JUSTICE BREYER'S BALANCED REASONING ON FREE SPEECH: A COMPARATIVE ANALYSIS

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INTRODUCTION

In recent years, several muscular Supreme Court opinions have relied on a categorical approach to First Amendment jurisprudence. These formalistic opinions restrained federal[1] and state[2] legislators' efforts to protect the privacy of consumers against corporate efforts to harvest personal information. The Roberts Court's jurisprudence has adopted a strict construction that makes up in activism what it lacks for nuance. The dominant perspective that has emerged requires judges to exercise the most stringent form of judicial review for speech regulating speakers' articulation of topics and perspectives. The absolutist language, used by Justices Kennedy[3] and Thomas,[4] protects corporate dominance of the marketplace of ideas while giving short shrift to government efforts to protect election integrity and personal privacy.

While the libertarian faction of the Court has grown in majority, Justice Breyer repeatedly voiced an approach more circumspect.[5] He envisioned First Amendment jurisprudence as a realm requiring contextual analysis rather than a field in which the level of judicial stringency undermines legislative efforts to strengthen personal and collective interests in self-government, healthcare decisions, and commercial communications.[6] His

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[1] *See*, *e.g.*, Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335 (2020).

[2] *See*, *e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).

[3] *See*, *e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 318–20, 340 (2010) (subjecting an electioneering law restricting corporate expenditures to content- and viewpoint-based strict scrutiny review).

[4] Reed v. Town of Gilbert, 576 U.S. 155, 161–63 (2015) (finding a signage law to be presumptively unconstitutional and subject to strict scrutiny review).

[5] The libertarian trend appears in a variety of opinions. *See*, *e.g.*, *Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2346 (adopting a strict scrutiny test for "[c]ontent-based laws"); *Town of Gilbert*, 576 U.S. at 165 ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech.") (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).

[6] *See* Clay Calvert, *Selecting Scrutiny in Compelled-Speech Cases Involving Non-Commercial Expression: The Formulaic Landscape of A Strict Scrutiny World After Becerra and Janus, and A First Amendment Interests-and-Values Alternative*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 81, 84 (2020) ("The danger is that judges' political ideologies will sway these determinations and fill that wiggle room, akin to how the personal economic philosophies of the justices dictated decisions during the *Lochner* era.").

concurrences and dissents offer a perspective on free speech doctrine that refuses to be bogged down by a formalism that often settles for economic interests in preference to individual privacy and political participation.

While Justice Breyer sought to ground his proportionality approach in American jurisprudence, his critics regard the product to be too malleable to provide adequate guidance to judges, lawyers, public agencies, and litigants. First Amendment scholar and attorney Floyd Abrams argues that Breyer "offered interpretations of the First Amendment that appear . . . closer to those adopted in European nations in interpreting their more limited free speech protections under the European Convention on Human Rights."[7] Abrams regards Justice Breyer's pragmatism to be wrongheaded oversight of the fact that "the First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech matters."[8] Abrams argues further that Breyer's broad reading of free speech interpretation inverts the First Amendment's chief function of safeguarding the right to speak freely by allowing government to overextend legislative authority and to thereby impede the marketplace of ideas.[9]

Professors Vikram Amar and Alan Brownstein likewise find fault with Justice Breyer's method. They argue that it amounts to no more than a "free-form balancing approach,"[10] by which they presumably mean that he leaves too much room for judicial subjectivity. Their concern appears to be that by balancing interests, courts would give broad latitude to the enforcement of non-speech policies to the detriment of communications, which would thereby be censored by regulatory enforcement.[11]

Other commentators, on the other hand, are less averse to borrowing from European courts. They find Breyer's views to be consistent with those of countries with "a strong commitment

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[7] Floyd Abrams, Keynote Remarks, *Free Speech Under Fire: The Future of the First Amendment*, Keynote Remarks, *in* 25 J.L. & POL'Y 47, 58 (2016).
[8] *Id.* at 59.
[9] *Id.*
[10] Vikram David Amar and Alan Brownstein, *The Voracious First Amendment: Alvarez and Knox in the Context of 2012 and Beyond*, 46 LOY. L.A. L. REV. 491, 497 (2013).
[11] *See*, *e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552, 582 (2011) (Breyer, J., dissenting) ("In this case I would ask whether Vermont's regulatory provisions work harm to First Amendment interests that is disproportionate to their furtherance of legitimate regulatory objectives.").

to individual civil liberties."[12] On this view, he constructed an analytical method that could be helpful to courts considering the value of speech, countervailing policy concerns, the fit between law, and any less restrictive alternatives to achieving the goals of regulation. That test adds transparency and nuance to analyses into whether a law is an ordinary economic regulation or one that interferes with core aspects of free speech.[13]

Breyer's dissatisfaction with categorical free speech rules leaves uncertainty about how courts could balance the countervailing public interests at stake against the desires of speakers. The lack of bright line rules in his approach provides no definitive guidelines about what considerations should weigh stronger on the side of regulation and on the ledger of free speech.

His totality of the circumstances approach nevertheless creates a degree of judicial accountability that contemporary libertarian doctrines do not. The balancing approach he proposed is not ad hoc; indeed, it offers greater depth of reasoning than the currently accepted bright line rules of scrutiny. Professor Vicki Jackson notes that there are similarities between Canadian and European jurisprudence and Breyer's willingness to weigh free speech against relevant government concerns.[14] His elaboration adds a specific test to guide judges' reasoning through "the benefits and potential alternatives" in circumstances where "the statute works speech-related harm" disproportionate "to the benefits that the statute seeks to provide."[15]

While opinions from "[c]onstitutional courts in other nations," such as Canada, Europe, South Africa, and Israel, undoubtedly influenced his thinking, Breyer's elaboration adds clarity as to how foreign and U.S. courts can identify whether a "statute imposes a burden upon speech that is disproportionate in light of the other interests the government seeks to achieve."[16]

Breyer's corpus of opinions on how courts should

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[12] Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1414 (2006).
[13] Here I am referring to what Justice Kagan has labeled "workaday economic and regulatory policy." Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).
[14] Vicki C. Jackson, *Gender and Transnational Legal Discourse*, 14 YALE J. L. & FEMINISM 377, 391 (2002).
[15] United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 841 (2000) (Breyer, J., dissenting).
[16] Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 367 (2009) (Breyer, J., concurring in part and dissenting in part).

synthesize various factors meant to preserve speech while maintaining the need for judicial modesty when the regulations deal with traditional government function over healthcare, safety, professional regulations, collective bargaining, and privacy. It is in these and other areas that he added clarity to European Court holdings on human rights.

Proportionality is on the rise throughout the world. Breyer's suggested approach to judicial review joined a growing world juridical consensus about the need to balance rather than engage in the formalism on the First Amendment common to the Roberts Court. He both gained and contributed to the worldwide dialogue on proportionate review of regulations that have an incidental effect on speech.[17]

The discussion here proceeds in three parts. The Essay begins by discussing Justice Breyer's proportionality jurisprudence. Part I situates his approach and explains the extent to which it differs from the dominant, deregulatory trend in the Roberts Court free speech jurisprudence. Part II turns to a comparative study of European law. Part III reflects on counterarguments to proportionality analysis. The aim is to better understand strengths and weaknesses of a balanced approach to speech that while not core to the First Amendment nevertheless enjoys constitutional protections.

