v. New York, 268 U.S. 652, 666 (1925).

[2] Under this doctrinal methodology, "[c]ontent-based laws are subject to strict scrutiny" while "content-neutral laws are subject to a lower level of scrutiny." Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2346 (2020). The lower level of scrutiny for content-neutral laws generally is intermediate scrutiny. *See* John Fee, *The Freedom of Speech-Conduct*, 109 KY. L.J. 81, 93 (2020) (noting that courts apply intermediate scrutiny "to content-neutral regulations of speech"). The Supreme Court also applies a version of the even lower-level rational basis review when deciding if censorship of student speech in school-sponsored venues is permissible. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272-73 (1988) (holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns"). In addition to strict scrutiny, intermediate scrutiny and something approaching rational basis review, the Supreme Court sometimes applies a fourth standard called exacting scrutiny. *See* Alex Chemerinsky, *Tears of Scrutiny*, 57 TULSA L. REV. 341, 342–43 (2022) (asserting that "the Supreme Court has indisputably indicated that there are four levels of scrutiny: rational basis, intermediate scrutiny, strict scrutiny, and a new tier, 'exacting scrutiny,' that is now the second-most stringent level of review") (internal citations omitted). *See generally* R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. REV. 207 (2016) (addressing the exacting scrutiny standard).

[3] David S. Han, *Middle-Value Speech*, 91 S. CAL. L. REV. 65, 75 (2017). The U.S. Supreme Court has held that several categories of expression generally fall outside of the scope of First Amendment protection. *See* Barr v. Am. Ass'n of Pol. Consultants,

generally constitutional if they meet the standards of intermediate scrutiny."[4]

Categorizing a statute as content based or content neutral, in turn, often seals its fate.[5] That is because it is decidedly more difficult for a law to survive strict scrutiny than intermediate review.[6] That critical difference aside, both strict and intermediate scrutiny entail what Justice Stephen Breyer—the recently retired Justice whose free-speech jurisprudence permeates this Article—recently described as "means-end scrutiny to determine whether a challenged regulation unconstitutionally burdens [protected] speech."[7]

The second prominent feature of the First Amendment topography a newbie presumably spots is theoretical: The presence of several well-entrenched theories and venerable values—for instance, truth discovery in the marketplace of ideas[8]

Inc., 140 S. Ct. 2335, 2361 (2020) ("The Court has held that entire categories of speech – for example, obscenity, fraud, and speech integral to criminal conduct – are generally unprotected by the First Amendment entirely because of their content.") (Breyer, J., concurring in part and dissenting in part); Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–46 (2002) ("The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children."). It should be added that when the government itself speaks, the usual rules for First Amendment scrutiny discussed here do not apply. *See* Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 730 (2011) ("The Supreme Court has held that when the government is the speaker, the First Amendment does not apply at all or provide a basis for challenging the government's action.").

[4] Jason M. Shepard, *The First Amendment and Mandatory Condom Laws: Rethinking the "Porn Exception" in Strict Scrutiny, Content Neutrality and Secondary Effects Analysis*, 19 NEV. L.J. 85, 108 (2018).

[5] *See* Enrique Armijo, *Reed v. Town of Gilbert: Relax, Everybody*, 58 B.C. L. REV. 66, 92 (2017) ("If there is one First Amendment rule that is clearer than any other, it is that the determination that a regulation is content-based or content-neutral will almost always determine if the regulation will be invalidated or upheld.").

[6] *See* S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 718 (2021) (Gorsuch, J., concurring) ("The whole point of strict scrutiny is to test the government's assertions, and our precedents make plain that it has always been a demanding and rarely satisfied standard."); *see also* Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 238 (2012) ("Given that almost all laws fail strict scrutiny and almost all laws pass intermediate scrutiny, the pivotal point in the doctrinal structure is the content analysis.").

[7] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2176 (2022) (Breyer, J., dissenting).

[8] *See* Jared Schroeder, *Fixing False Truths: Rethinking Truth Assumptions and Free-Expression Rationales in the Networked Era*, 29 WM. & MARY BILL OF RTS. J. 1097, 1098 (2021) (noting that "a line of prominent Justices, beginning with Oliver Wendell Holmes, wed their understandings and justifications for free expression to the marketplace of ideas theory, which assumes truth will generally succeed and falsity will fail in a relatively unregulated exchange of ideas," and adding that "the marketplace of ideas approach" has "its foundations in truth").

and wise decision making in a self-governing democracy[9]—that provide rationales for shielding speech from governmental censorship or that justify governmental regulation.[10] For instance, in upholding the Federal Communications Commission's power to compel over-the-air broadcasters to fairly cover public issues, the United States Supreme Court observed that "the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[11]

Ideally, these two features—free-speech doctrine and free-speech theory—operate harmoniously. They should do so because, as former Yale Law School Dean Robert Post notes, "[t]he function of doctrine is both to implement the objectives attributed by theory to the Constitution and to offer principled grounds of justification for particular decisions."[12] Put slightly differently by Professor James Weinstein, free-speech theory ostensibly offers "a systematic account of the values that underlie, or should underlie, contemporary American free speech doctrine."[13] But is that true when it comes to the Supreme Court's tiers-of-scrutiny doctrine in First Amendment cases?

---

[9] *See* Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 OHIO ST. L.J. 815, 818–19 (2020) ("Democratic self-governance means that government officials rule with the consent of the governed, which is usually granted or withheld at the voting booth. Valid consent requires full information about the government's policy choices as well as complete and accurate information about official conduct."); Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1631, 1656 (2021) (observing that "democracy-based theories emphasize the value of speech to democratic self-governance (rather than to individual speakers)").

[10] *See* Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence*, 17 CARDOZO ARTS & ENT. L.J. 273, 273–74 (1999) ("Over the years scholars and jurists have offered a laundry list of reasons to protect expression under the First Amendment. The freedoms of speech and press, for example, are said to promote and to protect discovery of truth, democratic self-governance, self-realization, dissent, tolerance, and honest government.") (internal citations omitted); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1403 (2017) (identifying "autonomy, self-expression, democratic deliberation, the search for truth, and the checking function" as among, in the eyes of scholars in both the liberal and republican approaches, "the core values the First Amendment protects").

[11] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

[12] Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, in ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 152, 153 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

[13] James Weinstein, *How Theory Matters: A Commentary on Robert Sedler's "The 'Law of the First Amendment' Revisited,"* 58 WAYNE L. REV. 1105, 1107 (2013).

