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Abstract

In his three decades on the Supreme Court, Justice John Paul Stevens has developed a distinctive approach to the First Amendment. During his tenure, the Court's majority has crystallized a theory of First Amendment speech protection as an abstract, negative protection of individual autonomy against government interference. In contrast, Justice Stevens' pragmatic judicial methodology has caused him to place greater emphasis on free speech decisions' practical consequences, particularly their effectiveness in making democratic debate inclusive as to both participants and subject matter in order to ensure robust, well-informed public discourse. Alone on the present Court, Justice Stevens manifests a deep concern with disparities in social power that can exclude economically and politically marginal speakers from public debate. This article refers to Justice Stevens's combination in free speech cases of a pragmatic methodology and a populist ethic as pragmatic populism.

The article first examines the distinctions between the majority's and Justice Stevens's approaches to free speech cases. It then examines the distinctive ways in which Justice Stevens' pragmatic populism advances expressive freedom: his singular commitment to protecting means of expression especially important to underfinanced speakers; his efforts to ensure that the political process includes many and varied perspectives; and his nuanced analysis of commercial advertising and of speech that assaults marginalized groups and persons.

THE PRAGMATIC POPULISM OF JUSTICE STEVENS'S FREE SPEECH JURISPRUDENCE

*Gregory P. Magarian**

If any single word can describe Justice John Paul Stevens's approach to judicial decision making, the word is "pragmatic." Justice Stevens's opinions routinely display the hallmarks of pragmatic reasoning. Methodologically, he resists abstract, "one size fits all" legal rules and standards, pays close attention to the facts and contexts of particular cases, and favors limited resolutions that address only the questions squarely presented. "[H]is emphasis is on how rules work"[1] rather than on enforcing formal abstractions or advancing normative ends. One thorough study of Justice Stevens's early Supreme Court years ascribes to his work "the consistency of pragmatic method and concern for clarity, rather than of conservatism or liberalism."[2] The Justice's pragmatism has achieved special prominence in his opinions about expressive freedom under the First Amendment. His free speech opinions aim "to distinguish communications of greater and lesser value and to weigh each against the public interest in constraint, which varies according to context."[3] Pragmatism has led Justice Stevens to nuanced, practically grounded reasoning in an area that can lend itself all too easily to reflexive, normatively charged outcomes.

Justice Stevens takes a distinctive approach to the First Amendment, an approach this Article calls "pragmatic populism." During the Justice's three decades on the Supreme Court, majority decisions have crystallized a theory of First Amendment speech protection as an abstract, negative protection of individual autonomy against government interference. Justice Stevens's pragmatism, in contrast, causes him to place greater emphasis on free speech decisions' practical consequences for collective decision

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1. Robert Judd Sickels, John Paul Stevens and the Constitution: The Search for Balance 154 (1988).

2. *Id.* at 1; *see also* Norman Dorsen, *John Paul Stevens*, 1992/1993 Ann. Surv. Am. L., at xxvi ("He is a pragmatist—cautious, realistic, practical."). Using different terms, Frederick Schauer associates Justice Stevens with "the Legal Realist claim that the power of the particular always or usually dominates the power of the general." Frederick Schauer, *Justice Stevens and the Size of Constitutional Decisions*, 27 Rutgers L.J. 543, 544 (1996). William Popkin casts Justice Stevens as "a common law lawyer adapting his views to modern conditions." William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 Duke L.J. 1087, 1090.

3. Sickels, *supra* note 1, at 65.

making about matters of public concern. In his view, the First Amendment must operate to make democratic discourse inclusive as to both participants and subject matter in order to ensure robust, well-informed public debate. This substantively pragmatic approach to free speech controversies, filtered through a pragmatic judicial methodology, has led Justice Stevens to a populist[4] focus on disparities in social power that can exclude economically and politically marginal speakers from public debate.

This Article demonstrates how the combination of methodological and substantive pragmatism that Justice Stevens brings to First Amendment cases has produced his distinctively populist free speech jurisprudence. Part I draws an outline of Justice Stevens's pragmatic populism. The first section describes the Burger and Rehnquist Courts' dominant, autonomy-focused conception of expressive freedom as a negative right against government regulation. The Court's negative First Amendment jurisprudence attaches no special importance to the goal of fostering robust democratic discourse, and it therefore pays no special attention to the differences in economic and political power that characterize many free speech controversies. The second section of Part I explains how Justice Stevens's pragmatism, both in his substantive focus on the consequences of free speech decisions and in his practically grounded approach to judicial decision making, forms the basis for his populist challenge to the Court's negative First Amendment doctrine.

Part II examines the distinctive ways in which Justice Stevens's pragmatic populism advances expressive freedom. The first section demonstrates Justice Stevens's singular commitment to protecting means of expression especially important to underfinanced speakers. The second section focuses on his efforts to ensure that the political process includes many and varied perspectives, fostering broad-based debate about critical public issues. Part III addresses recent academic critics of Justice Stevens who charge that his First Amendment opinions reflect a politically liberal bias. Refuting those charges, the discussion explains how Justice Stevens's nuanced responses to First Amendment claims in two important areas—speech that assaults marginalized groups and persons, and commercial advertising—serve his pragmatic concern with the social power dynamics that affect public debate.

4. By populist, I mean a legal doctrine that employs the First Amendment to prevent entrenched distributions of economic and political power from limiting the inclusion of speakers and ideas in public discourse, in order to foster vigorous debate in the service of a healthy democratic system. I take this sense of populism—emphasizing broad-based participation in public decision making, openness to dissent, and an overarching aspiration toward participatory democracy—from Lawrence Goodwyn, The Populist Moment: A Short History of the Agrarian Revolt in America (1978). For an interesting discussion of populism's implications for expressive freedom, see J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 Yale L.J. 1935 (1995) (book review).

I. THE CONTEXT AND UNDERPINNINGS OF JUSTICE STEVENS'S PRAGMATIC POPULIST APPROACH TO EXPRESSIVE FREEDOM

A. *The Negative First Amendment of the Burger and Rehnquist Courts*

The development of First Amendment free speech doctrine in the early twentieth century focused on government efforts to silence speakers of modest means who held highly unpopular political views.[5] The famous opinions of Justices Oliver Wendell Holmes and Louis Brandeis in those early cases developed the position that expressive freedom serves the need in a democratic society for open, robust discussion of controversial issues, in part by protecting marginal voices that bring distinctive perspectives to public discourse. As Justice Brandeis wrote in *Whitney v. California*,[6] "Those who won our independence believed . . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . that the greatest menace to freedom is an inert people; [and] that public discussion is a political duty."[7] During the Warren Court era, a majority of the Justices embraced the Holmes-Brandeis approach to expressive freedom as constitutional doctrine. In numerous decisions, of which the most eloquent and influential were *New York Times Co. v. Sullivan*[8] and *Cohen v. California*,[9] the Court aggressively vindicated economically and politically marginal speakers' important role in expanding debates about matters of societal concern. Justice John Harlan, the great skeptic of the Warren Court's rights revolution, declared in *Cohen*, "The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion . . . in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity."[10]

Over the past thirty-five years, however, the Court has dramatically shifted its focus in free speech cases. In a trend that gradually developed under Chief Justice Warren Burger and took firm hold under Chief Justice William Rehnquist, the Court has treated expressive freedom not as a means to the end of inclusive democratic discourse but rather as a negative right that shields individual autonomy against government interference.[11]

5. *See* Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).

6. 274 U.S. at 375.

7. *Id.* (Brandeis, J., concurring).

8. 376 U.S. 254 (1964) (overturning a libel verdict against civil rights leaders based on the need to prevent potential liability from undermining political debate).

9. 403 U.S. 15 (1971) (overturning the conviction of Vietnam War opponent for displaying the slogan "Fuck the Draft" on his jacket while walking through a courthouse).

10. *Id.* at 24.

11. I have called this predominant notion of free speech the "private rights theory" of expressive freedom. The description in this paragraph draws upon an earlier, more systematic discussion in Gregory P. Magarian, *Regulating Political Parties Under a "Public*

Because this negative approach to expressive freedom views individual autonomy as the object of constitutional free speech protection, it entails no special attention to the instrumental benefits of free speech for democratic discourse. Speech that advances public debate has no greater constitutional value than any other category of speech.[12] As long as individuals—prominently including the often-powerful institutions that the law generally treats as rights-bearing individuals[13]—can use the expressive capacity they possess to say what they want to say, the First Amendment is doing its job. The Court, in following this negative approach to expressive freedom, allows little room for government efforts to regulate in ways that redistribute or expand expressive opportunities. The Court does, however, balance free speech claims against countervailing government regulatory interests, such as the interests in preserving public order and governmental efficiency.