I. FREE SPEECH PROPORTIONALITY À LA JUSTICE BREYER

Justice Breyer was not entirely averse to categorical review but recognized its need only in matters of core First Amendment concerns on subjects of philosophical, political, scientific, and artistic merit, content, and perspective. These he contrasted from "ordinary disclosure laws" and "ordinary social and economic regulation."[18] His approach recognized that judges should "defer significantly to legitimate commercial

[17] When viewed in context, lack of balance belies the Court's stated commitment to avoiding First Amendment findings preventing incidental burdens on speech. *Compare* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2346 (2020) (contrasting incidental regulations of speech and content-based restrictions), *and id.* at 2347 ("'the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech'") (quoting Sorrell v. IMS Health Inc., 564 U.S. at 567), *with id.*, 140 S. Ct. at 2360 (describing restraints on speech that do not raise compelling government interests, including, "drug labels, securities forms, and tax statements") (Breyer, J., concurring in part and dissenting in part).

[18] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2380–81 (2018) (Breyer, J., dissenting).

regulatory objectives."[19] Rather than automatically relying on strict scrutiny whenever regulation places secondary burdens on speech, Breyer, dissenting in *Sorrell v. IMS Health, Inc.*, articulated a test to examine whether a challenged law created "harm to First Amendment interests" that were "disproportionate to their furtherance of legitimate regulatory objectives."[20] He distinguished "ordinary economic regulatory programs," "ordinary regulatory programs," and "ordinary regulatory means"[21] from essential Free Speech Clause concerns, especially as the latter deals with political communications.[22] His proposed approach recognized legislative prerogatives to "lower drug prices" and provide consumers with "more balanced sales messages" through regulatory mandates that affect free speech only indirectly and incidentally for "entirely commercial" goals.[23]

In contrast to Breyer's interpretive formulation, the dominant strand of American First Amendment jurisprudence is facially formalistic in its method and deeply political in its effect. The majority's rationale in *Sorrell* illustrates the Court's unwillingness to abide by a state legislature's balance of priorities. The case concerned a successful challenge to Vermont's Prescription Confidentiality Law, which prohibited non-consensual "s[ale], license, or exchange for value" of pharmacy records to pharmaceutical manufacturers and marketers to be used for the promotion and marketing of prescription drugs.[24] The statute pertained to state authority to protect consumer privacy, a matter ordinarily left to a mix of federal, state, and local statutes, regulations, and ordinances.[25]

The majority opinion in *Sorrell*, written by Justice Kennedy, held Vermont's law to be subject to heightened scrutiny, relevant for review of content-based restrictions.[26] The Court found the State had discriminated against the favorable

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[19] *Sorrell*, 564 U.S. at 582 (Breyer, J., dissenting).
[20] *Id.*
[21] *Id.* at 584, 602.
[22] *Id.* at 582 (listing political speech as an example of speech warranting tight constraints on government authority).
[23] *Id.* at 602.
[24] VT. STAT. ANN., tit. 18, § 4631 (2010); *Sorrell*, 564 U.S. at 561.
[25] *See*, *e.g.*, CAL. CIV. CODE § 1798.100-1798.198; VA. CODE ANN. § 59.1-571-59.1.1-581; PRIVACY ACT, 2021, N.Y. GEN. BUS. LAW. §§1100-1110; WASHINGTON PRIVACY ACT (Washington SB. 5062).
[26] *Sorrell*, 564 U.S. at 567 ("Both on its face and in its practical operation, Vermont's law imposes a burden based on the content of speech and the identity of the speaker.").

views pharmaceutical manufacturers had about their products.[27] Breyer's formula, on the other hand, sought to pursue a "revision of our laws affecting privacy . . . in light of uncertain predictions about the technological future."[28] In *Sorrell*, he would have found that the restraint had an "indirect, incidental, and entirely commercial" effect on speech.[29]

This Part of the Essay presents Justice Breyer's argument in greater detail through a series of concurrences and dissents that charted a proportional approach to First Amendment reasoning. Part II then compares his proposed test with those found in foreign opinions that weigh free speech against regulatory interests. Clarity on this subject is of critical importance, as Professor Gregoire Webber points out, because the current European proportionality doctrine is capacious.[30] As he puts it, "Today, there seems to be no obvious agreement as to what is to be balanced."[31] Breyer's proposed formulation could provide greater rigor and clarity to EU opinions.[32]

Justice Breyer grounds his free speech jurisprudence in American precedents; yet his penchant for balancing is consistent with trends around the world that regularly appear in human rights cases that are decided by international tribunals and foreign decisions. Among Supreme Court Justices, however, his approach remained a minority position. The modern debate has long been simmering in the United States, pitting Justices committed to categorical rules against those who rely on nonformalist standards.[33]

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[27] *Id.* at 564.

[28] STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 69 (2005).

[29] *Sorrell*, 564 U.S. at 602 (Breyer, J., dissenting).

[30] Gregoire Webber, *Proportionality and Limitations on Freedom of Speech*, THE OXFORD HANDBOOK OF FREEDOM OF SPEECH 173, 186 (Adrienne Stone and Frederick Schauer eds., 2021).

[31] *Id.*

[32] On the embrace of proportional analysis by constitutional courts around the world see Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3096 (2015) ("'Proportionality' is today accepted as a general principle of law by constitutional courts and international tribunals around the world.").

[33] The debate about whether proportional analysis is appropriate in First Amendment cases has roots in the opening disagreement between Justices Felix Frankfurter and Hugo Black. *Compare* Konigsberg v. State Bar, 366 U.S. 36, 67 (1961) (Black, J., dissenting) ("The Court, by stating unequivocally that there are no 'absolutes' under the First Amendment, necessarily takes the position that even speech that is admittedly protected by the First Amendment is subject to the 'balancing test'. . . . In my judgment, such a sweeping denial of the existence of any inalienable right to speak undermines the very foundation upon which the First Amendment, the Bill of

The few modern opinions that rely on judicial balancing, such as Justice Steven's majority opinion in *Bartnicki v. Vopper*, recognize that "privacy concerns give way when balanced against the interest in publishing matters of public importance."[34] That judgement found unconstitutional the prosecution of a media company for lawfully acquiring and disseminating a conversation of public importance that had been illegally tape recorded by an unknown party.[35] Stevens' balancing formula, however, did not provide methodological clarity of the rules, factors, or substantive rights to which courts should refer. Neither did he elsewhere elaborate a test of balancing, such as in his opinion for an adult zoning case, where he likewise found relevant the weighing of government interests against those of speakers.[36]

Justice Breyer was more systematic in his approach to the weighing of private and public concerns. In his concurrence to *Bartnicki*, Breyer gave greater guidance to how judges should engage in "reasonable balance between . . . speech-restricting and speech-enhancing consequences."[37] The case demonstrated the value of statutory interpretation as well as the need for principled adjudication. He argued for determining whether federal and state wiretapping laws imposed burdens that were disproportionately high relative to their benefits to maintaining the right to privacy.[38] His suggested framework of decision making went beyond stringent levels of scrutiny articulated by the Court—such as strict scrutiny with its strong presumption of unconstitutionality—but, instead, entered into a constitutional calculous of weighing different interests, including the importance of private speech on matters that were of public concern.

