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Approximately Speech

David McGowan

Response

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The editors of the *Minnesota Law Review* have invited me to comment on the presentations made at the symposium the Law School held to celebrate the Law Library's acquisition of its millionth volume. In a brief Response such as this, I cannot do justice to the full range of ideas presented at the symposium. I will instead offer some thoughts, prompted by the contributions of Professors Lillian BeVier and Frederick Schauer,[1] regarding the use of proxy doctrines in free speech analysis.

I

Free speech analysis should focus on that thing or set of things that distinguishes free speech cases from other cases. A very familiar implication of this claim, which Professor Schauer has demonstrated convincingly over the years, is that speech itself cannot be the exclusive focus of free speech analysis.[2] Almost all social behavior involves practices or institutions that either employ or are constituted by speech, broadly defined to include all intentionally expressive behavior.[3] Almost all cases

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My thanks to Larry Alexander, Lillian BeVier, Dan Farber, Miranda McGowan, Adam Samaha, Frederick Schauer, and Eugene Volokh for their comments. Remaining mistakes are my fault.

1. Lillian R. BeVier, *The First Amendment on the Tracks: Should Justice Breyer Be at the Switch?*, 89 MINN. L. REV. 1280 (2005); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005). I would weigh in on the subjects discussed by Dan Farber, but my Hamiltonianism is on record already.

2. *See* Schauer, *supra* note 1, at 1256 n.1. The notion of a "free speech case" is ambiguous because it does not distinguish between the set of things the First Amendment covers and the set of things it protects. Professor Schauer has emphasized this important distinction in his work. I discuss it in Part IV.

3. *See, e.g.*, Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2366 (2000) ("Society con-

involving social behavior therefore involve speech, and almost all laws regulating social behavior affect speech.[4] Nevertheless, most cases are not free speech cases. Anyone who has spent any time thinking about this topic can immediately provide a laundry list of expressive acts that can be regulated without so much as a judicial nod to the First Amendment.[5]

If speech is a necessary but not sufficient condition for making a case a free speech case, what is a sufficient condition? Libraries could be filled with the work done on this topic, and I will not add to it. My concern is instead for how courts deal with the thing or set of things that makes for a free speech case, whatever those things are. To clarify thinking about this question of method, however, I will pose some answers to the main question.[6]

One could simply say a case is a free speech case whenever a judge analyzes the conduct at issue using the doctrinal tools judges have developed for free speech cases. A case is a free speech case when a judge says it is a free speech case. This definition is obviously circular (and a bit of crass realism to boot), but it helps make a point. Because expression is present in every case, judges may engage in free speech analysis whenever they feel like it. Nothing in law or logic stops them from analyzing price fixing or extortion cases using free speech tools.[7] We know the price fixer and the blackmailer would be convicted even if a judge invoked free speech rules, but nothing keeps a judge from doing so.

In fact, judges *do* engage in every case in something that can be called free speech analysis. They either do it overtly, when they apply free speech doctrines and treat a case as a free speech problem, or they do it implicitly, when they look at the

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sists of myriad forms of social practices, and speech is constitutive of almost all of these practices."). On the definition of "speech," see *Spence v. Washington*, 418 U.S. 405, 409–11 (1974).

4. *See* Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 929 (1993).

5. For example, price fixing, bribery, extortion, fraud, tax evasion, and professional malpractice all fall into this category. *See, e.g.*, KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 40–43 (1989); Frederick Schauer, *The Aim and the Target in Free Speech Methodology*, 83 NW. U. L. REV. 562 (1989).

6. I will present the first answer here and the next two in Part II.

7. They could use the overbreadth doctrine to analyze a garden-variety trespass case involving the delivery of diapers (not speech) as a free speech case, if they wanted. *Cf.* Virginia v. Hicks, 539 U.S. 113 (2003) (overturning state court ruling that antitrespass policy was unconstitutionally overbroad).

facts of a case and decide whether to decide it using free speech doctrines. Implicit analysis classifies; it is the process by which a judge decides a case is about price fixing rather than speech, or tax fraud rather than speech, or about speech rather than tax fraud. When a judge condemns a price fixer to jail with not a word about free speech, the decision entails an unstated but nevertheless real conclusion that the case was not about free speech.

Once in a while, a party will assert a free speech claim in a factual context judges recognize as involving expression but not free speech. To refute such claims, judges must make implicit free speech analysis explicit. The result is often a somewhat awkward, groping attempt to define and defend a principle that is far more elusive than the mainstream free speech cases, such as political rallies or marches, let on.[8]

United States v. Freeman[9] offers a concrete example of what I mean. John Freeman held seminars about taxation. At these seminars, he "urged the improper filing of returns, demonstrating how to report wages, then cross out the deduction line for alimony and insert again the amount of the wages, showing them as 'nontaxable receipts.'"[10] Freeman was convicted of "aiding and abetting, and counseling" violations of the Internal Revenue Code.[11] He insisted he did no more than advocate "tax noncompliance," which advocacy he claimed the First Amendment protected.[12] Freeman asked the trial judge to instruct the jurors that they could acquit him on free speech grounds. The trial judge refused. After his conviction, Freeman appealed from the refusal. In an opinion by then-Judge An-

8. Mainstream cases are those in which the facts unambiguously implicate societally recognized free speech interests and values. They are, in a strict sense, conventional. *United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982), on the other hand, provides an example of an awkward explanation. Gary Barnett was indicted for aiding and abetting others who attempted to manufacture phencyclidine (PCP). *Id.* at 837. He did so by selling drug-cooking recipes, which he would mail to buyers who sent him $10. *Id.* at 838. Barnett moved to dismiss the indictment against him on First Amendment grounds. *Id.* The court quite correctly rejected his claim as having no support in the law, but did not explain very well why regulation of his expression received no free speech scrutiny at all. *Id.* at 842–43.