Viewing all free speech claims as formally equal while restricting government efforts to distribute expressive opportunities has an important practical consequence: The First Amendment does much more for rich and politically powerful speakers than for poor and politically marginal speakers.[14] Economic or political power allows those who possess it to create expressive opportunities, while negative free speech doctrine presumptively bars government from regulating those opportunities.[15] In contrast, economically and politically marginal people and groups, who often lack the capacity to create expressive opportunities, frequently need affirmative government aid. Government efforts to create expressive opportunities for marginal speakers may require redistribution of more powerful speakers' expressive opportunities. The Court's negative approach to the First Amendment privileges autonomously generated expressive opportunities and disdains government regulation of speech. A few familiar examples illustrate how the Court has invoked the First Amendment to assist the expressive activity of socially powerful speakers while ignoring or compromising the expressive interests of both underfinanced speakers and political dissenters.

Rights" First Amendment, 44 Wm. & Mary L. Rev. 1939, 1947-59 (2003) (describing characteristics of private rights theory).

12. For further discussion of the Court's recent failures to show any special concern for political expression, see Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 Minn. L. Rev. 247, 251-52 (2005).

13. *See* Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394 (1886) (introducing the concept of the "corporate person" to U.S. law).

14. Numerous commentators, at various stages during the Burger and Rehnquist years, have critiqued the Court's reinforcement of existing distributions of expressive opportunities. Important examples include J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 Duke L.J. 375; Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L. Rev. 1405 (1986); Cass R. Sunstein, *Free Speech Now*, 59 U. Chi. L. Rev. 255 (1992).

15. *See* Magarian, *supra* note 11, at 1957-58 (describing the Court's distaste for government regulation to redistribute expressive opportunities).

The negative First Amendment reinforces economic disparities in the distribution of expressive opportunities. In *Miami Herald Publishing Co. v. Tornillo*,[16] the Court curbed the effect of the Warren Court's decision in *Red Lion Broadcasting Co. v. FCC*,[17] which had authorized substantial government regulation of communications media in order to expand access to the means of public debate. *Miami Herald* buttressed the Court's decision in *Columbia Broadcasting System, Inc. v. Democratic National Committee*,[18] which dismissed the possibility that the First Amendment might mandate access to expressive opportunities. In *Hudgens v. NLRB*,[19] the Court overruled another Warren Court decision, *Amalgamated Food Employees Union Local 540 v. Logan Valley Plaza, Inc.*,[20] to hold that private shopping centers did not have to tolerate expressive activity. A series of decisions in the 1980s limited the public's access to government property useful for expression, either by imposing a cramped definition of what constituted a "public forum"[21] or by credulously defining the class of "time, place, or manner" regulations that justify limitations on speech in nonpublic forums.[22] Taken together, these decisions make private property a predicate for participation in public discourse. One who owns property may freely use it to speak or to prevent others from speaking. The fact that ownership may depend on governmentally conferred advantages—permission to build a shopping center, or granting of a broadcast license—does not justify redistributive regulation. At the same time, the government has no affirmative obligation to make its own expressive resources available to underfinanced speakers.

The negative approach to expressive freedom, applied to free speech disputes about the electoral process, also reinforces existing allocations of political power. The most important and prominent example is *Buckley v. Valeo*,[23] in which the Court, equating money with speech,[24] blocked governmental efforts to limit expenditures in political campaigns. The *Buckley* Court upheld restrictions on campaign contributions as a means of preventing actual or perceived corruption of government.[25] In contrast, the

16. 418 U.S. 241 (1974) (striking down a state statute that required news outlets to provide rights of reply to subjects of published criticisms).

17. 395 U.S. 367 (1969).

18. 412 U.S. 94 (1973).

19. 424 U.S. 507 (1976).

20. 391 U.S. 308 (1968).

21. *See, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788 (1985) (denying political groups access to a federal employee charity drive).

22. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (upholding the expulsion of advocates for homeless from a park adjacent to the White House).

23. 424 U.S. 1 (1976) (per curiam). For further discussion of campaign finance regulation, see *infra* notes 167-83 and accompanying text.

24. *See Buckley*, 424 U.S. at 16. ("[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." (citations omitted)).

25. *See id.* at 24-29.

Court rejected as a justification for regulating campaign expenditures the government's asserted "interest in equalizing the relative ability of individuals and groups to influence the outcome of elections."[26] Ignoring the danger that wealthy and powerful interests might consolidate control over the political process, the Court dismissed this "equalization rationale" as a patently impermissible attempt to "restrict the speech of some elements of our society in order to enhance the relative voice of others," which the Court termed "wholly foreign to the First Amendment."[27] The *Buckley* Court, at first glance, appears to have transcended a negative approach to expressive freedom by recognizing the special importance of political speech and the necessity of robust, unlimited political debate.[28] The majority, however, treated campaign spending as an undifferentiated category of autonomous speech that government regulation could only impede. The Court showed no regard for the substantive discrepancies in economic and political power that affect political campaigns. Rejection of the "equalization rationale" has allowed holders of political power to entrench their dominance in our political system.

The Court's negative approach to expressive freedom, in both its economic and political dimensions, undergirds many other central developments in First Amendment doctrine over the past three decades: unprecedented judicial attention to financial remuneration for speech as an object of First Amendment concern;[29] a decisive preference for First Amendment autonomy claims of the major political parties over First Amendment access claims of minor political parties;[30] and the creation and increasing prominence of First Amendment protection for commercial advertising.[31] All of these doctrines reflect the Court's increasingly rigid commitment to a First Amendment that protects individuals' expressive autonomy from government regulation without regard to the social position of the speaker, the nature and purpose of the speech, or the consequences of the Court's decision for democratic discourse.

26. *Id.* at 48.

27. *Id.* at 48-49.

28. *See id.* at 14-15 (asserting the central importance of electoral speech under the First Amendment).

29. *See, e.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991). For further discussion of restrictions on financial remuneration for speech, see *infra* notes 95-112 and accompanying text.

30. *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) (rejecting a First Amendment challenge to the state's ban on minor parties' use of fusion candidacies). For further discussion of minor parties' First Amendment claims, see *infra* notes 133-59 and accompanying text.

31. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976) (striking down a state ban on price advertising by pharmacists and announcing the doctrine of First Amendment protection for commercial speech). For further discussion of commercial speech, see *infra* notes 243-68 and accompanying text.

B. *Justice Stevens: From Pragmatism to Populism*

Justice Stevens joined the Supreme Court in 1976, just as the majority was beginning to solidify its negative view of expressive freedom. Justice Stevens immediately displayed a very different approach to the First Amendment. Rejecting the theory that the Free Speech Clause merely affords individual autonomy a negative protection against government regulation, he approaches free speech controversies with acute attention to their underlying facts and likely practical consequences. Rather than understanding the First Amendment as an indifferent shield against government action, he understands it as a positive means toward a robust, inclusive democratic discourse. Thus, instead of deciding First Amendment cases in a manner that elevates the strong and denigrates the weak, he has articulated a First Amendment jurisprudence that strives to prevent established differences in political and economic power from perpetuating themselves by permeating democratic discourse.

1. Substantive and Methodological First Amendment Pragmatism

Justice Stevens's free speech jurisprudence provides a counterpoint to the Court's disregard for the differences in economic and political power integral to many free speech controversies. From the Justice's earliest years on the Court, two pragmatic premises—one substantive and the other methodological—have driven his analysis in First Amendment cases.

First, because pragmatism looks toward the actual consequences of decisions, Justice Stevens's pragmatism dictates the substantive view that a central purpose of constitutional speech protection is to allow our self-governing polity to engage in informed debate about issues of public concern.[32] Although he takes care not to limit the First Amendment to explicitly political expression, explaining that the Framers "used words that identify and express a faith in principles of tolerance and resistance to authority that bespeak a broader concept of liberty,"[33] his consistent emphasis on resistance to official orthodoxy[34] reflects a purposive, socially

32. John Dewey's account of free speech provides an interesting antecedent to Justice Stevens's approach. Dewey, while recognizing the importance of speech for personal flourishing, emphasized the value of expressive freedom for a democratic system, stating that "whatever interferes with the free circulation of knowledge and opinions is adverse to the efficient working of democratic institutions." John Dewey & James H. Tufts, Ethics 399 (rev. ed. 1932). He also identified "those who are already entrenched in power, economic and political" as the source of danger to freedom. *Id.* at 401-02. Accordingly, he recognized the special importance for democracy of political dissenters: "[G]enuine democracy will always secure to every individual a maximum of liberty of expression and will establish the conditions which will enable the minority by use of communication and persuasion to become a majority." *Id.* at 404.