This Article illustrates Justice Breyer's perception of a dangerous disconnect in the Court's free-speech jurisprudence between its often formulaic, unbending approach to scrutiny and its invocation and deployment of free-speech theories and values when deciding cases. In brief, Justice Breyer sought a more subtle and refined–detractors, albeit, might derisively deem it a more malleable and mushy[14]—tack for calculating scrutiny that more closely hews to First Amendment values, interests, and theories.[15] To borrow from Professor David Han's observation regarding how courts might implement doctrine, Justice Breyer eschewed analyzing "issues in a shallow manner, based on a surface application of formal doctrine" and, instead, favored "a deeper examination of the values and theories underlying the doctrine."[16]

Part I of this Article explores both Justice Breyer's critique of the Court's common strategy for selecting a scrutiny standard to measure a statute's constitutionality and his earnest affection for proportionality review.[17] Part II then examines Justice Breyer's embrace of certain free-speech theories and values.[18] It also delves into the seemingly close connection between Justice Breyer's views on these matters and those of the aforementioned Dean Post. Finally, Part III concludes by discussing Justice Breyer's possible free-speech jurisprudence legacy and explaining how, in a series of cases, he bridged the marketplace of ideas with democratic self-governance, cohesively connecting them to inform that likely legacy.[19]

I. CATEGORIES AS NONBINDING, RULES OF THUMB FOR SELECTING SCRUTINY STANDARDS: IT'S NOT THE TAX CODE

Justice Breyer long inveighed against the routinized application of the abovementioned, tiers-of-scrutiny doctrinal

---

[14] *See* Zachary S. Price, *Symmetric Constitutionalism: An Essay on Masterpiece Cakeshop and the Post-Kennedy Supreme Court*, 70 HASTINGS L.J. 1273, 1303 (2019) (noting that while Justice Breyer's "approach aims to be more responsive to competing concerns and provide a model of deliberative democracy, the very mushiness of such context-dependent judgments could risk degrading First Amendment doctrine's current symmetry").

[15] *See* Reed v. Town of Gilbert, 576 U.S. 155, 175–76 (2015) (Breyer, J., concurring) ("The First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories, such as 'content discrimination' and 'strict scrutiny,' would permit.").

[16] David S. Han, *Compelled Speech and Doctrinal Fluidity*, 97 IND. L.J. 841, 878 (2022).

[17] *See infra* notes 20–59 and accompanying text.

[18] *See infra* notes 60–120 and accompanying text.

[19] *See infra* notes 121–150 and accompanying text.

facet of First Amendment jurisprudence.[20] He advocated, instead, for a more flexible, proportionality form of scrutiny for deciding the majority of cases affecting speech.[21] It is an approach, as Professor Mary-Rose Papandrea recently wrote, under which "the Court's traditional free speech doctrines provide helpful 'rules of thumb' but are not determinative."[22] Justice Breyer's explicit endorsement of proportionality in free-expression cases while on the Supreme Court traces back more than twenty years, at least to his concurrence in *Bartnicki v. Vopper*.[23] It is a variant of the proportionality procedure he also embraced in Second Amendment cases.[24]

---

[20] *See* Clay Calvert, *Curing the First Amendment Scrutiny Muddle Through a Breyer-Based Blend Up? Toward a Less Categorical, More Values-Oriented Approach for Selecting Standards of Judicial Review*, 65 WASH. U. J.L. & POL'Y 1, 13 (2021) ("Breyer's approach to scrutiny is not dictated by categories [and, instead,] hinges on the extent to which a law threatens First Amendment values and objectives.").

[21] *See* Carmen Maye, *Public-College Student-Athletes and Game-Time Anthem Protests: Is There a Need for a Constitutional-Analytical Audible?*, 24 COMMC'N. L. & POL'Y 55, 91 (2019) (noting that Justice Breyer believes that "proportionality review may be appropriate as an alternative to the 'tiers of scrutiny' approach" in some situations involving free-speech issues); Benjamin Pomerance, *An Elastic Amendment: Justice Stephen G. Breyer's Fluid Conceptions of Freedom of Speech*, 79 ALB. L. REV. 403, 506 (2016) (noting that Justice Breyer "prefers employing a 'proportionality' balancing test for the vast majority of cases, refusing to place a heightened burden upon the statute at issue"); *see also* Justin Collings & Stephanie Hall Barclay, *Taking Justification Seriously: Proportionality, Strict Scrutiny, and the Substance of Religious Liberty*, 63 B.C.L. REV. 454, 470 (2022) ("A court engaged in proportionality analysis asks two broad questions: (1) Has the relevant interest been restricted?—and, if it has—(2) Is the restriction *justified*? The first question constitutes the *limitation* phase, the second the *justification* phase.") (emphasis in original).

[22] Mary-Rose Papandrea, *Mahanoy v. B.L. & First Amendment "Leeway,"* 2021 SUP. CT. REV. 53, 55.

[23] 532 U.S. 514 (2001). *Bartnicki* involved the intentional disclosure on a radio program of the contents of an illegally intercepted cellular phone call in the face of both federal and state wiretapping statutes barring such interception and disclosure. *Id.* at 517–25. Explaining how he would analyze the constitutionality of the statutes as applied to the facts of the case, Justice Breyer wrote:

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

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

[24] *See* District of Columbia v. Heller, 554 U.S. 570, 689–90 (2008) (Breyer, J., dissenting) (adopting "an interest-balancing inquiry" that he referred to as "proportionality," under which a court "generally asks whether the statute burdens a

For Justice Breyer, a law affecting speech does not automatically necessitate analysis under the demanding, oft-fatal strict scrutiny standard simply because it is content based.[25] That is partly because, as he explained in 2020, "reflexively appl[ying] strict scrutiny to all content-based speech distinctions . . . is divorced from First Amendment values."[26] As that quotation suggests, Justice Breyer embraced a values-driven methodology, rather than a categorical one, for analyzing the constitutionality of speech-affecting statutes. Indeed, for Justice Breyer, values and proportionality go hand-in-hand as essential interpretive tools the Court should use when considering constitutional protection for individual rights.[27]

Therefore, instead of ritualistically deploying a categorical, content-based-versus-content-neutral formula for discerning a tier of scrutiny, Justice Breyer averred that the Court should "appeal more often and more directly to the *values* the First Amendment seeks to protect . . . [and] ask whether the regulation at issue 'works speech-related harm that is out of *proportion* to its justifications.'"[28] Or, as he encapsulated it during his final year on the Supreme Court, "Where content-based

---

protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests" and "take[s] account both of the statute's effects upon the competing interests and the existence of any clearly superior less restrictive alternative"). The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. The Second Amendment was incorporated in 2010 through the Fourteenth Amendment Due Process Clause to apply to state governments to protect from laws restricting individuals' right to possess handguns in their homes for self-defense purposes. *See* McDonald v. City of Chicago, Ill., 561 U.S. 742, 791 (2010) ("We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.").