9. 761 F.2d 549 (9th Cir. 1985).

10. *Id.* at 551.

11. *Id.*

12. *Id.*

thony Kennedy, the Ninth Circuit reversed Freeman's conviction on twelve counts but affirmed on two others.[13]

All fourteen counts were based on Freeman's expression. The court distinguished the twelve counts on which it held that Freeman was entitled to an instruction from the two on which he was not based on the context in which the expression occurred. Freeman was entitled to a free speech instruction with regard to counts as to which there was some evidence that he "directed his comments at the unfairness of the tax laws generally, without soliciting or counseling a violation of the law in an immediate sense."[14] Freeman was not entitled to an instruction for counts based on a meeting with an individual taxpayer, who sought him out to make sure she had followed his (illegal) advice correctly when filling out her returns.[15] Freeman prepared a draft return for her and reviewed and approved some documents she had filled out herself.[16]

The court held this conduct had nothing to do with free speech, so the trial court's refusal to give a First Amendment instruction was not error. The court said:

> the defendant does not have a First Amendment defense simply for the asking. Counseling is but a variant of the crime of solicitation, and the First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself. In those instances, where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone.[17]

This is a perfectly workable explanation for a holding that is no doubt correct on its facts. It is also the kind of explanation one could easily poke holes in if one cared to. What is counseling, and what distinguishes it from exhortation or protest? What is the objective meaning of the words used, and how can a

13. *Id.*

14. *Id.* at 551–52. This evidence entitled Freeman to a jury instruction, though not an acquittal, meaning that it was up to the jury to decide whether Freeman had been engaged in protected advocacy or unprotected solicitation and counseling. The court derived an instruction from *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), writing that "[a]s the crime is one proscribed only if done willfully, the jury should have been charged that the expression was protected unless both the intent of the speaker and the tendency of his words was to produce or incite an imminent lawless act, one likely to occur." *Freeman*, 761 F.2d at 552.

15. *Freeman*, 761 F.2d at 552.

16. *Id.*

17. *Id.* (citations omitted).

court decide that without running afoul of the rule that legal liability or legal protection should not depend on the content of speech?[18] Why should one believe that Freeman had a different purpose in "counseling" than in the seminars? When is speech "integral" to an act? If Freeman is liable for this false filing, shouldn't listeners who harm themselves or commit crimes in response to songs and movies be able to sue singers and producers?[19] Or, alternatively, isn't the reaction of a listener (such as a taxpayer) an impermissible basis for content regulation?[20]

These are all nifty rhetorical questions that are (and should be) almost totally meaningless in the context of the counseling counts in *Freeman*. Common sense tells us how that case winds up, no matter how many rhetorical hoops a court decides to jump through or ignore. The facts count far more than the verbal tests, in significant part because, as the decision makes plain, the facts determine which tests are used and which are not.

Freeman suggests a continuum that helps understand implicit free speech analysis. The opinion distinguishes between seminar lectures, which might or might not present a free speech problem, depending on the jury's view of the facts, and the meeting to counsel an individual taxpayer on evasion, which as a matter of law was not free speech. We can place the seminar in the middle of the continuum and the meeting at the far right-hand side, where it sits with the recipe from *United States v. Barnett*,[21] price fixing, and other speech acts that present no free speech problem. We can fill in the left side by imagining that Freeman was charged with ranting about the Internal Revenue Code in a speech made on a corner in a public park.

Free speech case	Ambiguous case	Not a free speech case
Park-corner rant	Tax evasion seminar	Counseling tax evasion

18. For a summary of cases that address the issue of content distinction, see DANIEL A. FARBER, THE FIRST AMENDMENT 21–38 (1998).

19. *See, e.g.*, Waller v. Osbourne, 763 F. Supp. 1144, 1151 (M.D. Ga. 1991) (granting summary judgment against complaint alleging songs of Ozzy Osbourne caused plaintiff's son to shoot himself).

20. *See* Boos v. Barry, 485 U.S. 312, 320–21, 334 (1988).

21. *See supra* note 8.

Judges place every matter that comes before them somewhere on this continuum. When they place a case on the left-hand side of this continuum, they may or may not explain why they do so, but they will only do so when the facts fit within recognized free speech conventions, so any explanation would be optional and might seem pointless.[22] One almost never sees an explanation of why a judge has placed a case on the right, either, because such placement seems similarly obvious. This classification—implicit free speech analysis—is done all the time. It is done far more often than explicit free speech analysis, though, as noted above, the difference exists because it would be inefficient to engage in free speech analysis in every case, not because it would be impossible.