Yet Breyer's concurrence in *Bartnicki* also left much unanswered. The calculous he proposed remained under-

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Rights, and, indeed, our entire structure of government rest."), *with* Dennis v. United States, 341 U.S. 494, 524–25 (1951) (Frankfurter, J., concurring) ("The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.").

[34] 532 U.S. 514, 534 (2001).

[35] *Id.* at 525.

[36] Young v. American Mini-Theatres Inc., 427 U.S. 50, 62–63 (1976) (relying on a balancing formula to review government interests against adult theaters' speech interests under the First Amendment).

[37] *Bartnicki*, 532 U.S at 536 (Breyer, J., concurring).

[38] *Id.*

defined. His concurrence was, nevertheless, important because it perceived the need for legislative flexibility that reflected both the public interest in obtaining information and the personal interest in privacy to parties engaged in sensitive communications. Rather than basing decisions entirely on "overly broad or rigid constitutional rules,"[39] he weighed both conflicting speech interests. Moreover, he put the case in the context of participatory self-government.[40] Professor Paul Gewirtz notes that Breyer's free speech jurisprudence is not only a negative guarantee but also is meant "to promote active liberty by encouraging the exchange of ideas, public participation, and open discussion."[41] The Justice's pragmatism developed over a series of cases and coalesced into a more coherent prudential approach on which the judiciary can rely to examine speech and government interests rather than simply pigeonholing a case in a judicially constructed category.[42]

With time, Justice Breyer elaborated a more systematic test that would have required courts to examine "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."[43] In his partial concurrence and partial dissent to *Iancu v. Brunetti*, a case that held the "immoral" or "scandalous" portions of the Lanham Act to violate the First Amendment,[44]

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[39] *Id.* at 541 (Breyer, J., concurring).
[40] *See* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 252–53 (2002) (asserting that the First Amendment "in context also forms a necessary part of a constitutional system designed to sustain that democratic self-government" by facilitating the exchange in ideas).
[41] Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 YALE L.J. 1675, 1681 (2006).
[42] Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 227 (1997) (Breyer, J., concurring in part) ("With important First Amendment interests on both sides of the equation, the key question becomes one of proper fit. That question, in my view, requires a reviewing court to determine both whether there are significantly less restrictive ways to achieve Congress' over-the-air programming objectives, and also to decide whether the statute, in its effort to achieve those objectives, strikes a reasonable balance between potentially speech-restricting and speech-enhancing consequences."); Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) (asserting that balancing interests in of First Amendment "in practice . . . has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative"); United States v. United Foods, Inc., 533 U.S. 405, 429 (2001) (Breyer, J., dissenting) (reviewing whether a statute was "necessary and proportionate to the legitimate promotional goals that it seeks").
[43] Reed v. Town of Gilbert, 576 U.S. 155, 179 (2015) (Breyer, J., concurring).
[44] Iancu v. Brunetti, 139 S. Ct. 2294, 2299 (2019).

Justice Breyer wrote that categorical rules of free speech should be "rules of thumb" rather than inflexible determinative of outcomes.[45] He recognized that balancing is intrinsic throughout the rule of law and articulated an schema designed to avoid what Jamal Greene has called "judicial subterfuge" by judicially created, catch-all categories.[46]

The First Amendment, as Justice Breyer wittily put it, is not a tax code.[47] He preferred the proportionality approach to categorizing that a particular law affecting communication was either viewpoint discrimination or content discrimination.[48] He provided significantly greater methodological clarity to his thinking on proportionality in *United States v. Alvarez*, which found unconstitutional the Stolen Valor Act, where his concurrence leaned on means/ends analysis.[49] He therein put the test in context of earlier Supreme Court decisions that also hinted a proportionality review of limits on expression that warranted neither "near-automatic condemnation (as 'strict scrutiny' implies) nor near-automatic approval (as is implicit in 'rational basis' review)."[50] More specifically he noted that it was consistent with precedent to review the "seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so."[51] Rather than relying on manipulable judicial categories, Breyer would evaluate all materially relevant interests—public and private—and the context of a challenge to a restrictive regulation. Breyer's proposed test was not categorical but nuanced, conscious of context, values, and countervailing interests.

We might add the insight that, given the Court's current direction toward history and tradition, Breyer's methodology for proportional analysis of content regulations should be further coupled with assessments of historical factors that amount to all-

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[45] *Id.* at 2304 (Breyer, J., concurring in part and dissenting in part).
[46] JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 70–77, 168 (2021).
[47] *Iancu*, 139 S. Ct. at 2304.
[48] *Id.* (Breyer, J., concurring in part and dissenting in part) ("I would place less emphasis on trying to decide whether the statute at issue should be categorized as an example of 'viewpoint discrimination,' 'content discrimination,' 'commercial speech,' 'government speech,' or the like.").
[49] United States v. Alvarez, 567 U.S. 709 (2012) (Breyer, J., concurring)
[50] *Id.* at 731.
[51] *Id.* at 730.

things-considered reasoning. The factors of proportionality might be termed rules of reasoning. It does not regard all speech as identical under the First Amendment. Atop Breyer's speech pyramid remain expressions that are by nature philosophical, religious, historical, social scientific, or artistic.[52]

Proportionality is also the method Justice Breyer proffered in his concurrence to *Reed v. Town of Gilbert*.[53] His statement came in opposition to the majority's categorical statement on content regulations.[54] Yet, any explicit resort to balancing rarely appears in U.S. free speech opinions. This is unfortunate because it diminishes the transparency necessary for understanding why certain viewpoint discrimination is not barred in laws, such as those prohibiting harassments in the workplace[55] or at publicly funded institutions.[56] Judicial reasoning must identify the totality of the material circumstances of a case, but "traditions and the conscience of the people" also play a significant role in free speech jurisprudence.[57] Justice Breyer's proportionality test lacks that retrospective component of free speech analysis. Historical analysis can further enrich his approach to the First Amendment, but it is not likely to yield many answers because the Court only began to expostulate its meaning in the twentieth century.[58]

Historically the chief opponent to the balancing approach to free speech was Justice Black.[59] Libertarian strand of thought continues to be a darling of members of the free speech academy,[60] albeit privacy scholars often rely on balancing approaches in matters concerning interests of data retention and

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[52] *Id.* at 731–32 (Breyer, J., concurring) ("Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like raise such concerns, and in many contexts have called for strict scrutiny. But this case does not involve such a law."); *Id.* at 751 (Alito, J., dissenting) ("Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat.").
[53] Reed v. Town of Gilbert, 576 U.S. 155, 175 (2015) (Breyer, J., concurring).
[54] *Id.*
[55] Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*
[56] Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, *et seq.*
[57] *Cf.* Rochin v. California, 342 U.S. 165, 169 (1952) (referring to the Due Process context of Fourth Amendment incorporation).
[58] *See* Alexander Tsesis, *Prohibiting Incitement on the Internet*, 7 VA. J.L. & TECH. 5, 15 (2002).
[59] *See, e.g.*, Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960); Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1962).
[60] *See* Webber, *supra* note 30, at 174–75.

digital communication.[61]

The method Breyer developed runs counter to the dominant strand of the Roberts Court jurisprudence. So much so that with Breyer's retirement from the Court, the majority's analysis is likely to become more stringent in constructing free speech doctrine. His leaving the bench bodes well for a more muscular approach to free speech review and litigation that eschews the type of nuance that proportionality his test would offer. The Roberts Court's approach is to reject on First Amendment grounds any balance of free speech as it did in *Matal v. Tam*, which found the Lanham Act's prohibition against trademarks that disparaged any person living or deceased to be unconstitutional viewpoint discrimination.[62]

The *Reed* majority adopted a categorical rationale rather than engaging in thorough vetting of legal concerns that give to regulations affecting individual's messages. Justice Thomas for the majority wrote that strict scrutiny applies to all content-based regulations.[63] The *Reed* decision deploys absolute-sounding statement that are themselves misleadingly opaque.