[25] *See* Reed v. Town of Gilbert, 576 U.S. 155, 176 (2015) (Breyer, J., concurring) ("But content discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not *always* trigger strict scrutiny.") (emphasis in original).

[26] Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2358 (2020) (Breyer, J., concurring in part and dissenting in part).

[27] STEPHEN BREYER, AMERICA'S SUPREME COURT: MAKING DEMOCRACY WORK 162 (2010); *see id.* at 160 (asserting that "we should address individual rights separately because their enforcement can demand special interpretive tools, among them the use of *values* and of *proportionality* in determining where and how a rights-safeguarding provision applies") (emphasis in original). A version of the book cited in this footnote, which was published by Oxford University Press, was published in the United States by Alfred A. Knopf under the title STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW (2010).

[28] Iancu v. Brunetti, 139 S. Ct. 2294, 2305 (2019) (Breyer, J., concurring in part and dissenting in part) (quoting United States v. Alvarez, 567 U.S. 709, 730 (2012) (Breyer, J., concurring)) (emphasis added).

regulations are at issue, I would ask a more basic First Amendment question: Does 'the regulation at issue wor[k] harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives'?"[29]

To resolve that crucial query, he identified four variables courts should consider. They are "the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so."[30] Professor Alexander Tsesis notes that this approach "allows for nuance, context, and balancing,"[31] and Professor William Araiza deems it "an explicit balancing approach to free speech issues."[32] Indeed, Justice Breyer wrote in 2010 that "[p]roportionality involves balancing."[33]

The first step in such a proportionality analysis for Justice Breyer involves "asking just what the First Amendment harm is,"[34] while the second entails examining what "the justification [is] for this harm."[35] Justice Breyer's technique, as summarized by U.S. District Court Judge Paul Barbadoro, "permit[s] judges

---

[29] City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1478 (2022) (Breyer, J., concurring) (quoting Reed v. Town of Gilbert, 576 U.S. 155, 179 (2015) (Breyer, J., concurring)).

[30] *Reed*, 576 U.S. at 179 (Breyer, J., concurring). Justice Breyer earlier identified this same quartet of considerations his 2010 book *America's Supreme Court: Making Democracy Work*. He wrote there that in some areas of the law:

> the Court more directly weighs harms, justifications, and potentially less restrictive alternatives. How serious is the harm to free speech that a certain statute may cause? How important are the statute's countervailing objectives? To what extent will the statute achieve these objectives? Are there other, less restrictive ways of accomplishing as much?

BREYER, *supra* note 27, at 164; *see also Barr*, 140 S. Ct. at 2362 (Breyer, J., concurring in part and dissenting in part) ("A proper inquiry should examine the seriousness of the speech-related harm, the importance of countervailing objectives, the likelihood that the restriction will achieve those objectives, and whether there are other, less restrictive ways of doing so."). These four factors are substantially similar to the ones that Justice Breyer recently wrote should be considered in Second Amendment cases affecting public carriage of concealed firearms. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2190 (Breyer, J., dissenting) ("Courts must be permitted to consider the State's interest in preventing gun violence, the effectiveness of the contested law in achieving that interest, the degree to which the law burdens the Second Amendment right, and, if appropriate, any less restrictive alternatives.").

[31] Alexander Tsesis, *Compelled Speech and Proportionality*, 97 IND. L.J. 811, 834 (2022).

[32] William D. Araiza, *Invasion of the Content-Neutrality Rule*, 2019 BYU L. REV. 875, 885 (2019).

[33] BREYER, *supra* note 27, at 164.

[34] *Barr*, 140 S. Ct. at 2362 (Breyer, J., concurring in part and dissenting in part).

[35] *Id.*

to address the competing interests that underlie disputes . . . more directly and with greater flexibility."[36]

To be clear, Justice Breyer does not reject outright either strict scrutiny or the use of categories such as content-based or content-neutral laws when examining statutes. What he objects to is deploying such categories "too rigidly."[37] He twice recently wrote that "the First Amendment is not the Tax Code."[38] In short, when choosing a scrutiny standard for testing the constitutionality of statutes affecting free expression, he chafes against "strict formalism"[39] and the "mechanical use of categories."[40] More pop culturally put from the aughts era, Justice Breyer believes the Court should loosen up its categorical buttons.[41]

For Justice Breyer, categorizing a statute as content based might trigger strict scrutiny when it *also* targets a particular viewpoint or when it aims at specific speakers and their messages in traditional public forums.[42] Elsewhere, however, Justice Breyer believed that classifying a law as discriminating against content was more useful simply "as a rule of thumb, rather than as an automatic 'strict scrutiny' trigger, leading to almost certain legal condemnation."[43] Driving the degree of First Amendment scrutiny thus should not be categories but "the democratic values embodied within that Amendment"[44] and how much damage they might suffer under a given statute. A key democratic value for Justice Breyer, in turn, is safeguarding the marketplace of ideas so that people may influence public policy and laws

---

[36] Rideout v. Gardner, 123 F. Supp. 3d 218, 235 (D. N.H. 2015).
[37] Iancu v. Brunetti, 139 S. Ct. 2294, 2304 (2019) (Breyer, J., concurring).
[38] City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1476 (2022) (Breyer, J., concurring). *See also Brunetti*, 139 S. Ct. at 2304 (Breyer, J., concurring) ("After all, these rules are not absolute. The First Amendment is not the Tax Code.") (Breyer, J., concurring).
[39] *City of Austin*, 142 S. Ct. at 1476 (Breyer, J., concurring).
[40] Reed v. Town of Gilbert, 576 U.S. 155, 179 (2015) (Breyer, J., concurring).
[41] THE PUSSYCAT DOLLS, *Buttons*, *on* PCD (A&M Records 2005).
[42] *Reed*, 576 U.S. at 176 (Breyer J., concurring); *see also* Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2361 (2020) (Breyer, J., concurring in part and dissenting in part) ("There are times when using content discrimination to trigger scrutiny is eminently reasonable. Specifically, when content-based distinctions are used as a method for suppressing particular viewpoints or threatening the neutrality of a traditional public forum, content discrimination triggering strict scrutiny is generally appropriate.").
[43] *Reed*, 576 U.S. at 176 (Breyer, J., concurring).
[44] *Barr*, 140 S. Ct. at 2361 (Breyer, J., concurring in part and dissenting in part).

through their elected representatives.[45] In short, strict scrutiny, with its presumption of unconstitutionality, typically should be applied when laws are likely "to interfere significantly with the 'marketplace of ideas'"[46] or are likely "to meaningfully interfere with [a speaker's] participation in the 'marketplace of ideas.'"[47]