Because judges always engage in implicit free speech analysis, any theory or doctrine concerned with explicit free speech analysis must either explain both explicit and implicit analysis, or it must disregard what judges actually do with regard to speech. The latter approach is pointless. Any theory of what distinguishes free speech cases from other cases must explain implicit free speech analysis. Any doctrine designed to implement such a theory must be capable of performing such analysis.

II

Judges have developed a number of proxies to help them with free speech analysis. As a step up from the circularity of our last heuristic, one could say a case is a free speech case whenever the facts trigger a proxy doctrine. The proxy notion is appealing because it captures the doctrine and intuition most important to current free speech analysis.

The doctrine is the content distinction, which holds that restrictions of speech based on the content of expression should

22. The exception to this rule involves cases where a plaintiff seeks to take facts that in conventional analysis should go on the left and move them to the right. *See, e.g.*, Virginia v. Black, 538 U.S. 343 (2003); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (mem.). Adam Samaha rightly points out to me that judges generally entertain only the arguments parties make, so it would be more precise to say that counsel place every matter on such a continuum by deciding whether to make a free speech argument. Such decisions will rest on predictions of how judges would react to such an argument, which is to say predictions as to where judges would place a case on a continuum of the type mentioned in the text, so the point does not alter the substance of my argument.

be scrutinized more closely than content-neutral restrictions.[23] We should admit at the outset that this distinction cannot be justified on the ground that all or even most content-based restrictions of speech produce net social losses. There is no reason to believe such a claim is true, and good reason to believe it is false. Prohibitions on price fixing or counseling tax evasion are content-based regulations of speech. It would be silly to pretend that the social costs of such prohibitions are greater than the benefits, because the prohibited expression creates high costs but few benefits.

How can the distinction be justified? Judicial efficiency is the obvious answer. In a certain set of cases the distinction tilts the scale strongly in favor of a speaker and against the government. Rather than asking whether the facts present a significant risk of harm to free speech interests, the doctrine presumes harm, and this presumption is generally conclusive. The presumption acts as a proxy for full-blown harm analysis, thereby economizing on the costs of such analysis.

Such costs include the risk (expected cost) that courts would get full-blown analysis wrong. Presumptions may get some cases wrong too, of course, so they might create costs at the same time they economize on them. On this view, the content distinction is justified if (and only if) it avoids more costs than it creates. Because virtually all cases involve expression, and some expression causes net social losses, whether the content distinction meets this criterion depends on the set of cases to which it is applied.

Nothing in the content distinction itself tells judges when to apply it. It is not used in most cases, however, and most cases do involve expression, so this fact limits the degree to which one can extrapolate from the distinction to the thing or set of things it is a proxy for. Put slightly differently, we know the distinction is a proxy, and a fairly limited one, because it can neither explain nor perform implicit free speech analysis. In fact, a judge engaged in implicit free speech analysis will always look at the content of expression to decide whether to apply the doctrine of content neutrality,[24] a seemingly paradoxical fact that should be more embarrassing for the doctrine than is

23. *E.g.*, FARBER, *supra* note 18, at 21–38.

24. Justice Stevens was right to say "[w]e have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." Hill v. Colorado, 530 U.S. 703, 721 (2000).

commonly recognized. Any doctrine that cannot be applied until violated has pretty strict limits.

The proxy notion also explains the most prominent free speech intuition, which is that the intention of the government is the key to free speech analysis. On this view, free speech cases are about identifying the aim of a government action and protecting speech from actions taken with bad aims in mind.[25] This view has considerable appeal. A regulation aimed at a target is more likely to hit the target than a regulation aimed at something else. The government might intend to regulate speech by enacting a general law, such as an increase in the marginal tax rate, but such a rule would fit so poorly with its end that rational officials would be unlikely to try it. The low probability that general laws aim to do something harmful to free speech interests justifies more relaxed scrutiny of such laws (though, as we see in a moment, not of all their applications).

I do not believe the purpose of the government is the true subject of free speech analysis, however. Purposive analysis is itself a proxy.[26] Some regulations motivated by a desire to suppress expression receive no constitutional scrutiny at all. Freeman's prosecution for counseling exemplifies the point, as does the usual list of fraud, price fixing, forgery, and other expressive crime, which the government fully intends to stamp out by penalizing content.[27] Other regulations are permissible

25. *See* Schauer, *supra* note 1, at 1261 n.22 (listing sources taking this view).

26. For the reasons stated in the text, I take a slightly different view of the role of government motive than does Professor BeVier. She sees the doctrine as less concerned with the effects of speech regulation than with the motives behind such regulation. BeVier, *supra* note 1, at 1281. She sees "the search for illicit government motives as the driving force behind nearly the whole body of First Amendment doctrine." *Id.* at 1289–90. As I see it, motive analysis is a proxy for social effects analysis, which is and must be the real concern of the doctrine. Thus, while it may well be true that the search for bad motives drives the development of doctrine, government motive as such is not the subject of the doctrine (although specifying what counts as a "bad" motive may be).