The same categorical statement of content regulations being subject to strict scrutiny appears in the more recently decided *Barr v. American Association of Political Consultants*.[64] In that case, Justice Breyer, writing in concurrence for two other justices, would have used intermediate scrutiny because it would be less presumptuous that the regulation offended the right of free speech.[65] However, where a government exception impacts communications rational scrutiny does not suffice.

> 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

[61] *See* Alexander Tsesis, *Marketplace of Ideas, Privacy, and the Digital Audience*, 94 NOTRE DAME L. REV. 1585 (2019).
[62] Iancu v. Brunetti,139 S. Ct. 2294, 2298 (2019); Matal v. Tam, 137 S. Ct. 1744, 1765 (2017).
[63] Reed v. Town of Gilbert, 576 U.S. 155, 165 (2015) ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."); *see also* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 457 (2015) (relying on strict scrutiny analysis to uphold a content-based limitation on judicial candidate speech).
[64] Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2346 (2020) ("Content-based laws are subject to strict scrutiny.").
[65] *Id.* at 2362 (Breyer, J., concurring).

> whether there are other, less restrictive ways of doing so. Narrow tailoring in this context, however, does not necessarily require the use of the least-restrictive means of furthering those objectives. That inquiry ultimately evaluates a restriction's speech-related harms in light of its justifications.[66]

Justice Breyer's aim was to systematize what the Court has sometimes called "intermediate scrutiny," though sometimes referred to "as an assessment of 'fit,' sometimes called it 'proportionality,' and sometimes just applied it without using a label."[67]

Cases like *Reed*, contrary to any nuanced balancing, invoke the most stringent review for any form of content regulation "regardless of the government's benign motive."[68] The reasoning behind the holding lies in the understandable, historic, American skepticism with governmentally imposed orthodoxy[69] demonstrating "'animus toward the ideas contained' in the regulated speech."[70] However, the *Reed* majority went much further to make a blanket statement that strict scrutiny doctrine applies to all content-based regulations.[71]

This conclusion, though, overlooks many content-based restrictions that raise no First Amendment concerns. In a concurrence, Justice Breyer conceded that "content discrimination, as a conceptual tool, can sometimes reveal weaknesses in the government's rationale for a rule that limits speech."[72] Breyer went on to explain, however, that a strong presumption that the majority goes too far in holding that strict scrutiny applies to all content-based restrictions.[73]

The Roberts Court majority, as Justice Kagan has pointed out, has turned the First Amendment into a judicial weapon

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[66] *Id.*
[67] *Id.*
[68] *Reed*, 576 U.S. at 165.
[69] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."); Alexander Tsesis, *Compelled Speech and Proportionality*, 97 IND. L.J. 811, 814 (2022) (discussing anti-authoritarian aspects of the First Amendment).
[70] *Reed*, 576 U.S. at 165 (*quoting* Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).
[71] *Id.* at 170–72.
[72] *Id.* at 176 (Breyer, J., concurring).
[73] *Id.*

against legislative efforts to protect individual rights and advance general welfare through economic and regulatory policy.[74] A balance of values—speech rights, government purposes, and narrowly tailored laws—should provide the context for interpreting cases that challenge restrictions on communications. Kagan listed the many types of permissible signage laws that are content-based but not subject to strict scrutiny analysis, including those marking historical sites, favoring blind crossings and hidden alley signs, and beautifying highways by limiting areas of postings.[75]

The trend on the Court is not to balance, as Justice Breyer suggested, but rather to rely on categorical reasoning that favors commercial vendors against consumers, who seek privacy, and workers, who rely on collectively bargained terms of employment. The Court has repeatedly charged regulators with overstepping their power to shape public policy. In *Sorrell*, as we saw, the Court rejected as unconstitutional consumer a privacy law in favor of corporate commercial trade in personal health,[76] without the provider's consent. The majority's holding acknowledged neither a state nor federal right to privacy. By only reviewing the effects of the law on free speech and discounting the State of Vermont's legislative findings about its need to protect the privacy of health care records, the Court rendered the Free Speech Clause a deregulatory tool favoring pharmaceutical companies rather than ordinary consumers. *Sorrell* raised the standard of review of government regulation too high and diminished the State's ability to provide for individual concerns in favor of corporate ones.

In another opinion favorable to business, *Janus v. AFSCME*, the Roberts Court found as unconstitutional collective bargaining, labor laws.[77] "Speech," Justice Kagan warned against frivolous reliance on the First Amendment to challenge

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[74] Janus v. Am. Fed'n of State, Cty., & Mun. Emp., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J. dissenting) ("most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy").

[75] *Reed*, 576 U.S. at 180 (Kagan, J., concurring).

[76] Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011) (relying on heightened scrutiny to review and find unconstitutional a statute that restricted "the sale, disclosure, and use" of pharmaceutical business records despite the state's interest in protecting citizens' privacy rights).

[77] *See Janus*, 138 S. Ct. at 2448. The Court in *Janus* applied an "exacting scrutiny" standard to its review of compelled agency fees, which the Court explained was not as demanding as the strict standard of scrutiny. *Id.* at 2465. The Court found that exacting scrutiny lies between strict scrutiny for pure speech and intermediate scrutiny for commercial speech. *Id.*

work-a-day regulations, "is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices."[78]

More comprehensive reasoning appears rarely, such as in *Carpenter v. United States*, which balanced the need for information, risks posed by its disclosure, the statutory scheme used to limit communication, and other methods available to the authorities.[79] In *Carpenter*, the Court held that the Fourth Amendment requires a state to get a search warrant before gaining access to seven days' worth of cell phone site data that law enforcement agents had used for a criminal investigation.[80] The Court balanced the interests of law enforcement and those of individuals, finding that "allowing government access to cell-site records contravenes that expectation [of privacy]."[81] The Court was keenly conscious of evidence that "seismic shifts in digital technology"[82] required some limit on government's ability to clearly surveil an individual to so great an extent as to breach their "reasonable expectation of privacy in the whole of his physical movements."[83]

The *Carpenter* case signaled the willingness to go beyond mere categories to a more holistic reflection on data distributed through a digital marketplace of ideas where "memory is nearly infallible." The balance of interests is closely related to the European approach which balances free speech interests with other fundamental rights such as privacy.

II. WEIGHTY FOREIGN DECISIONS

Justice Breyer's work on proportional reasoning in free speech cases benefitted from "foreign experience," which he regarded as important to a Justice's research.[84] Judgments made by "constitutional courts of other nations considering similar problems," Jackson argues, broaden our "understanding of what

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[78] *Janus*, 138 S. Ct. at 2502 (Kagan, J., dissenting).
[79] Carpenter v. United States, 138 S. Ct. 2206 (2018).
[80] *Id*. at 2223.
[81] *Id.* at 2217.
[82] *Id.* at 2219.
[83] *Id.* at 2217.
[84] Stephen Breyer, *Keynote Address*, 97 AM. SOC'Y INT'L L. PROC. 265, 265 (2003).

is relevant to U.S. constitutional interpretation."[85] Seminal opinions of the European Court of Human Rights can and should help to guide the evolution of proportional reasoning abroad and in the United States.