Breyer's disdain for determinative categories and, conversely, his fondness for rules of thumb extended elsewhere in First Amendment jurisprudence. For instance, he viewed "the 'government speech' doctrine [as] a rule of thumb, not a rigid category."[48] Perhaps that is because, as he wrote in delivering the Court's 2022 opinion in *Shurtleff v. City of Boston*,[49] the line between government and private speech sometimes blurs.[50] In *Shurtleff*, Justice Breyer–in accord with his rejection of a firm categorical approach for discerning the level of scrutiny noted above[51]–rebuffed a "mechanical"[52] methodology and "the rote application of rigid factors"[53] for deciding whether expression constitutes government speech. Indeed, in the 2009 government-speech case of *Pleasant Grove v. City of Summum*,[54] Justice Breyer simultaneously expressed his disdain for letting categories alone dictate First Amendment decisions and his adoration of proportionality:

> In my view, courts must apply categories such as "government speech," "public forums," "limited public forums," and "nonpublic forums" with an eye toward their purposes—lest we turn "free speech" doctrine into a jurisprudence of labels . . . . Consequently, we must sometimes look beyond an initial categorization. And, in doing so, it helps

---

[45] City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1476–77 (Breyer, J., concurring); *see also* Part III (addressing Justice Breyer's bridging of the marketplace of ideas theory with democratic self-governance).
[46] *City of Austin*, 142 S. Ct. at 1479 (Breyer, J., concurring).
[47] *Id.*
[48] Pleasant Grove City v. Summum, 555 U.S. 460, 484 (2009) (Breyer, J., concurring).
[49] 142 S. Ct. 1583 (2022).
[50] *See id.* at 1589.
[51] *See generally* Iancu v. Brunetti, 139 S. Ct. 2294, 2304 (2019) (Breyer, J., concurring) ("After all, these rules are not absolute. The First Amendment is not the Tax Code."); City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1476 (2022) (Breyer, J., concurring); Reed v. Town of Gilbert, 576 U.S. 155, 179 (2015) (Breyer, J., concurring).
[52] *Shurtleff,* 142 S. Ct. at 1589.
[53] *Id.*
[54] 555 U.S. 460 (2009).

> to ask whether a government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective.[55]

In sum, Justice Breyer did not invariably oppose applying strict scrutiny to test the validity of laws targeting the content of speech.[56] What he bridled against was deploying strict scrutiny simply because a law was content based.[57] Strict scrutiny, in Justice Breyer's view, typically should be applied only after first considering whether the harm wrought to key First Amendment values by a law is disproportionately greater than the law's ostensible benefits or objectives.[58] For example, in rejecting the application of strict scrutiny to test the validity of a municipality's sign ordinance, Justice Breyer recently reasoned that "the City of Austin's (City's) regulation of off-premises signs works no such disproportionate harm. I therefore agree with the majority's conclusion that strict scrutiny and its attendant presumption of unconstitutionality are unwarranted."[59] With this background in mind, the Article next analyzes Justice Breyer's perception of the core First Amendment free-speech theories and values with which the Court should be most concerned about statutes harming.

II. JUSTICE BREYER AND HIS EMBRACE OF FREE-SPEECH THEORIES, VALUES, AND THE WORK OF ROBERT POST

For Justice Breyer, "values are the constitutional analogue of statutory purposes."[60] This means that when the Court confronts issues involving free expression, it should

---

[55] *Id.* at 484 (Breyer, J., concurring).
[56] *Reed*, 576 U.S. at 176 (Breyer, J., concurring); *see also* Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2361 (2020) (Breyer, J., concurring in part and dissenting in part) ("There are times when using content discrimination to trigger scrutiny is eminently reasonable. Specifically, when content-based distinctions are used as a method for suppressing particular viewpoints or threatening the neutrality of a traditional public forum, content discrimination triggering strict scrutiny is generally appropriate.").
[57] *Barr*, 140 S. Ct. at 2358 (Breyer, J., concurring in part and dissenting in part).
[58] *See* City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1476 (2022) (Breyer, J., concurring) (contending that "where strict scrutiny's harsh presumption of unconstitutionality is at issue, it is particularly important to avoid jumping to such presumptive conclusions without first considering 'whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives'" (quoting Reed v. Town of Gilbert, 576 U.S. 155, 179 (2015) (Breyer, J., concurring))).
[59] *Id.*
[60] BREYER, *supra* note 27, at 162.

examine "the expressive values underlying the First Amendment's speech protection."[61] Put slightly differently by Justice Breyer, the Court should investigate whether and how deeply a law "affects an interest that the First Amendment protects."[62] This Part explores what are, for Justice Breyer, the First Amendment's core expressive values and interests.

As noted earlier, two of the most important theories and values underlying free-speech jurisprudence in the United States are the marketplace of ideas and democratic self-governance.[63] This Part provides overviews of both, and it illustrates how Justice Breyer, either explicitly or implicitly, embraced them.

A. Justice Breyer and the Marketplace of Ideas

The marketplace of ideas theory traces back to the writings of poet John Milton in 1644 and philosopher John Stuart Mill in 1859.[64] It was imported into First Amendment jurisprudence slightly more than a century ago by Justice Oliver Wendell Holmes, Jr. in his dissent in *Abrams v. United States*.[65] Justice Holmes famously explained there that when it comes to divergent opinions and viewpoints over which people clash, "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[66] He added that this "is the theory of our Constitution."[67] Holmes's words in *Abrams*, as Dean Rodney Smolla observes, have today "assumed the status of seminal secular scripture, becoming to First Amendment law what Genesis is to the Bible."[68]

Professor Stanley Ingber explains that the marketplace "theory assumes that a process of robust debate, if uninhibited by governmental interference, will lead to the discovery of truth, or at least the best perspectives or solutions for societal

---

[61] *Id.* at 163.
[62] Expressions Hair Design v. Schneiderman, 581 U.S. 37, 49 (2017) (Breyer, J., concurring).
[63] *See supra* notes 8–9 and accompanying text.
[64] MATTHEW D. BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 2–3 (2001).
[65] 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); *see* Joseph Blocher, *"The Road I Can't Help Travelling": Holmes on Truth and Persuadability*, 51 SETON HALL L. REV. 105, 110 (2020) (noting how "Holmes launched the [marketplace] metaphor in *Abrams*").
[66] Abrams v. U.S., 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
[67] *Id.*
[68] Rodney A. Smolla, *The Meaning of the "Marketplace of Ideas" in First Amendment Law*, 24 COMMC'N. L. & POL'Y 437, 437 (2019).

problems."[69] Although Justice Holmes did not personally believe in absolute truths, the centerpiece of theory usually is framed in terms of either *discovering* the truth through the competition of ideas or *testing* various conceptions of the truth.[70] As Dean Smolla explains, "for Holmes the benefit of the marketplace was not the end but the quest, not the market's capacity to arrive at final and ultimate truth but rather the integrity of the *process*."[71]

Justice Breyer often cited the marketplace of ideas in free-speech cases.[72] For example, during his final year on the Court,

---

[69] Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3 (1984).