27. Professor Jed Rubenfeld argues that these examples do not contradict the proposition that purposive analysis is the core idea of the First Amendment. He argues the principle does not extend to legal prohibitions on lying because "an injunction against false statements of fact is an orthodoxy that no legal system—indeed no communicative system—can do without. It would not be possible to have law or even to conceive of law without embracing the practice of fact-finding." Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 819 (2001). I do not see how this argument preserves the princi-

even though motivated by a desire to suppress expression, so long as the Court's tests are employed. Obscenity may be prosecuted so long as its definition meets the *Miller* standard,[28] and so far the Court has employed the First Amendment to limit the tort of intentional infliction of emotional distress only with regard to public attacks on public figures.[29] A flat ban on offense-based regulations would legalize expressive public nudity or intercourse (even when done in a park rather than a bar), and a host of other things courts are simply not going to call protected speech any time soon.[30] If anything, the trend is weakly in the other direction.[31]

One can also see this point from the other direction. Some regulations not motivated by a desire to suppress expression (nor aimed at the content of expression) do suppress expression. Suppose Freeman is ranting away on the park corner and begins to look seriously ill. A beat cop sees him and is genuinely worried about Freeman's health. (If it helps, suppose Freeman is ranting in German and the cop does not speak German.) To stop Freeman from having a heart attack, the cop orders him to desist.

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ple. There would be nothing illogical about a legal system that rejected laws motivated by a desire that people tell the truth. The system would be radically inefficient, but that is just a cost-benefit argument of the kind Professor Rubenfeld says the First Amendment does not admit. If the domain of the First Amendment is defined by cost-benefit analysis, however, then what goes on within that domain is nothing more than a type of such analysis. That type of analysis may be nothing more than categorical presumptions about costs and benefits, but since such presumptions are bounded by such analysis, they cannot be anything else.

28. *See* Miller v. California, 413 U.S. 15, 23–26 (1973).

29. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50–57 (1988). One could object that the tort of intentional infliction of emotional distress is not explicitly aimed at speech. That is true, but when speech is involved it rests on the reaction to speech, which in other contexts is an impermissible basis for a regulation. My thanks to Eugene Volokh for stressing that the Court has not ruled out further limits on the emotional distress tort.

30. I can see a good case for stopping all obscenity prosecutions, but there is no plausible case for doing away with all expression-based emotional distress claims. If we reach the point where the midnight telephone caller panting obscenities is treated the same as a park-corner protester, the First Amendment will be more self-parody than law. The panter generates no social benefits worth the cost of doctrinal protection. *Cf.* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 675 (1990).

31. *E.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 289–96 (2000) (treating obviously content-based zoning restriction on erotic businesses as content-neutral restriction).

I believe this is an easy case, in which the cop should be found to have violated the speaker's First Amendment rights. The order significantly harms free speech interests, though it is not based on Freeman's content nor motivated by a desire to suppress speech. Freeman probably knows his physical state at least as well as the cop, and he internalizes any physical harm he might do to himself.[32] An order that he stop speaking for his own good offends the Millian premises that support much free speech doctrine. Yet the notion of purposivism cannot deal with this case, unless it is tortured in some way to allow a court to declare that the cop's "real" purpose was to stop Freeman from ranting, rather than to save his life. And if a court goes down that road, it gives the game away, because the analysis is then driven by whatever justifies a court in disregarding the cop's actual intention. The notion of purposivism itself cannot do that job.

Bartnicki v. Vopper[33] supports this conclusion. The laws at issue in that case prohibited the disclosure of an unlawfully intercepted communication.[34] The purpose of the law was to protect the privacy of persons who communicated through devices such as cell phones.[35] It applied without regard to what was said, and therefore was neither aimed at content nor motivated by content-based disagreement or offense.[36] People might speak more freely if they knew their communications would not be republished, so the law arguably promoted speech rather than restricting it. Nevertheless, when a local radio station played a tape of an intercepted cell phone conversation regarding a local labor dispute, the Court held that the First Amendment provided the station a defense against application of the law to the facts at hand.[37]

Justice Stevens's majority opinion recognized that the case violated neither the content proxy nor the motive proxy, and that one could claim free speech interests for the law as well as against this particular application.[38] He nevertheless concluded that the First Amendment provided a defense because the

32. He might or might not internalize the cost of such harm, depending on whether he was insured.

33. 532 U.S. 514 (2001).

34. *Id.* at 522–24.

35. *Id.*

36. *Id.* at 526.

37. *Id.* at 522–35.

38. *Id.* at 529–35.

communication in question involved a matter of public concern.[39] The Court reserved judgment on whether the First Amendment would provide such a defense if the case concerned "trade secrets or domestic gossip or other information of purely private concern,"[40] a reservation which makes clear that the majority was concerned about the social benefits of the expression at hand, and thus the social costs of applying the law. The gist of the Court's analysis was that applying the statute to the facts at hand infringed too much on free speech interests, thus causing net speech losses.

Bartnicki is therefore about balancing. Justice Breyer's concurrence makes the point explicit.[41] By implication, *Bartnicki* holds that there is more to free speech analysis than the content or motive proxies. It suggests a third way in which a case might be considered a free speech case. One might simply say that judges should balance speech interests in all cases, so that a free speech case is one where a judge balances the social costs of a speech regulation against the social benefits of such a regulation, and the balance favors speech over the regulation.