After all, Justice Breyer's balanced approach to judicial review is not novel. While in the United States, judicial balancing remains an outlier, democracies around the world have determined such analysis best guides determinations about relevant constitutional values. There is much to be gained from the transparency, clarity, and contextuality of opinions from other judicial systems. As Jackson points out, proportionality offers the possibility for careful, open, and well-reasoned constitutional thought that can be challenged on appeal.[86] The weighing of all relevant values of a case is the norm in countries as diverse as Canada, Estonia, Germany, Iceland, Monaco, New Zealand, and South Africa. Courts throughout the world regard proportionality to be the overarching principle necessary to achieve fair adjudication among competing interests.[87]

The United States Supreme Court and a significant number of scholars regard free speech to be of such categorical importance that proportionality analysis is out of line in First Amendment jurisprudence. Professor James Weinstein, for instance, expresses concern that judicial balancing might lead to "ideological bias" and thereby reduce the "rigorous protection from content regulation."[88] Weinstein taps into a critically important principle that understands the First Amendment to protect robust discussion, openness, heterodoxy, and nonconformism. However, the worry that a balancing approach to free expression theory will suppress ideas is overstated. Indeed, balancing already exists in the field of First Amendment. Laws can be narrowly tailored to prohibit secondary boycotts, unfair trade practices, associations meant to suppress competition;[89] furthermore, corporate proxy statements may be required,[90] and employer statements that constitute unfair labor

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[85] Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 583 (1999).

[86] *See* Vicki C. Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENT. 803, 834 (2004) (reviewing David M. Beatty, *The Ultimate Rule of Law* (2004)).

[87] Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 74, 91 (2008).

[88] James Weinstein, *Participatory Democracy As the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 511 (2011).

[89] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982).

[90] Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 384 (1970).

practices may be prosecuted.[91]

What remains is to define the meaning of balance and proportionality, and it is particularly here that Breyer's approach provides insights for an international audience. Currently, tests are brief and rather ambiguous. Breyer's four-part test offers greater clarity. Less rigorous tests, such as the one courts rely on in England, explain balancing to "involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the [European] Convention [of Human Rights]."[92] Such broadly worded articulations of proportionality grant judges greater latitude than Breyer's multi-step approach.

South Africa is no more clear in its proportionality articulation than is Great Britain. The Constitutional Court of South Africa finds proportionality necessarily grounded in "principles" that look "for rationales" "rather than to extracting rigid formulae." That principle argument involves inter-related elements of proportionality necessary in a democratic society.[93] The 1996 Constitution of the Republic of South Africa empowers courts to review "the nature of the right," distinguishing it from America's formalistic use of three levels of judicial scrutiny.[94] The South African Bill of Rights is more explicit, stating that "the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable." That rule is required for needs of an

> open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—a. the nature of the right; b. the importance of the purpose of the limitation; c. the nature and extent of the limitation; d. the relation between the limitation and its purpose; and e. less restrictive means to

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[91] NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969).
[92] Regina v. Secretary of State for the Home Department (Appellant) ex parte Razgar (FC) (Respondent) [2004] UKHL 27 ¶ 20, https://www.refworld.org/pdfid/46c998742.pdf.
[93] Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others (CCT19/94 , CCT22/94) [1995] ZACC 7; 1995 (10) BCLR 1382; 1995 (4) SA 631, at ¶ 57, 58 (1995), https://www.saflii.org/za/cases/ZACC/1995/7.html.
[94] AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 360 (Doron Kalir tr., 2012).

achieve the purpose.[95]

A comprehensive review of proportionality is beyond the scope of this article,[96] but it is worth mentioning a couple of other examples of proportionality around the world that could benefit from a Breyer-esque form of rigor of proportionality. In Israel, the Supreme Court found that limits "caused to the human right by the arrangements in the law will be proportionate to the benefit achieved by the realization of the proper purpose."[97] Germany's judicial balancing relies on a two-part assumption; on one side of the ledger is the constitutional right and on the second a constitutional right of equal importance.[98] Likewise, several tolerant nations guarantee fundamental rights, including New Zealand's Bill of Rights Act that enables courts to consider on balance other rights and freedoms consistent with "free and democratic society."[99]

In the EU, where constitutional interpretation is subject to members' domestic constitutional limitations,[100] a consensus exists that values other than liberty of expression should and must go into judicial decision-making. Dignity, for instance and most especially in Germany—where the right is found in Article 1 of the Basic Law—must go into the ledger as of foremost value to be weighed against any communication interests.[101] There is

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[95] CONST. OF THE REPUBLIC OF SOUTH AFRICA, Chapter 2 ¶ 39 (Interpretation of Bill of Rights) (May 8, 1996), https://www.justice.gov.za/legislation/constitution/saconstitution-web-eng.pdf

[96] Such analysis is more on the order of a book. ALEXANDER TSESIS, FREE SPEECH IN THE BALANCE (2020).

[97] Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Interior ¶ 75 (2006), https://versa.cardozo.yu.edu/opinions/adalah-legal-center-arab-minority-rights-israel-v-minister-interior. Israel has an array of listed civil, political, economic, social, and due process rights, https://knesset.gov.il/constitution/ConstP17_eng.htm, subject to the Basic Law's Limitation Clause: by a law; fitting the values of the State of Israel; "enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorization in such Law." Basic Law: Human Dignity and Liberty, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/39134/97918/F1548030279/ISR39134.pdf.

[98] BARAK, *supra* note 94, at 369, 546.

[99] CANADIAN CHARTER OF RIGHTS AND FREEDOMS § 1; NEW ZEALAND BILL OF RIGHTS ACT 1990 § 5.

[100] *See Consolidated Versions of the Treaty on European Union*, 55 OFF. J. EUR. UNION 13, 18 (2012).

[101] *See* Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549, 1563 (2004) (noting that, in the German

no other way to determine whether reasonable alternatives are available, which is suggested by Justice Breyer's suggested weighing analysis.

Canada's Charter of Rights and Freedoms recognizes speech, association, and assembly to be fundamental rights. On the other side of the ledger, it recognizes that "reasonable limits" can be "prescribed by law" when they are "demonstrably justified in a free and democratic society."[102] The combination of the two requires judges to balance speech and other legitimate concerns of pluralistic political order. The Supreme Court of Canada interpreted the provision to mean that a legal measure "must be . . . rationally connected" to a pressing and substantial public policy that has "rational connection" or "suitability" to such an open and pluralistic polity.[103] This principle is reflected in the *R. v. Keegstra* opinion of the Canadian Supreme Court that balanced concerns for speech and civic order to find constitutional the enforcement of a criminal law that prohibited willful promotion of hatred against identifiable groups.[104] The Court in Canada, as in the EU, has broadly interpreted proportionality and balance.