[70] *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 964 (1978) ("The classic marketplace of ideas model argues that truth (or the best perspectives or solutions) can be discovered through robust debate, free from governmental interference."); Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 14 ("Holmes certainly was a pluralist. Throughout his adult life, in a variety of intellectual endeavors, he displayed an instinctive aversion to assertions of 'absolute' truth."); Clay Calvert et al., *Fake News and the First Amendment: Reconciling a Disconnect Between Theory and Doctrine*, 86 U. CIN. L. REV. 99, 124–25 (2018) ("In brief, the marketplace theory is as much about *process* (challenging ideas) as it is about *product* (the truth).") (emphasis in original); G.S. Hans, *Changing Counterspeech*, 69 CLEV. ST. L. REV. 749, 760 (2021) (noting that "Justice Holmes emphasizes marketplace theory in ways similar to [John] Milton and [John Stuart] Mill – as the preferable venue for testing ideas for truth and validity – and also emphasizes its connection to constitutional principles set forth in the First Amendment"); Jared Schroeder, *Shifting the Metaphor: Examining Discursive Influences on the Supreme Court's Use of the Marketplace Metaphor in Twenty-First-Century Free Expression Cases*, 21 COMMC'N. L. & POL'Y 383, 392 (2016) (noting "Justice Holmes's own conclusion that truth was not absolute").

[71] RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 8 (1992) (emphasis in original).

[72] *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021) ("Our representative democracy only works if we protect the 'marketplace of ideas.'"); Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2358 (2020) (Breyer, J., concurring in part and dissenting in part) (asserting that "the free marketplace of ideas is not simply a debating society for expressing thought in a vacuum"); Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2103 (2020) (Breyer, J., dissenting) (fretting that the Court's decision "weakens the marketplace of ideas at a time when the value of that marketplace for Americans, and for others, reaches well beyond our shores"); Nat'l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2382 (2018) (Breyer, J., dissenting) (valuing the "role that the First Amendment plays" in safeguarding the "marketplace of ideas"); Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015) (asserting that "government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas"); Reed v. Town of Gilbert, 576 U.S. 155, 176–77 (2015) (Breyer, J., concurring) (reasoning that "whenever government disfavors one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas"); United States v. Alvarez, 567 U.S. 709, 732 (2012) (Breyer, J., concurring) (contending that "false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas"); Sorrell v. IMS Health Inc., 564 U.S. 552, 583 (2011) (Breyer, J., dissenting)

Justice Breyer observed that "[t]he First Amendment helps to safeguard what Justice Holmes described as a marketplace of ideas."[73] All totaled, he authored nine opinions while on the Court in which he directly referenced the marketplace of ideas.[74] Furthermore, in at least one other opinion, Justice Breyer implicitly referenced the marketplace of ideas, writing that the First Amendment is designed to protect "the free exchange of ideas."[75]

As Part III later makes clear, however, Justice Breyer valued the marketplace of ideas not so much for its truth-seeking and truth-testing capacities, but more as a means for providing citizens with a structure for discussing ideas, generating informed opinions about them and, in turn, for transmitting those opinions to their elected representatives in order to influence laws and shape public policy.[76] In short, he prized safeguarding the marketplace of ideas as a means to an end–as an essential tool for facilitating a representative democracy in which laws "reflect the People's will."[77] In other words, the First Amendment values a robust and free marketplace of ideas because it serves another constitutional value—fostering a democratic society in which citizens and public opinion influence the law.[78] Justice Breyer's embrace of this latter democratic value merits extended attention in the next section.

B. Justice Breyer and Democratic Self-Governance, Active Liberty, and the People's Will

In his seminal 1948 book *Free Speech and Its Relation to Self-Government*, philosopher–educator Alexander Meiklejohn asserted that "[t]he principle of the freedom of speech springs from the necessities of the program of self-government."[79]

(asserting that "test-related distinctions" among the types of speech being regulated "reflect the constitutional importance of maintaining a free marketplace of ideas").

[73] City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1476 (2022) (Breyer, J., concurring).

[74] *See supra* notes 72–73 and accompanying text.

[75] Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 740 (1996).

[76] *See infra* Part III.

[77] *Mahanoy*, 141 S. Ct. at 2046.

[78] *See* McCutcheon v. FEC, 572 U.S. 185, 236 (2014) (Breyer, J., dissenting) ("A politically oriented 'marketplace of ideas' seeks to form a public opinion that can and will influence elected representatives.").

[79] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948). Meiklejohn recently was described by one scholar as "among the most renowned theorists of the First Amendment." Stephen Bates, *Meiklejohn, Hocking, and Self-Government Theory*, 26 COMMC'N. L. & POL'Y 265, 265 (2021).

Citizens thus must have full and fair access to all facts and interests regarding any issue on which they must vote so that they may do so wisely and informedly.[80] Meiklejohn was more concerned that people have access to information than that they each have a right or an opportunity to speak their minds.[81] He invoked the image of moderating speech at a traditional town hall meeting to illustrate how speech could be squelched, for example, if it was redundant of already expressed views.[82] The ramification is that under the First Amendment, Meiklejohn prioritized "safeguarding collective processes of decisionmaking rather than individual rights."[83]

Justice Breyer also values the First Amendment in serving democratic self-governance but, as becomes evident here, in a manner slightly different from that of Meiklejohn. Early in his 2005 book *Active Liberty: Interpreting Our Democratic Constitution*, Justice Breyer asserts that liberty in the United States entails "not only freedom from government coercion but also the freedom to participate in the government itself" and "to share with others the right to make or to control the nation's public acts."[84] The term "active liberty" in the tome's title references the requisite participation and connection between people and their government that facilities "translating the people's will into sound policies."[85] In short, for Justice Breyer, the First Amendment "seeks first and foremost to facilitate democratic self-government."[86] Therefore, "strong free speech guarantees [are] needed to protect the structural democratic governing process."[87]

For example, Justice Breyer explains that laws that restrict "speech directly related to the shaping of public opinion" about "politics and policy-making by elected officials" must confront "strong pro-speech judicial presumptions" because

---

[80] MEIKLEJOHN, *supra* note 79, at 25.
[81] This is reflected in two of Meiklejohn's statements: (1) that "the point of ultimate interest is not the words of the speakers, but the minds of the hearers," *id.* at 25, and (2) that "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said." *Id.*
[82] *See id.* (asserting that "[n]o competent moderator would tolerate that wasting of the time available for free discussion" by allowing "twenty like-minded citizens" to express the same viewpoint).
[83] Post, *supra* note 12, at 166.
[84] STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 3 (2005).
[85] *Id.* at 16, 21 (defining active liberty as "the right of individuals to participate in democratic self-government").
[86] *Id.* at 53.
[87] *Id.* at 41.