33. John Paul Stevens, *The Freedom of Speech*, 102 Yale L.J. 1293, 1297 (1993).

34. "[W]hen Justice Jackson referred to the 'freedom to be intellectually and spiritually diverse' in the second flag salute case, he was construing the central meaning of the entire [First] Amendment." *Id.* (quoting West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943)).

grounded conception of expressive freedom. In an early dissent from a decision upholding a county jail's restriction on press access, Justice Stevens declares, "The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment."[35] He ties this informational value directly to democratic debate, explaining that if government were allowed to operate beyond public view, "the process of self-governance contemplated by the Framers would be stripped of its substance."[36]

Justice Stevens's focus on the consequences of free speech decisions, rather than their formal adherence to some libertarian abstraction, leads him to accept some government regulations that affect speech. Thus, in an opinion that acknowledges "[t]he essential concern embodied in the First Amendment is that government not impose its viewpoint on the public or select the topics on which public debate is permissible,"[37] he can also state, "Just as the regulation of an economic market may either enhance or curtail the free exchange of goods and services, so may regulation of the communications market sometimes facilitate and sometimes inhibit the exchange of information, ideas, and impressions."[38] Justice Stevens's recent majority opinion in *Bartnicki v. Vopper*,[39] which reversed a tort verdict against media outlets that acquired and published accounts of a private discussion between principal figures in a labor dispute, reiterates this special First Amendment solicitude for informed public debate. The opinion holds that "privacy concerns give way when balanced against the interest in publishing matters of public importance,"[40] calling that sacrifice of privacy "[o]ne of the costs associated with participation in public affairs."[41] This substantively pragmatic view of expressive freedom as a means to democratic ends contrasts sharply with the Court's tendency to view the Speech Clause as an abstract guarantee of expressive autonomy—a

35. Houchins v. KQED, Inc., 438 U.S. 1, 30 (1978) (Stevens, J., dissenting); *see also* Anderson v. Celebrezze, 460 U.S. 780, 794 (1983) (referring to robust debate on public issues as "the primary value[] protected by the First Amendment").

36. *Houchins*, 438 U.S. at 32 (footnote omitted).

37. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 553 (1981) (Stevens, J., dissenting in part).

38. *Id.* at 548 (footnote omitted). I believe Justice Stevens's substantive First Amendment pragmatism provides the most useful framework for understanding his statements, more prominent in his early years on the Court, about disparities in value among different kinds of speech. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 743 (1978) (plurality opinion) (arguing that "patently offensive references to excretory and sexual organs and activities. . . . surely lie at the periphery of First Amendment concern" (footnote and citations omitted)). His more recent acknowledgements of the value of some sexually explicit speech may reflect a pragmatic reassessment. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 877 (1997) ("The general, undefined terms 'indecent' and 'patently offensive' cover large amounts of nonpornographic material with serious educational or other value." (footnote omitted)).

39. 532 U.S. 514 (2001).

40. *Id.* at 534.

41. *Id.*; *see also* Republican Party of Minn. v. White, 536 U.S. 765, 797 (2002) (Stevens, J., dissenting) (contending that the First Amendment should not protect certain statements in state judicial elections because of the consequences for judicial integrity).

conspicuously scarce tendency in Justice Stevens's First Amendment opinions.

Justice Stevens's First Amendment jurisprudence also reflects a second pragmatic dimension. Because pragmatism directs attention to the particular circumstances in which a legal problem arises, the Justice resolves cases through a pragmatic methodology, which focuses on the practical implications of judicial decisions. He stresses the specific facts of each case and avoids announcing rules that might govern future situations in which distinct circumstances could require different legal approaches.[42] Thus, in the First Amendment context, he advocates "supplementing, if not replacing, the black-letter rule with a sensitivity to fact and context that allows for advancement of the principles underlying the protection of free speech."[43] He contends that accumulated observation provides a better guide through the free speech thicket than generic categories of expression and regulation. "My experience on the bench," he writes, "has convinced me that these categories must be used with caution and viewed with skepticism."[44] Justice Stevens criticizes black-letter approaches to free speech disputes as "often produc[ing] unworkable and unsatisfactory results."[45] Most significantly, he resists the Court's categorical presumption that content-based speech regulations violate expressive freedom.[46] Justice Stevens's *Bartnicki* opinion once again provides a recent illustration of his pragmatism at work. In assessing the constitutionality of publishing an illegally intercepted conversation, Justice Stevens takes pains to emphasize that the issue arises only "as applied to the specific facts of these cases"[47] and to limit the legal issue to the peculiar pattern of unlawful interception followed by lawful transmission.[48]

These two varieties of First Amendment pragmatism—substantive and methodological—prompt Justice Stevens to ask questions in free speech cases that his colleagues do not consider. Where does the speaker at issue

42. *See* Sickels, *supra* note 1, at 5 ("It is a constant theme in Stevens's judicial opinions: the best decisions are likely to be made by trial judges equipped with well-crafted rules . . . and the discretion to fit them intelligently to the facts of each case and to the wider needs of the legal system."); Popkin, *supra* note 2, at 1096 (imputing to Justice Stevens the belief that "courts should deliberate carefully about the facts of the case, avoiding both overly broad generalizations and summary dispositions"); Schauer, *supra* note 2, at 545-52 (discussing Justice Stevens's tendency to limit the scope of First Amendment decisions).

43. Stevens, *supra* note 33, at 1305.

44. *Id.* at 1302; *see also* Sickels, *supra* note 1, at 43 (describing Justice Stevens's First Amendment opinions as reflecting a "consistent preference for fact-gathering and individualizing, though not to the point of doing without explicit judge-made categories"); Popkin, *supra* note 2, at 1106 (noting that "Justice Stevens' commitment to case-by-case deliberation makes him suspicious of judicial generalities").

45. Stevens, *supra* note 33, at 1307.

46. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 277-78 (1981) (Stevens, J., concurring in the judgment) (contending that educational administrators properly may consider content of student activities in deciding how to allocate meeting space).

47. Bartnicki v. Vopper, 532 U.S. 514, 524 (2001).

48. *See id.* at 529 (citing "this Court's repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment").

stand in relation to economically and socially powerful institutions? Does the speech restriction at issue, by its nature, pose a disproportionate threat to the expressive interests of economically and/or politically marginal speakers? If the Court lets the restriction stand, will it narrow the scope of public debate? These questions have caused Justice Stevens to invoke the First Amendment most vigorously against economically and politically skewed speech restrictions to ensure that public debate will benefit from the perspectives of economically and politically marginal speakers. Through his pragmatic commitments, Justice Stevens has arrived at a populist approach to expressive freedom.

2. Pragmatism Before Populism: *City Council v. Taxpayers for Vincent*

One can distinguish Justice Stevens's pragmatic populism from a simple normative preference for certain results in First Amendment cases by recognizing that his substantive and methodological pragmatism did not immediately lead him to a populist emphasis on socially marginal expression. During the Justice's first decade on the Court, he wrote for a 6-3 majority in *City Council v. Taxpayers for Vincent*,[49] rejecting a political candidate's First Amendment challenge to a Los Angeles ordinance that prevented him from posting campaign signs on public property. The opinion carries many hallmarks of Justice Stevens's pragmatic First Amendment theory and his pragmatic methodology for analyzing cases. At bottom, however, the opinion places deference to legislative priorities and judgments ahead of any concern about underlying disparities in economic or political power.

Substantively, Justice Stevens begins his First Amendment analysis in *Taxpayers for Vincent* by noting that any effort "to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas"[50] would plainly violate the First Amendment. This framing of the issue echoes Justice Stevens's earlier acknowledgements of dissident speakers' importance for effective public discourse.[51] Methodologically, the opinion begins by dismantling the respondents' efforts to present the case as a facial challenge, a classic pragmatic move to contain the scope of the decision.[52] Balancing the parties' interests, Justice Stevens credits the city's aesthetic interest in "eliminating visual clutter"[53] based on the trial court's finding that Vincent's signs constituted the sort of clutter the city was trying to eliminate.[54] He mentions in a footnote the importance of preserving

49. 466 U.S. 789 (1984).
50. *Id.* at 804.
51. *See supra* notes 35-38 and accompanying text.
52. *See Taxpayers for Vincent*, 466 U.S. at 796-803.
53. *Id.* at 808.
54. *See id*. (discussing the district court's finding of fact).

inexpensive modes of communication[55] but concludes that public speaking or leafleting could provide the respondents with a comparably practical and cost-effective mode of communication.[56] Finally, he rejects the respondents' efforts to resolve the case categorically under the public forum doctrine, noting the incongruity of an argument that utility poles are traditionally open to expressive activity.[57]

Justice Stevens's analysis in *Taxpayers for Vincent*, however, abjures any special concern for the expressive interests of underfinanced speakers or political dissenters. Can Justice Stevens really be correct to assert that the case presents "not even a hint of bias or censorship,"[58] given the fact that the city government acted to suppress an electoral challenge to its own authority? Does public speaking or leafleting really offer these speakers, in this setting, an effective substitute for posting signs? The opinion tells us nothing about the Vincent campaign's financial state or tactical considerations, but presumably the respondents litigated this case all the way to the Supreme Court for a reason. At the level of balancing, does the city's aesthetic interest really withstand the argument that signage on private property undermines the city's goal? Justice Stevens dismisses that argument by reference to the sanctity of property rights,[59] which seems irrelevant to the conflict between expression and aesthetics, and to the potential utility of private property as an alternative space for signs,[60] which seems to beg the question.