The notion of balancing has a couple of important virtues the proxy doctrines lack. Most importantly, it can explain and implement implicit speech analysis. It therefore can explain why some cases involving speech are free speech cases and others are not. From a balancing point of view, judges treat price fixing as price fixing rather than speech because they are so confident that the balance favors regulation rather than protection that it would be a waste of time to explain why. Similarly, judges apply First Amendment analysis to a case involving a movie about price fixing because they are confident that the balance is so likely to favor protection that such analysis is worth the trouble.[42] At the left-hand side of the continuum, the social benefits of protecting expressive conduct are high relative to the social costs such conduct creates. As one moves from

39. *Id.* at 534–35.

40. *Id.* at 533.

41. Professor BeVier discusses *Bartnicki* as part of her critique of Justice Breyer's approach to free speech. BeVier, *supra* note 1, at 1281–83, 1303–08. I discuss her views of the opinion in Part III.

42. Balancing also can distinguish between First Amendment coverage and First Amendment protection. Balancing would define coverage to include all cases in which the speech cost of a regulation was high enough to make it efficient to check the regulation against First Amendment standards. It would define protection to include all cases where the benefits of protecting speech exceeded the costs.

left to right along the continuum, that ratio evens out and then reverses itself, with the costs of expressive conduct exceeding the benefits of protection. Changes in the ratio reflect a complex sociology of expressive behavior,[43] but the general point is clear enough.

Balancing has its own host of familiar problems, of course. It is to some degree subjective and can seem arbitrary. We never have real data on social effects, so there is a serious risk that "balancing" will be just a fancy word for the grinding of a judge's own ideological axe. It is very difficult to advise clients on how balancing will turn out, which makes planning difficult, may deter desirable conduct, and so on.[44] For some, balancing raises essentially aesthetic objections. It just does not look like law. It is a messy equation, or a multiple-equilibrium game which, in its seeming randomness and messiness, is obscure or anti-intellectual at best.

I concede all this. Ergo what? Balancing is the only approach on the table that explains implicit free speech analysis, which is to say it is the only approach that explains when a case is a free speech case. If I am right to say that it is a valid test of any theory of speech to require that it explain implicit free speech analysis, and a valid test of any doctrine that it be able to implement such analysis, then, of the doctrinal tools examined thus far, balancing is the only game in town. That in turn means that what the proxy doctrines approximate is some form of balancing.

III

Professor BeVier's contribution to this symposium analyzes Justice Breyer's approach to free speech issues. Part of her argument takes Justice Breyer to task for endorsing a view in which the First Amendment grants the state power to manage public debate, particularly through campaign finance legislation, rather than limiting such power. Subject to a qualification I will discuss in a moment, I think Professor BeVier is right to do so. For a host of reasons, the First Amendment works far better as a restriction on government power than as a source of government power. The notion of governmental speech man-

43. For a good discussion of factors that drive such changes, see Post, *supra* note 30.

44. For a catalogue of caveats on this subject, see RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 362–64 (2003).

agement is closer to the nightmare the First Amendment is supposed to prevent than the dream it is supposed to fulfill.[45]

Professor BeVier also criticizes Justice Breyer for disregarding existing free speech doctrines in favor of balancing. She reads his *Bartnicki* concurrence as favoring "a series of highly idiosyncratic determinations about the nature and weight of the statute's speech-restricting and speech-enhancing effects"[46] and chides him for not taking into account the risk that the opinion itself would deter future private communications by public figures, thus exacting what she sees as a cost in candor in conversations among public officials.[47]

I believe the *logic* of Justice Breyer's approach is actually quite sound. Consider the *Bartnicki* concurrence. It is true that Justice Breyer does not calculate the expected cost of foregone cellular communication by public officials (though since the probability that any given conversation would be intercepted is low, that cost would probably be low too). It is also true, however, that Professor BeVier does not attempt to calculate the aggregate cost to the public of having the media forgo such reports. A view of the case in which publication is condemned because the laws in question do not run afoul of the content or purpose proxies would ignore this cost. The fact of the matter is that neither side of this debate could measure with any precision the costs and benefits that might justify a decision one way or the other.[48]

One could, of course, argue that this is just the point. Balancing is such a mysterious and unconstrained method of decision that it should be avoided, at least in free speech cases. That view is understandable, but it fares poorly in light of the fact that there is no way to avoid free speech balancing. Judicial balancing at the level of implicit speech analysis is what determines whether judges will apply the proxy doctrines in

45. In particular, I second her skeptical account of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). *See* BeVier, *supra* note 1, at 1285–87.

46. BeVier, *supra* note 1, at 1307.

47. *Id.* at 1307–08.

48. In principle, this disagreement could be resolved by determining whether public figures reacted to *Bartnicki* by making fewer sensitive calls on cell phones. I am not aware of such a study. I doubt that *Bartnicki* had much of a marginal effect, however. A sophisticated public figure would know that cell phone communications can be intercepted. Such users would be highly averse to that risk even if media entities faced penalties for republication. The incentives to use secure means of communication are high without regard to *Bartnicki*.

the first place. Those doctrines implement a particular form of weighted balancing; they are not an alternative to it. That is why core free speech doctrines, such as the actual malice rule of *New York Times Co. v. Sullivan*[49] and the incitement test of *Brandenburg v. Ohio*[50] do not flatly prohibit all speech restrictions but instead demand that a law restricting speech clear a higher hurdle than is placed before a law that does not restrict speech.