active liberty is put at risk.[88] Considering how a law might affect active liberty—how it might either help or hinder citizens in informedly conversing and participating in the democratic political process and collectively shaping public policy through public opinion—is imperative for proper First Amendment analysis.[89] It thus is unsurprising that Justice Breyer quotes favorably Alexander Meiklejohn's *Free Speech and Its Relation to Self-Government* for the proposition that "'the people the United States shall be self-governed.'"[90] Indeed, Circuit Court Judge Michael W. McConnell describes Breyer's discussion of free speech in *Active Liberty* as being "in the tradition of Alexander Meiklejohn."[91] Similarly, Harvard Law Professor Cass Sunstein contends that Justice Breyer's "purposive interpretation of freedom of speech . . . emphasiz[ing] democratic self-government above all"[92] seemingly tracks Meiklejohn's thesis in *Free Speech and Its Relation to Self-Government*.[93]

Yet, by emphasizing individual participation in democratic self-governance, Justice Breyer breaks from Meiklejohn by focusing on the need for all individuals to openly participate in democratic self-governance.[94] For Justice Breyer, an active liberty perspective of the U.S. Constitution entails "creating a form of government in which all citizens share the government's authority, participating in the creation of public policy."[95] As noted above, Meiklejohn was at times more concerned with protecting the collective processes for decision-making than with an individual's right to speak—i.e., to participate—in that process.[96]

---

[88] *Id.* at 42.

[89] *See id.* at 55 ("The active liberty reference helps us to preserve speech that is essential to our democratic form of government, while simultaneously permitting the law to deal effectively with such modern regulatory problems as campaign finance and product or workplace safety.").

[90] *Id.* at 25 (quoting MEIKLEJOHN, *supra* note 79, at 25).

[91] Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2410 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005)).

[92] Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 Yale L.J. 1719, 1723–24 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005)).

[93] *Id.* at 1724 n. 29.

[94] *See* BREYER, *supra* note 84, at 47 (noting that the First "Amendment helps to maintain a form of government open to participation (in Constant's words) by 'all citizens, without exception'") (quoting Benjamin Constant, *The Liberty of the Ancients Compared with That of the Moderns* (1819), *in* POLITICAL WRITINGS 309, 327 (Biancamaria Fontana trans. & ed., 1988)).

[95] *Id.* at 33.

[96] *See supra* notes 81–83 and accompanying text.

If there is one current scholar who may have influenced Justice Breyer's understanding and interpretation of free-speech values and jurisprudence more than others, it likely is former Yale Law School Dean Robert Post. For example, Justice Breyer in 2017 cited Dean Post's book *Democracy, Expertise, and Academic Freedom*[97] to support Justice Breyer's assertion in *Expressions Hair Design v. Schneiderman*[98] that when the government seeks to regulate "community activities of all kinds," "it is often wiser not to try to distinguish between 'speech' and 'conduct.'"[99] This observation provided Justice Breyer with an excellent entrée in *Schneiderman* to espouse his values-based approach to scrutiny—specifically, that rather than wasting time trying to untangle speech from conduct, courts should "simply ask whether, or how, a challenged statute, rule, or regulation affects an interest that the First Amendment protects."[100] In turn, and in accord with a democratic self-governance theory of free expression, Justice Breyer stressed in *Schneiderman* that safeguarding "the processes through which political discourse or public opinion is formed or expressed" are "interests close to the First Amendment's protective core."[101]

In his 2020 opinion in *Barr v. American Association of Political Consultants, Inc.*,[102] Justice Breyer again cited Dean Post's book *Democracy, Expertise, and Academic Freedom*.[103] This time, Justice Breyer leaned on Post's tome to support Justice Breyer's view that the First Amendment must vigilantly protect the means by which citizens both exchange and debate ideas and then, after doing so and forming opinions, influence public policy through their elected representatives.[104] It thus is little wonder that in *Barr*

---

[97] ROBERT C. POST, DEMOCRACY, EXPERTISE AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE (2012).
[98] 581 U.S. 37 (2017).
[99] *Id.* at 49 (2017) (Breyer, J., concurring) (citing POST, *supra* note 97, at 3–4).
[100] *Id.*
[101] *Id.*
[102] 140 S. Ct. 2335 (2020).
[103] *Id.* at 2358 (Breyer, J., concurring in part and dissenting in part).
[104] Breyer explained in *Barr* that:

> [t]he concept is abstract but simple: "We the People of the United States" have created a government of laws enacted by elected representatives. For our government to remain a democratic republic, the people must be free to generate, debate, and discuss both general and specific ideas, hopes, and experiences. The people must then be able to transmit their resulting views and conclusions to their elected representatives, which they may do directly, or indirectly through the shaping of public opinion. The object of that

he identified "political speech, [speech in] public forums, and the expression of all viewpoints on any given issue" as meriting "heightened judicial protection."[105]

In *Democracy, Expertise and Academic Freedom*, Dean Post emphasized the participatory nature of democratic self-governance in terms that neatly track Justice Breyer's stance in *Active Liberty*. To wit, Dean Post wrote that:

> American democracy does not rest upon decision-making techniques, but instead upon the value of self-government, the notion that those who are subject to law should also experience themselves as the authors of law. Constitutional democracy in the United States seeks to instantiate this value by rendering government decisions responsive to public opinion and by guaranteeing to all the possibility of influencing public opinion.[106]

Dean Post focused on the need for the citizens to be able to participate in the shaping of public opinion and that, in turn, laws reflect public opinion.[107] As he encapsulated it, "[d]emocracy requires that government action be tethered to public opinion."[108]

This tracks Dean Post's earlier exposition in 2000 of a participatory theory of democratic self-governance.[109] Under this perspective, self-governance manifests itself "in the processes through which citizens come to identify a government as their own."[110] To produce such "authentic self-determination," the "state [must] be structured so as to subordinate its actions to public opinion, and . . . a state [must] be constitutionally prohibited from preventing its citizens from participating in the

---

> transmission is to influence the public policy enacted by elected representatives.

Id.

[105] *Id.*

[106] POST, *supra* note 97, at 17.

[107] *Id.* at 17–19.

[108] *Id.* at 19; *see also* Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053, 1063 (2016) (noting that "Post, far more than Meiklejohn, emphasizes the ability of individuals to participate in the formation of public opinion").

[109] Robert C. Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2367–69 (2000).