Justice William Brennan's dissent in *Taxpayers for Vincent* considers most of the practical concerns that Justice Stevens ignores, particularly stressing the utility of signs for underfunded speakers and questioning the utility of alternative means of expression.[61] Ahead of these practical arguments, however, Justice Brennan principally expresses categorical

55. *See id.* at 812 n.30 (acknowledging the Court's "special solicitude for forms of expression that are much less expensive than feasible alternatives and hence may be important to a large segment of the citizenry" but emphasizing that "this solicitude has practical boundaries").

56. *See id.* at 812.

57. *See id.* at 814.

58. *See id.* at 804.

59. *See id*. at 811 ("The private citizen's interest in controlling the use of his own property justifies the disparate treatment.").

60. *See id.* (asserting that "by not extending the ban to all locations, a significant opportunity to communicate by means of temporary signs is preserved").

61. *See id.* at 818-21 (Brennan, J., dissenting). *Taxpayers for Vincent* did not mark the first time Justice Brennan faulted a Stevens majority opinion for ignoring the economically skewed effects of a speech regulation. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), Justice Stevens sought to minimize the consequences for adults of an Federal Communications Commission ("FCC") restriction on "indecent" broadcasts, as applied to George Carlin's "seven dirty words" monologue, by noting that adults who wished to hear such material "may purchase tapes and records or go to theaters and nightclubs." *Id.* at 750 n.28. Justice William Brennan fired back that such reasoning reflected "a sad insensitivity to the fact that these alternatives involve the expenditure of money, time, and effort that many of those wishing to hear Mr. Carlin's message may not be able to afford." *Id.* at 774 (Brennan, J., dissenting).

mistrust of aesthetic justifications for speech restrictions.[62] Among other concerns, Justice Brennan indicts aesthetic justifications as easy pretexts for substantive biases.[63] Justice Stevens's majority opinion contains no thematic response to Justice Brennan's dissent, but he may have viewed Justice Brennan's position as reflecting a categorical prejudgment about the interests at stake. Moreover, he may conceivably have viewed Justice Brennan's position as reflecting a settled normative preference for particular results in free speech disputes or in broader societal conflicts. Justice Stevens's opinion, whatever the blind spots in its analysis, approaches the case from a practical perspective that acknowledges both the value of expressive freedom and the legitimacy of government regulation.

Pragmatic reasoning depends, above all, on the wisdom of accumulated experience. Although Part II of this Article discusses several emblematic pragmatic populist opinions of Justice Stevens that preceded *Taxpayers for Vincent*, that case demonstrates that Justice Stevens's consistent concern for economic and political inequities in free speech controversies emerged from an evolutionary process rather than a normative reflex. At times prior to *Taxpayers for Vincent*, and with increasing consistency in the years that followed, Justice Stevens has blazed a trail from his substantive and methodological First Amendment pragmatism to a doctrine that vigorously protects the interests of economically and politically marginal speakers.[64] The result is a free speech jurisprudence as attentive as Justice Brennan's to the special importance of protecting marginalized speakers and advancing public debate, but one whose pragmatic roots may have enhanced its persuasive force during the conservative judicial ascendancy that has marked Justice Stevens's tenure on the Court.

II. THE DISTINCTIVE CONTRIBUTION TO EXPRESSIVE FREEDOM OF JUSTICE STEVENS'S PRAGMATIC POPULISM

Justice Stevens's pragmatic populism speaks to questions of expressive freedom with a distinctive voice. In the relatively rare cases over the past three decades where the Court has acknowledged the special importance of preserving expressive opportunities for people and institutions with limited social power, Justice Stevens almost exclusively has written the majority opinions. On the more frequent occasions when the Court has analyzed

62. *See Taxpayers for Vincent*, 466 U.S. at 821-27 (Brennan, J., dissenting).

63. *See id.* at 822 ("The asserted interest in aesthetics may be only a facade for content-based suppression.").

64. In this respect, Justice Stevens has followed similar trajectories in his approaches to expressive freedom and to the problem of affirmative action under the Equal Protection Clause, gradually developing a normative perspective on regulation based on an accretion of information about power dynamics in American society. *Compare* Fullilove v. Klutznick, 448 U.S. 448, 533 (1980) (Stevens, J., dissenting) (criticizing a federal racial set-aside program in the context of "[o]ur historic aversion to titles of nobility"), *with* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting) ("There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.").

First Amendment disputes without regard to salient disparities in social power, or has invoked the First Amendment to expand expressive opportunities for socially powerful interests at the expense of socially weaker interests, Justice Stevens has repeatedly and convincingly criticized the majority's reasoning. The shape and effect of his pragmatic populist free speech jurisprudence emerges in the context of two critical areas of disparate social power: money and politics.

A. *Pragmatic Populism and the Economic Cost of Speech*

In the years following *Taxpayers for Vincent*, a concern with maintaining opportunities for communication without regard to the speaker's means has become one of the central features of Justice Stevens's approach to the First Amendment. That concern follows naturally from Justice Stevens's commitment to open, robust democratic discourse. Democracy requires equal rights of participation in public debate. If economically dominant people and institutions can use their superior economic resources to dominate public debate, then democratic discourse cannot occur.

1. Preserving Inexpensive Means of Communication

Justice Stevens has worked tirelessly to preserve inexpensive media, whether ancient or cutting edge, that are—in words he recently invoked—"essential to the poorly financed causes of little people."[65] His emblematic opinion of this sort came in *City of Ladue v. Gilleo*.[66] In that case, a Missouri town had enacted a ban on most residential signs that had the practical effect of barring political signs. The Court's decision to strike down the ban was unanimous, but Justice Stevens's reasoning in the majority opinion set a distinctive tone. At its core, the decision faults the ordinance for restricting "too much speech."[67] That complaint may seem counterintuitive, given the relatively small place of residential signs in the overall scheme of communication, but Justice Stevens emphasizes two defining characteristics of the medium: its deep roots in social practice[68] and its special value for underfinanced speakers. "Residential signs," he notes, "are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute."[69] Justice Stevens makes a point of distinguishing *Ladue* from *Taxpayers for Vincent* on the ground of

65. Martin v. City of Struthers, 319 U.S. 141, 146 (1943), *quoted in* Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150, 163 (2002).
66. 512 U.S. 43 (1994).
67. *Id.* at 55.
68. *See id.* at 54 (calling the residential sign "a venerable means of communication").
69. *Id.* at 57.

social practice,[70] although not on the ground that residential signs have greater utility than signs on public property for less affluent speakers.[71]

The following term, Justice Stevens handed down another majority opinion that expanded on the distinctive expressive interests of economically marginal speakers. *McIntyre v. Ohio Elections Commission*[72] presented a free speech challenge to an Ohio ban on anonymous political leaflets. Ohio argued that anonymous leaflets corroded political discourse by depriving the public of a critical piece of information: the identity of the person advancing an argument.[73] In the abstract, the argument carries substantial force. But Justice Stevens's majority opinion, placing greater value on the speaker's practical opportunity to participate in political debate,[74] concentrates on the practical extent to which the ban disproportionately affects speakers whose "fear of economic or official retaliation [or] concern about social ostracism"[75] is most likely to deter them from expressing their views. "[A]nonymous pamphleteering," he writes, "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."[76] Ohio's ban, like the ordinance struck down in *Ladue*, also singled out a communicative medium especially useful for modestly funded speakers.[77]

Reno v. ACLU[78] carries Justice Stevens's commitment to preserving inexpensive means of democratic discourse from the town square into

70. *See id.* at 54.

71. Interesting in this regard are Justice Stevens's precise, repeated references in *Ladue* to the burdened class of speakers as "residents" rather than "homeowners." *See id.* at 56 ("[d]isplaying a sign from one's own residence"); *id.* at 57 ("a person who puts up a sign at her residence"). The opinion manifestly acknowledges the interests of nonowner residents when it contrasts the incentives "individual residents" have "to keep their own property values up and to prevent 'visual clutter' in their own yards and neighborhoods" with the incentives of "persons who erect signs on others' land, in others' neighborhoods, or on public property." *Id.* at 58.

72. 514 U.S. 334 (1995).

73. *See id.* at 342 n.5 (acknowledging that mandatory disclosure of the speaker's identity "might provide assistance to critics in evaluating the quality and significance of the writing").

74. Justice Stevens's analysis also makes great use of practical reasoning in discrediting Ohio's justifications for the ban. The opinion effectively portrays the informational value of the speaker's identity as indistinguishable from the value of numerous other pieces of information that a speaker may choose to exclude. *See id.* at 348-49. It also indicts the overbreadth of the ban's deterrent function against fraudulent and libelous speech. *See id.* at 349-53.

75. *Id.* at 341-42.

76. *Id.* at 357.

77. Another decision in the same vein is *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002). Justice Stevens in *Watchtower* wrote for an 8-1 majority in striking down a municipal requirement that door-to-door canvassers register with the town and receive a permit, and his opinion revisits central themes of *Ladue* and *McIntyre*. *See id.* at 163 (emphasizing the importance of door-to-door canvassing as an effective means of communication for underfinanced or socially marginal speakers).