In the United States, on the other hand, there have even been hints by the Justice Kennedy wing of the Supreme Court that commercial speakers should be treated as natural persons. Thus, as we saw earlier, in *Sorrell*, the majority secured for pharmaceutical companies and any other data brokers a limitless right to sell natural subjects' details, including biometrics, to third party brokers. That differs significantly from the proportionality used the world round as in the EU, where judges

system, "freedom of speech, press, assembly, and association are decidedly inferior to the government's interest in securing and protecting human dignity"); Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 443 (2008) (arguing that "in the United States the constitutional right to free speech has greater regulative impact on defamed private actors than it does in Germany, Canada, and South Africa because substantively, greater weight is given to this right in the balance with competing values, such as reputation, dignity, and privacy").

[102] CAN. CHARTER OF RIGHTS AND FREEDOMS, CONST. ACT, 1982, pt. I, §§ 1 & 2.

[103] S. L. v. Commission scolaire des Chênes, [2012] 1 S.C.R. 235. (defining pluralist society); R. v. Oakes, [1986] 1 S.C.R. 103; Jackson, *supra* note 85, at 804–05 ("Canada has played a particularly influential role in the transnational development of proportionality testing in constitutional law. . . . The means-ends proportionality analysis has been further elaborated in Canadian caselaw, caselaw that is widely cited by constitutional courts around the world.").

[104] [1990] 3 S.C.R. 697. The Supreme Court of Canada reaffirmed its commitment to the principles of that case in the later Regina v. Keegstra, [1996] 1 S.C.R. 458, 459; R.S.C., ch. C-46, § 319(2) (1985) (Can.); *see also* Regina v. Andrews, [1990] 3 S.C.R. 870, 885.

weigh speech restrictions against policy for securing individuals' "personality, encompassing several elements such as dignity, honor, and the right to private life."[105]

The EU's Charter of Fundamental Rights explicitly recognizes proportionality in Article 52:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.[106]

Justice Breyer's four-part approach[107] could add rigor to judicial opinions that rely on the EU Charter's general statement of proportionality analysis.

This Part of the article examines some foreign state and European Union case law employing balancing standards to adjudicate conflicts between privacy and free expression. Democracies throughout the world balance speech with other core values without harming democracy nor degrading expression. They remain pluralistic despite what an author dismissively characterized as "measuring the unmeasurable" and "compar[ing] the incomparable."[108] European countries protect speech in all its forms of expressions and media, regardless of content, but consistent with Justice Breyer, they also recognize that at times core constitutional principles or other rational day-to-day regulations pose countervailing concerns for judicial weighing, synthesis, and determination.[109] Limitations clauses of international instruments, such as the European Convention on Human Rights' (ECHR) "right to freedom of expression" may be limited when "necessary in a democratic

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[105] Rolf H. Weber, *The Right to Be Forgotten: More than a Pandora's Box*?, 2 J. INTELL. PROP. INFO. TECH. & ELEC. COM. L. 120, 121 (2011).

[106] CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION Art. 52 (2012/C 326/02); *see also* Alexander Tsesis, *The Right to Erasure: Privacy, Data Brokers, and the Indefinite Retention of Data*, 49 WAKE FOREST L. REV. 433, 484 (2014).

[107] *See supra* text accompanying note 92.

[108] Laurent B. Frantz, *Is the First Amendment Law? A Reply to Professor Mendelson*, 51 CAL. L. REV. 729, 748 (1963).

[109] *See* JACOBS, WHITE, AND OVEY: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 483–84 (Bernadette Rainey *et al.* eds, 7th ed. 2017).

society."[110] This is consistent with the constitutional priorities recognized by Canada.

The European Court of Human Rights (ECHR) explicitly balances other constitutional values alongside speech.[111] Professor Robert Alexy has pointed out that in Europe "many constitutional courts" engage in balancing or weighing.[112] In turn, a scholar has accurately asserted that constitutional courts "all over the world" have adopted Alexy's principled theory of proportionality.[113] The four classic aspects of European proportionality analysis are pursuit of a legitimate end; suitability of an act achieving the objective; necessity of an act determined by whether it results in minimal disruption; and proportionality in *stricto sensu*, also called the balancing stage of net gains against reduction in right.[114]

Article 10 of the European Convention on Human Rights ("ECHR") secures for everyone the freedom of expression without interference by public authorities.[115] ECHR, adopted in 1953, is more broadly worded than the two-and-half century old U.S. Bill of Rights.[116] The former protects the rights "to hold opinions and to receive and impart information and ideas."[117] Exercise of those human rights, however, carries "duties and responsibilities" under those laws

> necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority

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[110] EUR. CONVENTION ON HUM. RTS. Art. 10 ("Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.").

[111] Sürek v. Turkey (No. 1), 26682/95, 1999-IV Eur. Ct. Hum. Rts. 353, 383–84.

[112] Robert Alexy, *Balancing, Constitutional Review, and Representation*, 3 INT'L J. CONST. L. 572, 572 (2005).

[113] Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT'L J. OF CONST. L. 574, 595 (2004).

[114] MATTHIAS KLATT & MORITZ MEISTER, THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY 8–9 (2012); BENEDIKT PIRKER, PROPORTIONALITY ANALYSIS AND MODELS OF JUDICIAL REVIEW: A THEORETICAL AND COMPARATIVE STUDY 15–39 (2013).

[115] EUR. CONVENTION ON HUM. RTS art. 10

[116] *Compare id.*, *with* U.S. CONST. amend. I.

[117] EUR. CONVENTION ON HUM. RTS RIGHTS art. 10

and impartiality of the judiciary.[118]

In the United States, privacy is more diffusely recognized, and even then, only in a limited number of cases that purport to rely on unenumerated rights, history, or tradition.[119] The Supreme Court in this country could only benefit from similar reflective factors to review cases and controversies that pit free speech claims against privacy interests. Justice Breyer's four-part test provides considerations, concerns, and evaluations that are similar to those found in Europe.

European Union's guaranty of privacy is far-reaching in significant measure because the right is codified in Article 8 of the European Convention.[120] The ECHR articulated five factors relevant to balancing privacy and speech conflicts: (1) the work's contribution to a debate of general interest; (2) how well known is the person concerned and the subject of the report; (3) prior conduct of the person concerned; (4) content, form, and consequences of the publication; and (5) circumstances in which the photographs, if any, were taken.[121] These considerations can further enrich Breyer's assessment of speech interests, countervailing government concerns, fit between the means chosen and the ends sought, and alternatives to restrictions on expression.[122]

A multifactoral approach,[123] which differs substantively

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[118] *Id.*

[119] *See*, *e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) ("[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" (quoting Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 503 (1977) (plurality opinion)); *see also* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"); Palko v. Connecticut, 302 U.S. 319, 325–26 (1937) ("implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed").

[120] CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS art. 8, Nov. 4, 1950, 213 U.N.T.S. 230, *available at* https://treaties.un.org/doc/Publication/UNTS/Volume%20213/volume-213-I-2889-English.pdf; EUR. COURT OF HUM. RTS., GUIDE ON ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 44–60 (2021). Article 8 rights are likewise balanced against the public prohibition against "interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." Art. 8, *supra*.

[121] Von Hannover v. Germany (No. 2), 2012-I Eur. Ct. H.R. 399, 439–441.

[122] United States v. Alvarez, 567 U.S. 709, 730 (2012) (Breyer, J. concurring).