[110] *Id.* at 2367.

communicative processes relevant to the formation of democratic public opinion."[111]

It should be added that Justice Breyer, in the campaign-contribution case of *McCutcheon v. FEC*,[112] cited another book by Dean Post, *Citizens Divided: Campaign Finance Reform and the Constitution*,[113] to similarly emphasize the importance of the connection between public opinion and public officials' responsiveness to it.[114] What caught the attention and scrutiny of some Court watchers and legal scholars here, however, was that *Citizens Divided* was not yet published when Breyer cited it in *McCutcheon*.[115] The implication was that perhaps Dean Post had a pre-publication pipeline to Justice Breyer.

Furthermore, Justice Breyer in *United States v. United Foods, Inc.,*[116] cited a law journal article by Dean Post regarding commercial speech to support the Justice's position that strict scrutiny is unwarranted "in every area of speech touched by law."[117] On one of the pages in Dean Post's article cited by Justice Breyer in *United Foods*, Post asserts that "First Amendment protections vary depending upon the constitutional significance of the speech that the government seeks to regulate, and this significance is measured by the constitutional values that we understand the First Amendment to serve."[118]

The latter half of that sentence parallels Justice Breyer's assertion in 2019 that the Court should answer First Amendment questions by appealing "more often and more directly to the values the First Amendment seeks to protect."[119] Ultimately, Justice Breyer's values-based approach to judicial scrutiny in First Amendment speech cases described earlier reflects Dean Post's view that First Amendment "doctrine ought to identify discrete forms of social order that are imbued with constitutional

---

[111] *Id.* at 2368.
[112] 572 U.S. 185 (2014).
[113] ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION (2014).
[114] *McCutcheon*, 572 U.S. at 238 (Breyer, J., dissenting).
[115] Josh Blackmun, *Talk About Citing Facts Outside the Record! Justice Breyer Cites Unpublished Book in McCutcheon Dissent*, JOSHBLACKMAN.COM (Apr. 19, 2014), https://joshblackman.com/blog/2014/04/19/talk-about-citing-facts-outside-the-record-justice-breyer-cites-unpublished-book-in-mccutcheon-dissent/.
[116] 533 U.S. 405 (2001).
[117] *Id.* at 425 (Breyer, J., dissenting) (citing Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 9–10 (2000)).
[118] *See* Post, *The Constitutional Status of Commercial Speech*, *supra* note 117, at 10.
[119] Iancu v. Brunetti, 139 S. Ct. 2294, 2305 (2019) (Breyer, J., concurring in part and dissenting in part).

value, and it ought to clarify and safeguard the ways in which speech facilitates that constitutional value."[120]

III. CONCLUSION

What will Justice Breyer's legacy be when it comes to free-speech cases? His advocacy for a proportionality and values-based approach to scrutiny has yet to win the judicial day, although it does have supporters.[121] Perhaps his most important legacy will be twofold: (1) linking, in a string of cases, the marketplace of ideas and democratic self-governance theories of free expression,[122] and (2) attempting to tether the level of judicial scrutiny to which speech-affecting statutes are subjected to the value of participatory democratic self-governance or what Justice Breyer might term active liberty.

In his penultimate free-speech opinion while serving on the nation's highest court—an April 2022 concurrence in *City of Austin v. Reagan National Advertising of Austin, LLC*[123]—Justice Breyer crisply connected the constitutional dots between the marketplace of ideas and democratic self-governance. "The First Amendment, by protecting the 'marketplace' and the 'transmission' of ideas, . . . helps to protect the basic workings of democracy itself," he explained.[124] In other words, a robust marketplace of ideas must be vigorously safeguarded to serve a particular democratic end – an end, importantly, that is not inextricably tied to truth discovery, which usually is considered the primary goal of the marketplace theory.[125] Rather, the marketplace of ideas must be protected to facilitate a self-governing democracy in which citizens, after receiving and debating information, influence public policy by voting on and

---

[120] Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1276–77 (1995).

[121] *See, e.g.,* Wollschlaeger v. Governor, 848 F.3d 1293, 1334 (11th Cir. 2017) (Tjoflat, J., dissenting) (agreeing with Justice Breyer's approach to determining the level of scrutiny, and contending that "[r]ather than relying on strict categorical definitions as automatic triggers for particular levels of constitutional scrutiny, we should instead embrace an approach focused on the values underlying the jurisprudential significance of those categories").

[122] *See infra* notes 123–34 and accompanying text (addressing Justice Breyer's comments in these cases linking the marketplace of ideas and democratic self-governance).

[123] 142 S. Ct. 1464 (2022) (Breyer, J., concurring.).

[124] *Id.* at 1477 (Breyer, J., concurring).

[125] *See supra* notes 69–71 and accompanying text (addressing truth discovery as a goal of the marketplace of ideas theory).

expressing their viewpoints to their elected representatives.[126] As Justice Breyer wrote in 2020, "the free marketplace of ideas is not simply a debating society for expressing thought in a vacuum. It is in significant part an instrument for 'bringing about . . . political and social chang[e].'"[127]

Justice Breyer also bridged the marketplace of ideas with democratic self-governance in delivering the Court's 2021 opinion in the student-speech case of *Mahanoy Area School District v. B.L.*[128] He reasoned there that "[o]ur representative democracy only works if we protect the 'marketplace of ideas.' This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will."[129] Justice Breyer expressed a similar stance seven years prior to *Mahanoy* in his dissent in the campaign–contribution case of *McCutcheon v. FEC*.[130] He wrote there that "[s]peech does not exist in a vacuum. Rather, political communication seeks to secure government action. A politically oriented 'marketplace of ideas' seeks to form a public opinion that can and will influence elected representatives."[131]

This assertion, in turn, echoed Justice Breyer's earlier sentiment from his 2011 dissent in *Sorrell v. IMS Health, Inc.*[132] In *Sorrell*, he stressed "the constitutional importance of maintaining a free marketplace of ideas"[133] where people can access all varieties of ideas. He contended that "[w]ithout such a marketplace, the public could not freely choose a government

---

[126] Justice Breyer explained in 2020:

> The concept is abstract but simple: "We the People of the United States" have created a government of laws enacted by elected representatives. For our government to remain a *democratic* republic, the people must be free to generate, debate, and discuss both general and specific ideas, hopes, and experiences. The people must then be able to transmit their resulting views and conclusions to their elected representatives, which they may do directly, or indirectly through the shaping of public opinion. The object of that transmission is to influence the public policy enacted by elected representatives.

Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2358 (2020) (Breyer, J., concurring in part and dissenting in part).
[127] *Id.* (quoting Meyer v. Grant, 486 U.S. 414, 421 (1988)).
[128] 141 S. Ct. 2038 (2021).
[129] *Id.* at 2046.
[130] 572 U.S. 185 (2014).
[131] *Id.* at 236 (Breyer, J., dissenting).
[132] 564 U.S. 552 (2011).
[133] *Id.* at 583 (Breyer, J., dissenting).

pledged to implement policies that reflect the people's informed will."[134] In sum, Justice Breyer's connecting of the marketplace of ideas theory of free expression to its importance in serving participatory democratic self-governance was not some one-off flight of fancy; it was a point he repeatedly pounded home in a line of cases.