From this perspective, Justice Breyer's preference for balancing looks more like a simple preference for direct analysis over proxy analysis than the introduction of a form of reasoning wholly foreign to free speech doctrine. To borrow from antitrust law, he prefers rule of reason analysis to quasi–per se rules that, as a practical matter, condemn certain laws.[51] One can certainly disagree with this choice, but the disagreement cannot rest on the ground that per se rules avoid balancing. As with antitrust, they (at least should) distill and embody the collective judicial experience with certain types of problems. They are the product of balancing over time.

One can certainly disagree with the choice to forgo per se rules in favor of rule of reason analysis. I believe there is less room for disagreement than Professor BeVier suggests, however. Professor BeVier's critique of Justice Breyer suggests that balancing is likely to rest on "highly idiosyncratic" decisions resulting in "subjective determination[s]" of costs and benefits.[52] There is a degree of subjectivity in all judicial analysis, of course, but I see no reason to believe that explicit balancing would lead to unconstrained subjectivity.

In a somewhat Burkean manner, any sort of judicial free speech balancing will be bounded by conventions and understandings regarding speech acts that people, including judges, generally share. Those conventions and understandings are what allow us all to make our way through a world filled with (and largely constituted by) a huge array of speech acts, so their existence cannot be in doubt. Nor can one doubt their relevance and usefulness for judging; such conventions and

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49. 376 U.S. 254 (1964).

50. 395 U.S. 444 (1969) (per curiam).

51. Rules such as the actual malice and incitement doctrines are only quasi-per se rules because, as just noted, they do not state absolute prohibitions on regulations. To avoid ugliness of exposition, however, I will refer to them as per se rules.

52. BeVier, *supra* note 1, at 1307, 1315–16.

practices are in fact the primary sources on which implicit free speech analysis relies. The failure of any proxy or bright-line rule to explain implicit free speech analysis confirms this conclusion. These facts are sufficient to refute the charge that balancing leads to rampant subjectivity or randomness, and to at least limit the force of Professor BeVier's more measured charge, even if they rest on mushy sociology rather than deductive logic.

Professor BeVier concludes her article by framing the issue between rule of reason and per se analysis not as an opposition but as a question of comparative advantage: Does per se analysis produce better decisions than rule of reason analysis?[53] I think this is exactly the right question. Because per se analysis uses tools that attempt to approximate the social costs and benefits of speech regulations, the best way to conduct this analysis is to ask which approach yields fewer errors, with an error defined as a holding that produces a net social loss. The problem, of course, is that not everyone agrees on what counts as a gain or loss, how one might try to measure gains and losses however one defines them, who is best situated to conduct the analysis, how precedent will affect the balance in the future, and on every other aspect of this mythical equation.

This analysis supports two conclusions. One is that Justice Breyer's overt balancing brings into the open the type of reasoning that defines the domain of free speech analysis, and which therefore defines what goes on inside that domain. Most of what can be said against his balancing can also be said of the process of deciding whether to use proxies such as content or motive analysis. It certainly applies to the process of deciding when Freeman's expression shades from protected activity into ambiguous activity, and then into activity of no free speech concern. In each case a certain level of precision is possible, but

53. Professor BeVier actually asks whether such rules restrain judicial arbitrariness to a greater degree than rule of reason analysis. *Id.* at 1316. As noted in the text, I do not think truly arbitrary analysis is likely under any rule, which is why I restate the problem in the text. Professor BeVier's statement of the question can be analogized to the debate in antitrust law regarding whether false positive findings (findings of liability for conduct that is actually efficient) are worse for society than false negative findings (findings exculpating inefficient conduct). On this debate, compare Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) (arguing that false positive findings are more harmful), with Oliver E. Williamson, *Delimiting Antitrust*, 76 GEO. L.J. 271, 281 (1987) (arguing that Judge Easterbrook's case actually has not been proved).

the final analysis is surprisingly hard to justify without recourse to conventions and understandings rather than proxies or bright-line rules.

The second conclusion is that Holmes's aphorism that the life of the law has been experience, not logic, applies to any effort at free speech balancing. Though it is true that balancing is consistent with the manner in which judges have distilled the proxy doctrines from experience, explicit balancing needs to be handled with extreme care. Sometimes it can protect speakers in circumstances where there is good reason to believe that the gains from protecting expression justify the costs, even though the facts at hand do not run afoul of any proxy doctrine. *Bartnicki* proves the point. There probably will be few such cases, however,[54] and it is troubling that there is no logical limit to balancing, which is the flip side of the fact that balancing can explain and implement implicit free speech analysis. Logic alone does not compel the conclusion that government is incapable of managing public debate for the public good. A lot of hard-earned experience compels exactly that conclusion, however, and it would do free speech doctrine no good at all for courts to lose sight of that experience. In the final analysis, that is precisely Professor BeVier's point.