78. 521 U.S. 844 (1997).

cyberspace. The Court's first confrontation with regulation of the Internet produced a landmark decision, striking down crudely conceived provisions of the Federal Communications Decency Act ("CDA") that sought to bar "indecent" speech from cyberspace.[79] Eschewing broad, affirmative declarations of principle, Justice Stevens structures his majority opinion in a characteristically pragmatic manner, explaining in great detail the nature of the Internet and the challenged regulations.[80] Distinguishing the CDA from the Federal Communications Commission ("FCC") restrictions on indecent broadcasting he led the Court in upholding in *FCC v. Pacifica Foundation*,[81] Justice Stevens states, "[T]he Internet can hardly be considered a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds."[82] He emphasizes the practical similarities between this most advanced form of communications technologies and older inexpensive media: "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."[83] He reiterates this analysis in rejecting the government's efforts to save the regulations from overbreadth with an affirmative defense based on credit card verification, noting that "it is not economically feasible for most noncommercial speakers to employ such verification."[84]

The relationship between the low cost of communicating over the Internet and the diversity of voices in public discourse emerges in Justice Stevens's separate opinions in several subsequent cases that considered successor statutes to the CDA. In *Ashcroft v. ACLU (Ashcroft I)*,[85] the Court approved Congress's use in the Child Online Protection Act ("COPA")[86] of "community standards" to define materials restricted as "harmful to minors." Justice Stevens dissented, objecting to this extension of the *Miller v. California*[87] obscenity framework into cyberspace on the ground that, under a community standards approach, "the community that wishes to live without certain material rids not only itself, but the entire Internet, of the offending speech."[88] In *Ashcroft II*, which affirmed a preliminary injunction against COPA because less restrictive means existed

79. *See* 47 U.S.C. § 223(a)(1), (d) (1994 & Supp. II).
80. *See Reno*, 521 U.S. at 849-61.
81. 438 U.S. 726 (1978).
82. *Reno*, 521 U.S. at 870.
83. *Id.*
84. *See id.* at 881; *see also id.* at 879-80 (rejecting the government's argument that the regulations' less restrictive effect on the World Wide Web ameliorated their more restrictive effects on other online media on grounds that transferring restricted speech to the Web "would cost up to $10,000 if the speaker's interests were not accommodated by an existing Web site").
85. 535 U.S. 564 (2002).
86. 47 U.S.C. § 231 (1994 & Supp. V).
87. 413 U.S. 15 (1973).
88. *Ashcroft I*, 535 U.S. at 612 (Stevens, J., dissenting).

to protect children from online indecency,[89] Justice Stevens's concurrence emphasizes the breadth of the statute's restrictive effect.[90] Another recent Internet censorship decision upheld the Children's Internet Protection Act ("CIPA") requirement that public libraries that receive federal funds use filtering software to prevent patrons from accessing material deemed harmful to minors.[91] Justice Stevens once again dissented, reiterating his opposition to meddling in such a massive, easily accessible communicative medium[92] and emphasizing another feature of the case that resonates with his pragmatic solicitude for inexpensive sources of information: public libraries' special role in educating the populace.[93]

In all the decisions Justice Stevens has written for the Court that struck down restrictions on inexpensive media, he has hardly stood alone; a solid majority signed his opinion in each of them. But no other member of the Court since Justice Brennan's retirement has approached Justice Stevens's leadership in focusing his colleagues on the equalizing value of inexpensive communications media. Moreover, Justice Stevens has distinguished himself in this area even from Justice Brennan. His opinions in the medium ban cases may lack the righteous passion that characterized, for example, Justice Brennan's dissent in *Taxpayers for Vincent*.[94] However, Justice Stevens's practical assessments of the economic stakes in these cases may have cemented his majorities. He has repeatedly established that marginal speakers' participation improves social debate and that bans on media distinctly useful for those speakers impose commensurate practical costs.

2. Curbing Financial Disincentives to Expression

The Supreme Court over the past two decades has paid unprecedented attention to restrictions on financial remuneration for speech. *Arkansas Writers' Project, Inc. v. Ragland*[95] and *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*[96] place strict limits on government's ability to impose content-based financial restrictions on expression. These decisions accurately recognize that restrictions on financial rewards for expressive activity may damage the "marketplace of

89. *See* Ashcroft v. ACLU (*Ashcroft II*), 542 U.S. 656 (2004).

90. *See id.* at 706-07 (Stevens, J., concurring).

91. *See* United States v. Am. Library Ass'n, 539 U.S. 194 (2003).

92. *See id.* at 222 (Stevens, J., dissenting) ("The effect of [the Children's Internet Protection Act-mandated] overblocking is the functional equivalent of a host of individual decisions excluding hundreds of thousands of individual constitutionally protected messages from Internet terminals located in public libraries throughout the Nation.").

93. *See id.* at 225-26.

94. *See supra* notes 61-63 and accompanying text.

95. 481 U.S. 221 (1987) (striking down a state sales tax that applied to some, but not all, magazines).

96. 502 U.S. 105 (1991) (striking down a state law that required publishers of criminals' accounts of their criminal activities to place profits in an escrow fund to benefit crime victims).

ideas."[97] They make no attempt, however, to assess the actual effects of financial restrictions on particular speakers and, consequently, on public debate. In *Simon & Schuster*, for example, the Court struck down New York's "Son of Sam" law, which required any publisher of a work that described the author's criminal activities to place profits from the work in escrow for five years to provide compensation for victims of the author's crimes.[98] The Court's analysis addressed neither the economic status of convicted criminals nor the particular value the public might derive from frank accounts of criminal activity. Instead it focused, as *Ragland* had,[99] on content-based discrimination in the abstract, decrying the state for "singl[ing] out speech on a particular subject for a financial burden that it places on no other speech and no other income."[100]

Justice Stevens joined the Court's opinion in *Simon & Schuster*, but his own majority opinions on financial disincentives focus much more directly on the economic consequences of barring financial remuneration for speech in particular contexts. In *Meyer v. Grant*,[101] he wrote for a unanimous Court in striking down Colorado's ban on paying circulators of initiative petitions. Rather than abstractly characterizing the ban as a content-based encroachment on negative autonomy rights, Justice Stevens's analysis focuses on two concrete consequences of the ban for the particular speakers it actually burdened. First, the ban stifled specifically political expression, both by muffling initiative advocates' voices during petition drives and by increasing the difficulty of putting an initiative to a statewide vote.[102] "Appellees seek by petition to achieve political change in Colorado," Justice Stevens emphasizes.[103] "[T]heir right freely to engage in discussions concerning the need for that change is guarded by the First Amendment."[104] Second, the ban "restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication."[105] Thus, as in the inexpensive media cases, Justice Stevens in *Meyer* focuses not on individuals' generic entitlement to any given means of communication, but rather on modestly funded

97. *See, e.g.*, *id.* (noting that "the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace").

98. *See id.* at 108-11 (describing the Son of Sam law).

99. *See Ragland*, 481 U.S. at 229 (emphasizing the presence of content-based discrimination as a "particularly repugnant" aspect of the challenged tax). Justice Stevens wrote a brief concurrence in *Ragland* for the sole purpose of noting his characteristic refusal to reject content-based restrictions on speech categorically. *See id.* at 234-35 (Stevens, J., concurring in part and concurring in the judgment).

100. *Simon & Schuster*, 502 U.S. at 123.

101. 486 U.S. 414 (1988).

102. *See id.* at 422-23.

103. *Id.* at 421.

104. *Id.*

105. *Id.* at 424. One might fairly criticize Justice Stevens from a pragmatic standpoint for failing to recognize the advantages wealthy and powerful interests often enjoy in referendum and initiative campaigns. *See generally* Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 Tex. L. Rev. 1845 (1999).

advocates' practical need for access to a particular means of communication.

In *United States v. National Treasury Employees Union (NTEU)*,[106] the issue of financial disincentives dovetailed with the doctrine of *Pickering v. Board of Education*,[107] which protects public employees from adverse job actions based on their speech about matters of public concern.[108] *NTEU* struck down a federal statute that barred federal employees from receiving honoraria for their speaking and writing activities. Justice Stevens, as in the Internet cases, emphasizes the scope of the ban's effect on speech, assailing "Congress'[s] wholesale deterrent to a broad category of expression by a massive number of potential speakers,"[109] and links "the public's right to read and hear"[110] with the interests of potentially discouraged speakers. The opinion's most distinctive feature is its recognition of the practical importance of honoraria to the ban's challengers—the class of federal employees below pay grade GS-16. High government officials, Justice Stevens observes, receive invitations to speak and write because of their stature. "In contrast, invitations to rank-and-file employees usually depend only on the market value of their messages."[111] High officials can benefit from speaking engagements through the availability of travel reimbursement. "In contrast, the denial of compensation for lower paid, nonpolicymaking employees will inevitably diminish their expressive output."[112] Once again, Justice Stevens articulates a populist take on a speech problem that the Court otherwise treats as a simple government encroachment on negative rights.