[123] Alexander Tsesis, *Multifactoral Free Speech*, 110 NW. U. L. REV. 1017 (2016).

from the categorical method that the current U.S. Supreme Court majority favors, is also apparent in the 2013 ECtHR, *Case of Delphi AS v. Estonia* decision.[124] In that case, the ECtHR sought a "fair balance" between conflicting speech and privacy interests, weighing a communication's "contribution to a debate of general interest, how well known the person concerned is, the subject of the report, the prior conduct of the person concerned, the method of obtaining the information and its veracity, the content, form and consequences of the publication, and the severity of the sanction imposed."[125] This depth of reasoning respects the right to expression but does not do so at the expense of countervailing interests. In a 2017 case, *Einarsson v. Iceland*, the ECtHR once again weighed the right to private life and reputation against the right to free expression.[126] The case articulated factors suitable to proportional analysis: "[1] [T]he contribution to a debate of general interest; [2] how well-known is the person concerned and what is the subject of the report; [3] his or her prior conduct; [4] the method of obtaining the information and its veracity; [5] the content, form and consequences of the publication; and [6] the severity of the sanctions imposed."[127] This goes much deeper than simply characterizing a matter to be reviewable under a judicially defined standard of scrutiny.

The judicial factors articulated in *Einarsson* are situational; they require identifying how both the speaker and audience benefit from the communications. Not all these factors would stand up in the United States; indeed, it is likely Justice Breyer would agree with the majority that the second factor in *Einarsson* could not withstand American strict scrutiny review.[128] Government cannot regulate any content under the First Amendment unless its policy addresses a compelling government interest in a manner least restrictive to the speech interest.[129]

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[124] Delfi AS v. Estonia, App. No. 64569/09 (Eur. Ct. H.R. 2013) https://hudoc.echr.coe.int/eng?i=001-126635.
[125] *Id.* ¶ 83.
[126] Egill Einarsson v. Iceland, App. No. 24703/15 (Eur. Ct. H.R. 2018) https://hudoc.echr.coe.int/eng?i=001-178362.
[127] *Id.* ¶ 39.
[128] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 364 (2010) ("The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.").
[129] *Id.* at 340 ("As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content," which is reviewed by whether the government has a compelling

Greater judicial balancing should fairly examine the value of the communication, the competing public policy concern, circumstances, extent of harm, and fit of regulatory aims with regulatory means. Both Justice Breyer's and the ECtHR's articulations of proportional judicial review of speaker's and government's interests could provide judges with a framework for determining whether the law limits core speech or what Justice Kagan calls "workaday economic and regulatory policy."[130] They include labor regulations, health care information, privacy data protection,[131] and certain types of fighting words.[132]

Justice Breyer's and Kagan's alternatives to categorical uses of strict scrutiny on all content regulation would identify first-order speech concerns but would not stop there. Second-order judgments are also relevant for determining matters such as pertinent constitutional structures[133] and implicit powers, over matters such as interstate commerce and privacy. Even when a judge selects a line of precedent on which to base an opinion, he or she is not engaged in a straightforward endeavor. Contextualization of evidence is inevitable, indeed it is essential, in any trial proceeding. Justice Breyer's free speech approach recognizes that neither text of the Constitution nor judicial test provide obvious answers to contemporary issues such as campaign finance reform or consumer protections. These concerns of secondary relevance are what, in a different context, Justices O'Connor, Kennedy, and Souter called, "a series of

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interest and the regulation is narrowly tailored). The Court relies on strict scrutiny review when reviewing content or viewpoint challenges. R.A.V. v. City of St. Paul., 505 U.S. 377, 393–95 (1992); Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 737–39 (2000) (critiquing the majority approach in *R.A.V.*).

[130] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

[131] *Id.* at 2501–02 (Kagan, J., dissenting) (citing Nat'l Inst. of Fam. Life Advocs. v. Becerra, 138 S.Ct. 2361 (2018) (invalidating a law requiring medical and counseling facilities to provide relevant information to users) and Sorrell v. IMS Health Inc., 564 U.S. 552 (2011) (striking down a law that restricted pharmacies from selling various data)).

[132] *R.A.V.*, 505 U.S. at 402–03 (1992) (White, J., concurring) ("[T]he Court's new 'underbreadth' creation serves no desirable function. Instead, it permits, indeed invites, the continuation of expressive conduct that in this case [of cross burning] is evil and worthless in First Amendment terms . . . Furthermore, the Court obscures the line between speech that could be regulated freely on the basis of content (*i.e.*, the narrow categories of expression falling outside the First Amendment) and that which could be regulated on the basis of content only upon a showing of a compelling state interest (*i.e.*, all remaining expression).").

[133] I am thinking of constitutional structures of governance such as federalist or regulatory powers.

prudential and pragmatic considerations."[134] As Frederick Schauer has pointed out, judges routinely (and sometimes, I would add, calculatingly) select doctrinal frameworks—be they public forum, designated public forum, limited public forum, unconstitutional conditions, or some other doctrine—to justify contingent judgments and make them appear obvious, objective, and straightforward.[135] In order to give first-order free speech decisions the appearance of content neutrality, the Supreme Court often fails to flesh out second-order issues pertinent to the resolution of a case. Justice Breyer's approach offers a path forward consistent with the persuasive wisdom of European courts.

III. COUNTERARGUMENTS TO PROPORTIONALITY

Among the many American detractors of the type of balancing approach Justice Breyer proposed, Professor John Hart Ely cautions against judicial subjectivity.[136] Ely asserts that determining what "element 'predominates'" in cases where the state regulates speech and conduct "will therefore inevitably degenerate into question-begging judgments about whether the activity should be protected."[137] And Professor James Weinstein warns that judicial balancing can lead to "ideological bias" against disfavored speech.[138] Their underlying concern is similar to that expressed by Professor Thomas Emerson, who, in his criticism of Justice Goldberg's opinion to *Gibson v. Florida Legislative Investigation Committee,* warns against judicial reliance on "*ad hoc* balancing."[139]

Balancing need not be ad hoc, however. Courts can review whether the government's concern involves a traditional government function or a state effort to police public opinion. The evaluation requires determination of whether a challenged law has only an incidental effect on communication or aims to suppress ideas, thoughts, expressions, writings, artistry, and the

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[134] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (*overruled on other grounds by* Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022)).
[135] Frederick Schauer, *Not Just About License Plates: Walker v. Sons of Confederate Veterans, Government Speech, and Doctrinal Overlap in the First Amendment*, 2015 SUP. CT. REV. 265, 265–66.
[136] John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495 (1975).
[137] *Id.*
[138] *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 511 (2011).
[139] THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 80, 267–69 (1970).

like.[140] One simple example of a legitimately balanced restriction that is not ad hoc is criminal fraud, which is an ancient cause of action that limits expression.[141] Various fraud laws give greater weight to policies that protect fair dealings and render actionable perfidious subterfuge.[142] Although fraud involves communication, it is not protected under the First Amendment "unless the reason for singling out that particular type of fraud was related to the "distinctively proscribable content" of the speech in question."[143] While Emerson's speech/conduct dichotomy and Ely's appeal to procedural fairness serve important analytical starting points for selecting and exercising adequate judicial scrutiny, Emerson's distinction between free expression and action comes with its own ambiguity. He provides no way to account for why state powers can be exercised to enforce regulations with an incidental effect on speech, such as mandates on tobacco warnings,[144] pharmaceutical markings,[145] or consumer products labels.[146] At some point in a court's analysis, a judge is likely to find it relevant to determine whether the restriction affects, interferes with, or censors speakers' political, personal, or scientific autonomy. Neither he nor Ely explain why such regulations do not infringe on core First Amendment values, though each compels speech. All of them have expressive components but none has been