IV

Professor Schauer's contribution to this symposium asks whether it is wise for current doctrine to "focus on the form of the [expressive] behavior and not on the identity of the actors."[55] He believes doctrine should pay attention to the identity of speakers, because some institutions "serve functions that the First Amendment deems especially important" or "disproportionately reflect the concerns and limits of the First Amendment."[56] Media firms such as newspapers are the main example of the sort of institution Professor Schauer has in mind, though he also mentions universities, elections, libraries, and scientific research as possible candidates for institutional treatment.[57]

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54. In addition to *Bartnicki*, *Schneider v. State*, 308 U.S. 147 (1939), comes to mind as involving regulations the Court accepted as not aimed at content or motivated by a bad purpose, but which it nevertheless struck down. However, the list of such cases is not long.

55. Schauer, *supra* note 1, at 1261.

56. *Id.* at 1273–74 & n.87.

57. *Id.* at 1274–76.

Professor Schauer is certainly right to say that some institutions affect free speech interests more than others. I believe this fact provides only weak support for his recommendation, however. I want to suggest both that judges do pay attention to institutions when engaging in free speech analysis, though the doctrine does not, and that little would be gained by placing greater emphasis on institutions than they currently receive. Net losses would be slightly more likely than net gains.

Institutions play an important role in implicit free speech analysis. When a case involves an institution a judge recognizes as being particularly likely to advance free speech interests, the judge is particularly likely to place the case closer to the left end of our continuum than to the right. Judges understand that movies about price fixing are speech because they understand that movies advance free speech interests significantly and are not an efficient means for fixing prices. Their understanding is tacit, not explicit, and rests on changeable but reasonably stable social conventions rather than bright-line rules, but it is certainly there. As Professor Robert Post suggested some years ago,[58] this sort of implicit analysis explains why judges are tempted to treat media firms as especially important speakers, though the cases provide at best equivocal support for such treatment as a doctrinal matter.[59]

Institutions are important to implicit analysis for the reasons Professor Schauer identifies. Translating his point slightly, the probability that a case implicates free speech interests is not constant. Part of the variance is explained by whether certain types of institutions are involved in the case. The chances are higher for a newspaper than for an auto shop. The same goes for the magnitude of any threat. Because some (but not all) free speech interests correlate positively with certain institutions, judges can use those institutions as an efficient proxy for cases in which regulations pose a threat to free speech interests.

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58. Post, *supra* note 30, at 677–78.

59. *Compare* Bartnicki v. Vopper, 532 U.S. 514, 525 n.8 (2001) (noting that the Court did not analyze differently speech claims of media and nonmedia defendants), *and* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) (stating that the inherent value of speech does not depend upon the identity or corporate form of the speaker), *with* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 778 (1986) (specifying media defendants when stating that libel plaintiffs must prove that allegedly defamatory statements were false).

Institutions are weaker proxies than either the content distinction or the motive inquiry, however. Institutions have many aspects, only some of which implicate free speech interests. Content-neutral regulations of a newspaper's office and computer leases, employment contracts, lines of credit, and virtually every other regulation of the paper's inputs are perfectly permissible. (That the Court occasionally comes close to departing from this rule, as when it came within a vote of denying a source a cause of action to remedy a newspaper's broken promise of confidentiality,[60] reinforces the conclusion that institutions receive de facto special treatment.) The same point is true of universities, which act as employers, landlords, tenants, and in similar capacities in which they do not and should receive special First Amendment treatment. Even as to such core functions as instruction, university employees such as professors practice content and viewpoint discrimination when doing so advances their educational mission.[61]

For this reason, most laws regulating even core expressive institutions present few if any free speech problems, which is not the case with content-based laws or those motivated by a desire to suppress speech, many of which do pose such risks. It is not clear what is to be gained by giving expressive institutions special treatment in formal free speech analysis, in addition to the de facto special treatment they receive in identifying cases in which free speech interests are in play. In other words, institutions seem better cast as a proxy for First Amendment coverage than as a proxy for First Amendment protection.

Professor Schauer believes that taking institutions into account might strengthen some doctrines that might currently be watered down by the Court's refusal to distinguish among speakers.[62] He argues, for example, that a Court "unwilling to distinguish among the lone pamphleteer, the blogger, and the full-time reporter for the *New York Times*" is more likely to deny speech protections to everyone than to grant them to everyone.[63] I am not sure whether this is true, but I will assume it

60. Cohen v. Cowles Media Co., 501 U.S. 663 (1991).

61. For a general discussion of speech regulation on campus, see David F. McGowan & Ragesh K. Tangri, *A Libertarian Critique of University Restrictions of Offensive Speech*, 79 CAL. L. REV. 825 (1991).

62. Schauer, *supra* note 1, at 1270–72. This argument with regard to the identity of speakers parallels a point Professor Schauer has made with regard to subject matter. *Id.* at 1272 n.84.

63. *Id.* at 1272.

is. What distinguishes the *Times* reporter from the blogger? Both serve First Amendment functions, which is Professor Schauer's point, but the *Times* is more familiar to judges than the blogger, so judges presumably would feel more comfortable if they could protect the *Times* without committing to protect the blogger, and this greater degree of comfort would make them more likely to protect the *Times*.