B. *Pragmatic Populism and Participation in Electoral Politics*

If a crucial function of speech is to inform the self-governing public,[113] then a system of free expression cannot allow existing political power arrangements to dictate the terms of political debate. Such a dynamic skews the debate toward the status quo and prevents consideration and adoption of new ideas. Politically entrenched entities seek to maintain their primacy just as tenaciously as economically entrenched entities. The First Amendment, in Justice Stevens's conception, serves as an important counterweight to both varieties of power. In cases that deal with the expressive rights of individual political dissenters, the systemic role of

106. 513 U.S. 454 (1995).
107. 391 U.S. 563 (1968).
108. *See id.* at 568.
109. *NTEU*, 513 U.S. at 467 (footnote omitted).
110. *Id.* at 470.
111. *Id.* at 469.
112. *Id.* at 469-70. The honoraria ban disproportionately burdened lower-paid employees even though, as Justice Stevens noted, the government had defended the ban based on the need to curb improprieties by members of Congress, and the only instances of arguably improper honoraria the government had shown involved higher-paid employees. *See id.* at 472 & n.18, 473 & n.19.
113. *See supra* notes 32-41 and accompanying text.

minor political parties, and the role of money in perpetuating political dominance, the Justice has developed a distinctive populist response to the majority's negative conception of political speech. In each of these contexts, he emphasizes the pragmatic concern with facilitating broad-based participation in the electoral process in order to ensure the public's access to a broad range of political ideas.[114]

1. Protecting the Rights of Political Dissenters

Early in his time on the Court, Justice Stevens authored a defense of political dissenters' expressive freedom whose force the Court has never matched in the ensuing years. In *NAACP v. Claiborne Hardware Co.*,[115] the Mississippi Supreme Court pronounced the organizers of a civil rights boycott jointly and severally liable for several acts of violent and coercive discipline that occurred in the course of the boycott.[116] Justice Stevens's opinion reversing that judgment presumes political advocacy's centrality to constitutional expressive freedom, quoting Justice Wiley Rutledge: "'The First Amendment is a charter for government, not for an institution of learning.'"[117] He portrays the boycott organizers' actions as quintessential political speech and emphasizes the special importance of political expression aimed at altering existing social hierarchies. "Through speech, assembly, and petition," he explains, "petitioners sought to change a social order that had consistently treated them as second-class citizens."[118] Such advocacy for change is too important for states to undermine with broad brush theories of liability. "A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of a relatively few violent acts."[119] *Claiborne Hardware* leaves a deep impression because it represents perhaps the most consequential setting in which the Court has required society to tolerate some degree of ancillary violence in the name of dynamic political dissent.

114. This same concern animates many of Justice Stevens's opinions in the voting rights area—leading him, for example, to take the problem of partisan gerrymandering more seriously than most on the Court, *see* Vieth v. Jubelirer, 541 U.S. 267, 319 (2004) (Stevens, J., dissenting) (contending that political gerrymandering claims are justiciable), and to recognize the incongruity of invoking the Equal Protection Clause to eviscerate remedies in the district-drawing process for racial minority groups that have historically suffered deliberate discrimination in that process, see Shaw v. Reno, 509 U.S. 630, 676-77 (1993) (Stevens, J., dissenting) (challenging the constitutional basis for racial gerrymandering claim based on white voters' objections to the state's effort to vindicate African-Americans' voting rights).

115. 458 U.S. 886 (1982).

116. *See id.* at 903-06 (describing violent aspects of the boycott).

117. *Id.* at 910 (quoting Thomas v. Collins, 323 U.S. 516, 537 (1945)); *see also id.* at 913 ("This Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" (quoting Carey v. Brown, 447 U.S. 455, 467 (1980))).

118. *Claiborne Hardware*, 458 U.S. at 912.

119. *Id.* at 933.

Justice Stevens has also strengthened constitutional protection for political dissent by shielding government employees from an even more threatening financial disincentive to expression than the federal honorarium ban struck down in the *NTEU* case:[120] political patronage systems, which condition public employment decisions on allegiance to the party in power. The Court first invoked the First Amendment against patronage in *Elrod v. Burns*,[121] imposing strict scrutiny on public employers who threatened to fire public employees whose job functions did not require political loyalty in order to secure the employees' political subservience. Justice Stevens wrote the majority opinion in a follow-up case, *Branti v. Finkel*,[122] which extended the *Elrod* rule to a situation in which the employer planned to fire employees without any initial threat.[123]

A decade later, Justice Stevens gave a forceful account of the harms patronage imposes on democracy. In *Rutan v. Republican Party of Illinois*,[124] a bare 5-4 majority extended the *Elrod* rule to hiring and promotion decisions. Justice Stevens's concurrence uses the misdeeds of his own state political party of record as a vehicle for explaining the importance of the First Amendment for confronting entrenched political power. Responding to Justice Antonin Scalia's biting dissent,[125] Justice Stevens makes two key points emblematic of his pragmatic populism. First, reflecting the importance of speakers' economic status and interest in evaluating burdens on expression, he exposes the logical flaws in Justice Scalia's assertion that patronage exacts little practical cost on employees.[126] Justice Stevens identifies "the harsh reality of party discipline"[127] as "[t]he iron fist inside the velvet glove of Justice Scalia's 'inducements' and 'influences.'"[128] Second, Justice Stevens dismantles Justice Scalia's argument that a patronage system's tendency to secure the dominant political party's control of government provides a net benefit to democracy.[129] As if unlocking a time capsule, Justice Stevens unearths a 1973 Seventh Circuit decision he authored, *Illinois State Employees Union v. Lewis*,[130] which discredits patronage from the standpoint of a substantively pragmatic account of expressive freedom:[131]

> [I]t is appropriate not merely to consider the rights of a particular janitor who may have been offered a bribe from the public treasury to obtain his political surrender, but also the impact on the body politic as a whole

120. *See supra* notes 105-11 and accompanying text.
121. 427 U.S. 347 (1976).
122. 445 U.S. 507 (1980).
123. *See id.* at 516-17.
124. 497 U.S. 62 (1990).
125. *See id.* at 92 (Scalia, J., dissenting).
126. *See id.* at 109-10.
127. *Id.* at 89 (Stevens, J., concurring).
128. *Id.* at 89 n.6 (quoting *id.* at 109-10 (Scalia, J. dissenting)).
129. *See id.* at 106-08 (Scalia, J., dissenting).
130. 473 F.2d 561 (1972), *cert. denied*, 410 U.S. 928 (1973).
131. *See supra* notes 32-41 (explaining Justice Stevens's substantive free speech pragmatism).

> when the free political choice of millions of public servants is inhibited or manipulated by the selective award of public benefits. While the patronage system is defended in the name of democratic tradition, its paternalistic impact on the political process is actually at war with the deeper traditions of democracy embodied in the First Amendment.[132]

Justice Stevens's *Rutan* concurrence emphasizes that the democratic system, and not just the individual employees forced to choose between conscience and livelihood, pays the cost of political patronage.

2. Protecting Electoral Rights of Political Outliers

One of the Rehnquist Court's most emphatic but least noted contributions to First Amendment doctrine has been its denigration of minor political parties' free speech interests. The Court in *Timmons v. Twin Cities Area New Party*[133] upheld a state ban on "fusion candidacies," a strategically popular device by which a minor party grants its nomination and ballot line to the willing nominee of one of the major parties. In *Clingman v. Beaver*,[134] the Court rejected a minor party's challenge to a state prohibition against parties' choosing to open their primary elections to registered members of other parties. Methodologically, these decisions minimize the minor parties' First Amendment interests through an analysis that almost comically ignores political reality and the power differential between major and minor political parties. According to the Court, minor parties need not invite major party voters to participate into their primaries because those voters can always desert the major parties and join the minor party.[135] Likewise, fusion candidacies offer no benefit to minor parties because minor parties can simply persuade major party candidates to switch party affiliations.[136] Substantively, the Court explicitly extols preservation of the two-party system to justify encroachments on minor parties' expressive freedom. As the Chief Justice wrote in *Timmons*, "the States' interest [in political stability] permits them . . . to decide that political stability is best served through a healthy two-party system."[137] In other words, denying a political challenger the opportunity to spread his or her ideas does not violate the First Amendment as long as the denial helps preserve the exclusive platform occupied by the dominant parties.[138]

132. *Lewis*, 473 F.2d at 576, *quoted in Rutan*, 497 U.S. at 91-92 (Stevens, J., concurring).
133. 520 U.S. 351 (1997).
134. 125 S. Ct. 2029 (2005).
135. *See id.* at 2035-36 (plurality opinion) ("Nothing in [the challenged provision] prevents members of other parties from switching their registration to the [Libertarian Party] or to Independent status.").
136. *See Timmons*, 520 U.S. at 360 (explaining that "[the New Party] is free to try to convince [an incumbent Democratic state representative] to be the New Party's, not the [Democratic Party's], candidate").
137. *Id.* at 367.
138. For a detailed examination of recent First Amendment doctrine as it relates to minor political parties, see Magarian, *supra* note 11.