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[140] One traditional function is waste disposal. *See* United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 346 (2007). Others include fire prevention, police protection, sanitation, public health, and parks and recreation. Nat'l League of Cities v. Usery, 426 U.S. 833, 845–53 (1976), *overruled on other grounds by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[141] History and Development of Fraudulent Conveyance Law goes back at least to Elizabethan times, when in 1571 law was passed to prevent debtors to frustrate their creditors. Husky Int'l Elecs., Inc. v. Ritz, 578 U.S. 356, 360–61 (2016); *see also* United States v. Stowell, 133 U.S. 1, 12 (1890) ("By the now settled doctrine of this court, . . . statutes to prevent frauds upon the revenue are considered as enacted for the public good and to suppress a public wrong, and therefore, although they impose penalties or forfeitures, not to be construed, like penal laws generally, strictly in favor of the defendant; but they are to be fairly and reasonably construed, so as to carry out the intention of the legislature.").

[142] Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 282 (1992), *citing to* William C. Tyson & Andrew A. August, *The Williams Act After RICO: Has the Balance Tipped in Favor of Incumbent Management?*, 35 HASTINGS L.J. 53, 79–80 (1983) ("criminal violations of antifraud provisions of the securities laws should constitute racketeering activity, provided that the conduct is in connection with purchase or sale of securities").

[143] Alan K. Chen and Justin Marceau, *Developing a Taxonomy of Lies Under the First Amendment*, 89 U. COLO. L. REV. 655, 706 (2018), *quoting R.A.V.*, 505 U.S. at 384.

[144] Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1333.

[145] 21 U.S.C. § 353 (b)(4)(A).

[146] 42 U.S.C. §§ 6292, 6294.

thought to transgress free speech principles.

In order to distinguish between laws that burden core speech and those that serve traditional government functions—such as protecting consumers, health, and safety—courts must reflect upon determinations that review "the surrounding circumstances [and whether] the likelihood was great that the message would be understood by those who viewed it."[147]

CONCLUSION

Justice Breyer's proportionality approach offers more nuance to free speech analysis than the currently accepted categorical use of strict scrutiny to strike content-based restrictions. The majority of the Court is unwilling to seriously engage with regulatory purposes, instead discounting them as violative of free-speech principles. This creates opacity as to why some regulatory laws touching speech–antitrust, copyright, and so forth–are found legitimate while others–women's health, collective bargaining, and so forth–are found unconstitutional. Formalism fails to answer why even regulations of workplace harassment are a matter of second-order viewpoint regulation. Title VII renders actionable the expression of perspectives that create a severely hostile work environment.[148] So too Title VI grants federal enforcement authority to prohibit discrimination based on race, color, and national origin in programs and activities receiving federal financial assistance.[149] There too a balance of social values is at play with the liberty of expression.

Judicial reasoning must identify the totality of the material circumstances of a case, or put another way, the context of regulation and its application to speech acts. Justice Breyer's four-part proportionality test creates a rubric for analyzing cases involving speech interests, countervailing government concerns, inquiries into the fit of policy and its aims, and alternatives for achieving public policy.

The current composition of the Court makes clear that history and tradition, in the short- and long-terms, have become the determinative category. History should enrich judicial understanding of the expressive interest at stake, countervailing government concerns, means/ends analysis, and less restrictive means of enforcement. More often than not, however, it is another instrument for judicial formalism and outcome-

[147] Spence v. State of Wash., 418 U.S. 405, 411 (1974).
[148] Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, (Title VII).
[149] *Id.* § 2000d, *et seq.*, (Title VI).

determinative reasoning.[150]

In the United States, tests have come to be tools for judicial deregulation. Doctrinal tests are necessarily starting points for analysis, but judicial rationale requires a variety of disparate considerations. Rather than selecting the conclusive test of adjudication, the Court should explore the balance of private and public concerns. Take, for example, the Court's reliance on strict scrutiny in *Citizens United v. Federal Election Commission* to strike an expenditure limit on corporate speech.[151] The Court imposed its will on constitutional law without adequately assessing pertinent evidence about how its interpretation affected biological voters and political associations.[152] Likewise, in *Sorrell*,[153] as Justice Breyer recognized in dissent, the need for information about pharmaceutical products, but out-of-hand rejected public concerns for deanonymization of sensitive, health information; integrity of pharmaceutical profession; and the public need for consumer data protection.[154]

The consequences of ignoring other constitutional rights were evident in free speech jurisprudence of reproductive rights prior to the *Dobbs v. Jackson Women's Health Center* overturning

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[150] In the hands of courts, history and tradition can also be rubrics for judicial activism that cherry picks nuggets from the past to bolster a judge's conclusions rather than engagement in serious research into primary sources. New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2177 (2022) (Breyer, J., dissenting) (asking rhetorically whether "the Court's approach permit judges to reach the outcomes they prefer and then cloak those outcomes in the language of history?"); Mark Tushnet, *The Significance of* Brown v. Board of Education, 80 VA. L. REV. 173 (1994) ("Law-office history reduces complexity and contradiction to simplicity and provides a story in which all evidence points to a single conclusion."); Howard Jay Graham, *The Fourteenth Amendment and School Segregation*, 3 BUFF. L. REV. 1, 23 (1953) (asserting that "[l]aw-office history, willy-nilly, is a confining, proscriptive enterprise" that ignores the surrounding historical purposes behind constitutional provisions).

[151] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010).

[152] *Id.* at 394 (Stevens, J., concurring in part and dissenting in part) ("The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its "identity" as a corporation. While that glittering generality has rhetorical appeal, it is not a correct statement of the law. Nor does it tell us when a corporation may engage in electioneering that some of its shareholders oppose. It does not even resolve the specific question whether Citizens United may be required to finance some of its messages with the money in its PAC. The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case.").

[153] *See supra* text accompanying note 20.

[154] Sorrell v. IMS Health, Inc., 564 U.S. 552, 558 (2011) (Breyer, J. dissenting).

Roe v. Wade and *Planned Parenthood v. Casey*.[155] Before *Dobbs*, *National Institute of Family and Life Advocates* chipped away, through First Amendment reasoning, at the right to an abortion before fetal viability. Justice Thomas for the majority in the latter case, took a categorical approach to speech rather than any form of balancing of free speech and privacy. Indeed, even Justice Breyer in dissent failed to engage in proportional analysis comparing, situating, and contextualizing what then were regarded to be rights incorporated by the Due Process Clause.[156] Without such balancing between speech, matters of privacy, and fair elections, the Court's reasoning often seems outcome determinative. Justice Breyer's many achievements on the Court included the development of a means/ends analysis into regulations that affect communications. First Amendment doctrine could only benefit from wisdom gleaned through the study of foreign jurisprudence that engages in proportional assessments of laws that indirectly affect free speech.

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[155] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022).

[156] Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporating the First Amendment of the United States); Roe v. Wade, 410 U.S. 113 (1973) (protecting compelling privacy right to abortion services); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (protecting abortion interest using an undue burden test prior to viability) both *overruled by* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. at 2279.