I see four objections to this line of thinking. First, with respect to news media, and perhaps universities (though not elections), it is on a collision course with economics. As technology lowers transaction costs, there is less need to form firms to economize on them,[64] which implies that more distributed forms of information production, such as blogging, will be increasingly common and increasingly important.[65]

To the extent Professor Schauer's desire to lean more heavily on established institutions runs counter to the implications of transaction cost theory, which I think it does, it will be unstable from the start and grow more unstable over time. Regardless whether this is true, the transaction cost savings that distinguish firms from bloggers are not directly relevant to free speech interests, so they do not justify differential treatment. In terms of function, bloggers have shown they can nail down stories of national importance as quickly and accurately as traditional media firms. In some cases, they do better.[66]

Second, this line of thinking pushes doctrine farther away from what it is trying to protect—the free speech functions the press serves—by placing greater weight on the proxy than on what it is a proxy for. That is what rules and proxies do, I suppose, but in this case the gains are ambiguous unless it can be shown that institutions deserve the marginal increment in protection that might be gained by constricting the scope of that protection. The case for that increment has to be made on its

64. Firms are best explained as devices for economizing on transaction costs. *See* R.H. COASE, *The Nature of the Firm*, 4 ECONOMICA (1937), *reprinted in* THE FIRM, THE MARKET, AND THE LAW 33, 40 (1988).

65. Media firms will not disappear, of course, but the proportion of First Amendment activity located in those firms will fall as lower costs induce nontraditional speakers to distribute widely content of at least arguably general public interest.

66. *E.g.*, DICK THORNBURGH & LOUIS D. BOCCARDI, REPORT OF THE INDEPENDENT REVIEW PANEL ON THE SEPTEMBER 8, 2004 *60 MINUTES WEDNESDAY* SEGMENT "FOR THE RECORD" CONCERNING PRESIDENT BUSH'S AIR NATIONAL GUARD SERVICE (Jan. 5, 2005), *available at* http://www.rathergate.com/CBS_report.pdf.

own terms. If it cannot be made, then protection should not be extended and the loss of protection is no loss. If it can be made, then one must ask why judges should refrain from extending it to bloggers and whoever else serves the relevant function.

This consideration brings up the third point, regarding trade-offs. There is a difference between judicial efficiency and judicial complacency. If the function of reporting deserves a reporter's privilege, for example, then all else being equal, judges *should* be extending the privilege to the extent of the function. A system in which judges cannot favor familiar institutions unless they follow their reasoning where it leads give judges an incentive to do so, and thus increases the degree of fit between doctrine and function. Conversely, allowing judges to play favorites with institutions they know well might diminish their incentive to explore closely the social functions of new institutions or practices, such as blogging. They might reason that a blogger who wants a reporter's privilege could either join a newspaper or start one, and therefore feel comfortable restricting the privilege to a subset of its logical domain.

Finally, for just this reason a rule structure that gives substantive benefits to certain institutions could skew the production of information in inefficient ways. First Amendment doctrines often lower the costs of speech activity.[67] Institutional preferences would give a speaker whose activity fell within the logic of a cost-lowering rule, but who was not part of a favored institution that served as a proxy for applying the rule, an incentive to incur costs just to obtain the benefit of the rule. A blogger might incorporate, print hard copies, or form a joint venture with an established paper, for example. Costs incurred in such efforts would distort production of information relative to a world in which cost-saving rules were applied to conduct that justified the rules; the notion that the law should force parties to incur costs just to save them is at least not obviously right.

Such costs might be tolerable if they were offset by larger gains in judicial efficiency. Because judges do take institutions into account in implicit free speech analysis, and because institutions are a relatively poor proxy for determining protection rather than coverage, I doubt that judicial efficiency gains would justify the costs of making it easier for judges to decide

67. *See* Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1329 (1992).

cases. Protection is probably better determined by direct sociological analysis of expressive practices and conventions than by more limited analysis of institutions as institutions.[68] Professor Schauer's call for greater sensitivity to the institutional sociology of speech makes a great deal of sense with respect to implicit analysis, where such considerations do in fact play an important role, but I am skeptical that any gains from doctrinal preferences for institutions would justify the costs.

CONCLUSION

Both Professor BeVier and Professor Schauer are rightly concerned with the practical task of free speech analysis. Their contributions show how important proxies are to free speech analysis. Indeed, I believe the gap between doctrinal proxies such as content and motive analysis and the interests they approximate is responsible for the common feeling that the results in First Amendment cases are generally sensible even though the doctrine itself is a mess.[69] Proxies are imperfect.

The gap between free speech doctrine and interests, and the feeling of unease it generates, is tolerable so long as we do not mistake the proxies for the interests. We can avoid that mistake by remembering that proxies are distilled experience, and that experience does not stop when proxy rules are stated. Such rules are justified only by their utility, and they must continue to prove that utility every day. That demand is what makes the approximation of speech tolerable as well as inevitable.

68. *Cf.* Schauer, *supra* note 1, at 1273 n.87.

69. That gap is at least partly responsible for Professor Post's feeling that the doctrine is detached from the values it expresses. *See* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1253–55 (1995).