As this makes clear, Justice Breyer privileged the marketplace of ideas *not* because of its capacity for producing or testing conceptions of the truth. Rather, he valued it in service of public participation in—and public influence over—political decisions, including law making, that ultimately shape society.[135] It also suggests that for Justice Breyer, the most rigorous level of scrutiny should be reserved for statutes that either: (1) harm citizens' ability to freely receive and openly debate information and to express viewpoints that might influence public opinion and for whom they vote to represent them,[136] or (2) "hinder[] the ability of the people to transmit their thoughts to their elected representatives."[137] This is evidenced in Justice Breyer's 2017 concurrence in *Expressions Hair Design v. Schneiderman*.[138] He explained there that when "a challenged government regulation negatively affects the processes through which political discourse or public opinion is formed or expressed (interests close to the First Amendment's protective core), courts normally scrutinize that regulation with great care."[139] In brief, the processes for *forming* public opinion and the avenues for *transmitting* public opinion to elected representatives are both of paramount importance, and laws interfering with either demand heightened

---

[134] *Id.*

[135] Justice Breyer wrote in 2015 that he:

> concede[d] that, whenever government disfavors one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas and with 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.

Reed v. Town of Gilbert, 576 U.S. 155, 176–77 (2015) (Breyer, J., concurring).

[136] *See* United States v. United Foods, Inc., 533 U.S. 405, 426 (2001) (Breyer, J., dissenting) (suggesting there is "a special democratic need to protect the channels of public debate, i.e., the communicative process itself," including methods for "contributing to a public debate" and "moving public opinion").

[137] City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1477 (2022) (Breyer, J., concurring).

[138] 137 S. Ct. 1144 (2017).

[139] *Id.* at 1152 (Breyer, J., concurring).

judicial review.[140] Justice Breyer therefore would apply strict scrutiny in cases where laws suppress individuals from conveying viewpoints and when they disparately treat people speaking in public forums.[141]

In contrast, Justice Breyer believed that heightened scrutiny was inappropriate for testing the validity of statutes that regulate ordinary economic and social matters and that were presumably adopted as a result of public participation in the political process.[142] To apply heightened scrutiny in such situations, Justice Breyer explained in 2018, would result in "a serious disservice through dilution" of First Amendment values, including safeguarding the marketplace of ideas.[143] The Court thus should take a "respectful approach to economic and social legislation"[144]—respecting the will of the people, as reflected through their elected representatives who adopted such legislation—rather than aggressively applying strict scrutiny.

So, with Justice Breyer now having left the Court, what happens next with his approach to scrutiny in First Amendment speech cases? When Justice Breyer announced in January 2022 that he would retire from the Supreme Court, he stressed that the United States represents a democratic experiment.[145] He made the same point several months later when speaking at the University of Virginia School of Law.[146] His words harkened back to another Justice who recognized the experimental nature

---

[140] *Cf.* Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2358 (2020) (Breyer, J., concurring in part and dissenting in part) ("For our government to remain a *democratic* republic, the people must be free to generate, debate, and discuss both general and specific ideas, hopes, and experiences. The people must then be able to transmit their resulting views and conclusions to their elected representatives . . . .").

[141] Reed v. Town of Gilbert, 576 U.S. 155, 176 (2015) (Breyer, J., concurring).

[142] Nat'l Inst. of Family & Life Advoc's. v. Becerra, 138 S. Ct. 2361, 2382–83 (2018) (Breyer, J., dissenting); *see also* City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1477–78 (2022) (Breyer, J., concurring) (suggesting that "many ordinary regulatory programs," while regulating the content of speech, were developed as a result of citizens conveying their views to elected representatives, do not suppress ideas and therefore should be not be subject to strict scrutiny).

[143] *See Becerra*, 138 S. Ct. at 2383.

[144] *Id.* at 2382.

[145] *See* Staff, *Read Justice Breyer's Remarks on Retiring and His Hope in the American 'Experiment,'* NAT'L PUB. RADIO, (Jan. 27, 2022, 2:47 PM), https://www.npr.org/2022/01/27/1076162088/read-stephen-breyer-retirement-supreme-court (setting forth the text of Justice Breyer's statement when he first announced that he would be retiring from the Supreme Court).

[146] Mary Wood, *The American Experiment Launched by Jefferson Goes On, Says Justice Breyer*, Univ. Va. School of Law, (April 12, 2022), https://www.law.virginia.edu/news/202204/american-experiment-launched-jefferson-goes-says-justice-breyer.

of the country's Constitution and government. Slightly more than one century earlier, when Justice Oliver Wendell Holmes, Jr. implanted the marketplace of ideas theory into First Amendment jurisprudence, he observed that placing faith in the "free trade in ideas" and "in the competition of the market" constitutes "the theory of our Constitution. It is an experiment, as all life is an experiment."[147] As noted earlier, Justice Breyer often invoked the marketplace of ideas in his free-speech opinions.[148]

Perhaps then, in the spirit of Justice Holmes and what Justice Breyer recently called "the great American constitutional experiment,"[149] it is time for the Supreme Court to test out in a purposeful manner a Breyerian approach to judicial scrutiny in First Amendment speech cases. Categories and classifications would take, if not a backseat, at least a turn riding shotgun in the front passenger seat. Values and proportionality would take over the wheel in the driver's position. They would steer the Court down a road toward heightened review when the mechanisms necessary for active liberty are jeopardized and generally away from it when "ordinary economic regulatory programs"[150] and commercial speech are at stake. Spotting a content-based law on the road ahead would not mandate making a hard right turn in the direction of strict scrutiny and down a path toward probable unconstitutionality. It would, instead, be more akin to a caution sign urging the Court to slow down and to keep its eyes open for whether core expressive First Amendment values are possibly jeopardized. And, of course, if this experiment in scrutiny determination ultimately were to crash, the old categorical approach could be called back into service, perhaps with a little bit of values-based fine tuning.

---

[147] Abrams v. United States, 250 U.S. 616, 630 (Holmes, J., dissenting).
[148] *See supra* notes 72–74 and accompanying text.
[149] *Justice Stephen Breyer Returns to Harvard Law School*, HARV. L. TODAY (July 3, 2022), https://today.law.harvard.edu/justice-stephen-breyer-returns-to-harvard-law-school/.
[150] Sorrell v. IMS Health Inc., 564 U.S. 552, 584 (2011) (Breyer, J., dissenting).