During the Burger years, Justice Stevens authored the majority opinion in *Anderson v. Celebrezze*,[139] probably the high watermark of judicial efforts to safeguard minor parties' role in the electoral process. *Anderson* struck down, by a tenuous 5-4 majority, Ohio's requirement that independent candidates for the presidency file nominating petitions seventy-five days before the statutory date for party primary elections.[140] Justice Stevens's First Amendment analysis focuses not on the immediate burden Ohio imposed on independent candidates but rather on voters' interest in considering a broad range of electoral choices. "By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group," he declares, "such restrictions threaten to reduce diversity and competition in the marketplace of ideas."[141] In explaining the Ohio law's constitutional defects, Justice Stevens sounds many themes central to advocacy of minor parties' electoral rights. He recognizes courts' special responsibility to safeguard minor party voters' expressive and associational rights "because the interests of minor parties and independent candidates are not well represented in state legislatures."[142] He extols minor parties' value throughout U.S. history as "fertile sources of new ideas and new programs," many of which "have in time made their way into the political mainstream."[143] He stresses the value of decisional flexibility in the electoral process;[144] conversely, in a move that *Timmons* will directly contradict, he discredits Ohio's asserted interest in "political stability" as an interest in "protecting the Republican and Democratic Parties from external competition" and makes clear that such an interest "cannot justify the virtual exclusion of other political aspirants from the political arena."[145]

As the Court in the Rehnquist years has grown hostile toward minor parties' free speech claims, Justice Stevens has donned the mantle of minor parties' consistent defender. First, he acknowledges the obvious fact, invisible through the Court's formalist goggles, that the two major parties control almost all government in the United States and therefore possess the motive and the means to stifle competition from minor parties.[146] Accordingly, he recognizes that the state restrictions challenged in *Timmons*

139. 460 U.S. 780 (1983).

140. *See id.* at 782-83 (explaining Ohio's regulatory scheme). Although the statute challenged in *Anderson* specifically dealt with the mechanics of independent candidacies, this discussion uses the generic phrase "minor parties" to encompass independent candidacies as well as candidacies backed by organized political parties other than the Democrats and Republicans.

141. *Id.* at 794.

142. *Id.* at 793 n.16.

143. *Id.* at 794.

144. "In election campaigns, particularly those which are national in scope, the candidates and the issues simply do not remain static over time." *Id.* at 790.

145. *Id.* at 802.

146. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 378 (1997) (Stevens, J., dissenting); *see also* Clingman v. Beaver, 125 S. Ct. 2029, 2047-48 (2005) (Stevens, J., dissenting).

and *Clingman*, contrary to the Court's assurances, present serious threats to minor parties' electoral activities.[147] Second, Justice Stevens repudiates the idea that the established political power structure has any constitutionally salient prerogative to preserve itself at the expense of challengers' right to advance their positions. Consistent with his view of expressive freedom as an essential guarantor of informed and robust democratic debate, he departs from the Court in recognizing "the virtues of the minor party challenge to entrenched viewpoints"[148] and the importance of "voters with viewpoints not adequately represented by the platforms of the two major parties."[149] Undermining minor parties' expressive freedom, as he first wrote in *Anderson*, damages the political process: "[I]t is a central theme of our jurisprudence," he reiterates in *Timmons*, "that the entire electorate . . . will benefit from robust competition in ideas and governmental policies . . . ."[150] Accordingly, he would let minor parties avail themselves of techniques such as fusion candidacies and open primaries.

In *Arkansas Educational Television Commission v. Forbes*,[151] the Court upheld a public broadcaster's standardless decision to exclude an independent candidate from a televised debate, perhaps the most significant forum a campaign can offer, based on little more than the broadcaster's assurance that the candidate's viewpoint had not caused the exclusion.[152] Echoing its willingness in *Timmons* to trade the expressive opportunities of political dissidents for the expressive security of the politically entrenched,[153] the Court warned that any standard that might expand a debate to more than two candidates could lead broadcasters to abandon debates altogether.[154] Justice Stevens, dissenting again, emphasizes the station's governmental status[155] and assails the Court's refusal to demand even the most rudimentary procedural requirements in a governmental authority's decision to disadvantage an electoral challenger.[156] He finds the absence of decisional standards especially troubling in light of the station's conspicuous rejection of the only independent candidate to request a place in the debates[157] and the broadcaster's reliance on the independent

147. *See Clingman*, 125 S. Ct. at 2048-49 (discussing the serious burden a semi-closed primary imposes on both voters and minor parties); *Timmons*, 520 U.S. at 371-74 (discussing the serious burden a fusion ban imposes on minor parties).

148. *Timmons*, 520 U.S. at 380.

149. *Id.* at 381.

150. *Id.* at 382; *see also Clingman*, 125 S. Ct. at 2054 ("Decisions that give undue deference to the interest in preserving the two-party system . . . enhance the likelihood that so-called 'safe districts' will play an increasingly predominant role in the electoral process.").

151. 523 U.S. 666 (1998).

152. *See id.* at 682-83 (upholding the broadcaster's exclusion of a candidate as a viewpoint-neutral regulation in a nonpublic forum).

153. *See supra* notes 137-38 and accompanying text.

154. *See Forbes*, 523 U.S. at 680-82.

155. *See id.* at 686-89 (Stevens, J., dissenting).

156. *See id.* at 690-95 (criticizing the arbitrary character of a broadcaster's decision to exclude an independent candidate).

157. *See id.* at 692 n.14.

candidate's modest financial support—a factor Justice Stevens suggests could have cut in favor of giving the candidate a forum.[158]

Justice Stevens's solicitude for political outliers extends beyond the specific context of minor party candidacies to embrace the interests of voters to whom electoral structures deny a meaningful voice in electoral decisions. In *California Democratic Party v. Jones*,[159] the Court struck down a provision of California's constitution that mandated "blanket" primary elections, which allowed voters to select a candidate of any party for each office on the ballot. Justice Scalia's majority opinion applied a quintessential negative rights analysis to the case, holding that the blanket primary represented the state government's effort to undermine political parties' "right not to associate" with nonmembers.[160] In sharp contrast, Justice Stevens's dissent portrays the blanket primary as a means toward "progressive inclusion of the entire electorate in the process of selecting their public officials."[161] He emphasizes the interests of voters who do not belong to the dominant party in "safe seat" districts to participate meaningfully in what, as a practical matter, is often the decisive stage of the electoral process.[162] In a signature rhetorical reversal, he exposes the majority's shallow First Amendment foundation: "When a State acts not to limit democratic participation but to expand the ability of individuals to participate in the democratic process, it is acting not as a foe of the First Amendment but as a friend and ally."[163]

Justice Stevens does not depart from the majority in these cases out of some political allegiance with minor parties or electoral outliers. To the

158. *See id.* at 692. Justice Stevens's dissent in *Forbes*, along with his dissent in *United States v. American Library Association*, 539 U.S. 194, 220 (2003), *see supra* notes 91-93 and accompanying text, also illustrates—by omission—another aspect of his pragmatic First Amendment jurisprudence. In both cases, the Court uses public forum analysis to help justify decisions to uphold restrictive government actions. *See Am. Library Ass'n*, 539 U.S. at 205-09 (plurality opinion) (rejecting public forum analysis in the context of libraries' content decisions as insufficiently restrictive of individual rights); *Forbes*, 523 U.S. at 676-82 (determining that a candidate debate on a public broadcasting station is a nonpublic forum). Justice Stevens's pragmatic methodology disdains rigid legal categories. *See supra* notes 42-48 and accompanying text. Accordingly, his dissents in these cases completely forego public forum analysis in favor of evaluating the particular facts of the cases in light of the constitutional interests the challenged government actions affect.

159. 530 U.S. 567 (2000).

160. *Id.* at 574.

161. *Id.* at 598-99 (Stevens, J., dissenting).

162. *See id.* at 600-01 (discussing the interests behind California voters' adoption of a blanket primary).

163. *Id.* at 595-96. Outside the electoral arena, Justice Stevens has shown a similar concern for social power differentials in the context of media access to government information. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 582-84 (1980) (Stevens, J., concurring), even as he praises the Court's recognition of a media access right to criminal proceedings, he notes the incongruity of recognizing that right in a case where "we are protecting the interests of the most powerful voices in the community," *id.* at 583, and not in an earlier case about media access to a jail, which "involved the plight of a segment of society least able to protect itself." *Id.* (citing Houchins v. KQED, Inc., 438 U.S. 1 (1978)).

contrary, he expresses great admiration for the two-party system,[164] and he recognizes states' substantial latitude to regulate electoral processes by imposing on minor parties such legal disadvantages as single-member districts with winner-take-all voting.[165] What he opposes in these cases are efforts by entrenched political powers, such as the major political parties, to sustain their dominance through the specific mechanism of muffling dissidents' contributions to political debate. He defends the rights of minor political parties and disaffected voters to participate in the electoral process because he believes, based on his best understanding of American democracy, that outliers' advocacy and energy contribute substantially to the health of our political system.[166] He invokes the First Amendment as a purposive vehicle toward vital, inclusive political discourse.

3. Allowing Campaign Finance Regulation in Order to Advance Democracy

Until the past decade, Justice Stevens maintained a relatively low profile in the Court's ongoing battles over attempts to regulate the use of money in political campaigns. However, in a brief dissent in *Colorado Republican Federal Campaign Committee v. FEC*,[167] he staked out a bold position:

> I believe the Government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns. . . . It is quite wrong to assume that the net effect of limits on contributions and expenditures—which tend to protect equal access to the political arena . . .—will be adverse to the interest in informed debate protected by the First Amendment.[168]

As discussed above, the Court in *Buckley v. Valeo*[169] emphatically rejected just such an equalization rationale for campaign finance regulation—a rejection that exemplifies the Court's negative free speech jurisprudence.[170] Four years after Justice Stevens extolled equalization in *Colorado Republican*, his concurring opinion in *Nixon v. Shrink Missouri*

164. *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 381 (1997) (Stevens, J., dissenting) ("The strength of the two-party system—and of each of its major components—is the product of the power of the ideas, the traditions, the candidates, and the voters that constitute the two parties.").

165. *See id.* at 379-80.

166. Justice Stevens's view of minor parties' First Amendment rights is distinctive enough that only Justice Ruth Bader Ginsburg fully joined his dissents from *Timmons* and *Clingman*. Justice David Souter joined both dissents in part, but he conspicuously declined to join the sections in which Justice Stevens criticized the majority for allowing states to act in defense of the two-party system. *See id.* at 382-84 (Souter, J., dissenting) (suggesting that the state could argue persuasively that the stability of the two-party system justifies curbs on minor parties).

167. 518 U.S. 604 (1996).

168. *Id.* at 649-50 (Stevens, J., dissenting).

169. 424 U.S. 1 (1976) (per curiam).

170. *See supra* notes 23-28 and accompanying text.

Government PAC[171] took aim at another key piece of the *Buckley* reasoning by declaring that "[m]oney is property; it is not speech."[172] He explains,

> Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results.[173]

Justice Stevens's brief but emphatic statements in these two cases stress the importance of equal participation in politics for public debate and, accordingly, for democracy itself.

Justice Stevens's campaign finance populism did not linger at the margins for long. In 2003, he and Justice Sandra Day O'Connor coauthored the lead opinion in *McConnell v. FEC*,[174] which upheld key elements of the Bipartisan Campaign Reform Act of 2002—the most sweeping new federal campaign finance regulations since the provisions that gave rise to *Buckley*. The coauthorship of the lead opinion complicates attribution of the *McConnell* reasoning, but Justice Stevens's statements in *Colorado Republican* and *Nixon* contain the seeds of central elements in *McConnell*. The opinion opens with the most vigorous defense of the need for campaign finance regulation that five Justices have ever signed, emphasizing the danger of allowing concentrations of wealth to dominate the political process.[175] It proceeds to defend the Act's restrictions on the use of "soft money"[176] to assist federal campaigns on the ground that those restrictions "do[] little more than regulate the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders."[177] In considering the government's justifications for the soft money restrictions, the opinion embraces an extremely broad conception of the anticorruption rationale recognized in *Buckley*, encompassing not just quid pro quo corruption but also "the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions."[178]

171. 528 U.S. 377 (2000) (reaffirming the *Buckley* distinction between presumptive constitutional permissibility of contribution limits and impermissibility of expenditure limits).

172. *Id.* at 398 (Stevens, J., concurring).

173. *Id.*

174. 540 U.S. 93 (2003).

175. *See id.* at 115-16.

176. "Soft money" refers to certain contributions collected by state party organizations. For a thorough explanation, see *id.* at 122-26.

177. *Id.* at 153.

178. *Id.* at 154. *See generally id.* at 143-54 (elaborating on the broad conception of a corruption justification for finance regulations).

These elements of *McConnell* retool important aspects of the *Buckley* doctrine[179] along populist lines. *Buckley* dismissed any thought of equalizing influence in the political process as impermissible government favoritism among speakers. *McConnell*, in contrast, centrally justifies campaign finance regulations as checks against political dominance by the wealthy. *Buckley* established a First Amendment right to make independent political expenditures, and the Court's subsequent decision in *First National Bank of Boston v. Bellotti*[180] left no doubt that right extended to corporations. *McConnell*, in contrast, frankly identifies the danger that the wealthy will dominate the political process as a proper, even necessary, factor in evaluating campaign finance regulations.[181] In *Buckley*, the corruption rationale provided a relatively narrow ground for limiting contributions, and the Court squarely rejected the equalization rationale. *McConnell*, in contrast, effectively broadens the corruption rationale to encompass concerns about unequal access to the political process. Justice Scalia is not wrong when he fumes in his separate *McConnell* opinion that the Stevens-O'Connor majority implicitly distinguishes money from speech[182] and explicitly holds corporate campaign speech subject to abridgement.[183] *McConnell* represents the Court's most serious effort in decades to focus its analysis of electoral regulations on a vision of broadly inclusive participatory democracy.

Justice Stevens's allowance for campaign finance regulations in these cases has technically resulted in votes against First Amendment claimants, but the claimants sought a constitutional shield for their political dominance. The Justice's reasoning makes clear that he views the regulations at issue as enhancing rather than limiting democratic political debate. This apparent inversion, informed by a keen awareness of how social power affects expressive opportunities, provides a way of thinking about other areas in which Justice Stevens has voted to reject First Amendment claims.

III. PRAGMATIC POPULISM AND THE LIMITS OF JUSTICE STEVENS'S FIRST AMENDMENT

Justice Stevens's jurisprudence in cases about financial and political inclusiveness marks him as a paladin of First Amendment rights for claimants whose opportunities to participate in public debate hang by the

179. *See* Buckley v. Valeo, 424 U.S. 1 (1976).

180. 435 U.S. 765 (1978).

181. *See McConnell*, 540 U.S. at 114-17 (framing the history of campaign finance regulation in terms of congressional concern about political dominance by the wealthy).

182. *See id.* at 248-55 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).

183. *See id.* at 255-63. As Justice Scalia acknowledges, *see id.* at 257, this aspect of the *McConnell* majority's reasoning has firm roots in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), whose upholding of a state restriction on direct corporate electoral expenditures marks the Court's most important vindication of campaign finance regulations between *Buckley* and *McConnell*.

slenderest of threads. However, two recent academic critics—Robert Nagel[184] and Arthur Hellman[185]—have indicted Justice Stevens for failing to go the same distance in defense of free speech claims associated in varying ways with the political right. Both Nagel and Hellman try to parlay asserted inconsistencies in the Justice's opinions into evidence of politically liberal bias. This part examines Justice Stevens's skeptical responses to two groups of free speech claimants discussed by Nagel and Hellman, respectively: speakers who seek protection for attacks on socially marginal or weak groups or individuals, and commercial advertisers. Rather than bearing a political animus against these claimants, Justice Stevens questions their free speech claims for the same reason he champions the claims of economically and politically marginal speakers. His opinions in these lines of cases fulfill the pragmatic populism of his broader free speech jurisprudence by seeking to maintain an inclusive and robust public debate.

A. *Speech that Tends to Exclude Distinct Groups from Democratic Discourse*

Robert Nagel's attack on Justice Stevens's First Amendment jurisprudence pivots on *Hill v. Colorado.*[186] There the Justice wrote for a 6-3 majority in upholding, against a challenge by pro-life activists, Colorado's prohibition on coming within eight feet of any unwilling listener in a 100-foot radius from any health care facility. While Nagel acknowledges that Justice Stevens's characteristically pragmatic analysis in *Hill* "could be a step toward a more thoughtful and realistic methodology in free speech cases,"[187] he attempts to discredit the analysis by contrasting it with Justice Stevens's assertedly contradictory approaches in several other recent cases. One of Nagel's central counterexamples is *Boy Scouts of America v. Dale*,[188] in which the Justice opposed the Court's invocation of the First Amendment's protection of expressive association to shield the Boy Scouts' policy of excluding gay scoutmasters. Nagel does not, but fairly could, extend his critique to another context, the cross-burning decisions,[189] in which Justice Stevens has expressed far more blunt antipathy toward the claims of political dissidents on the right.[190] Nagel

184. *See* Robert F. Nagel, *Six Opinions by Mr. Justice Stevens: A New Methodology for Constitutional Cases?*, 78 Chi.-Kent L. Rev. 509 (2003).

185. *See* Arthur D. Hellman, *Sex, Drugs, and Democracy: Who's Afraid of Free Speech?*, 41 Brandeis L.J. 417 (2003).

186. 530 U.S. 703 (2000).

187. Nagel, *supra* note 184, at 515.

188. 530 U.S. 640 (2000).

189. *See* Virginia v. Black, 538 U.S. 343 (2003) (approving bans on cross burning intended to intimidate viewers but striking down a particular ban before the Court because of an evidentiary presumption); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (striking down a municipal bias-motivated crime ordinance).

190. Robert F. Nagel may not have extended his accusations of liberal bias to encompass the cross-burning cases because Justice Stevens has treated presumably left-wing and right-wing symbolic arsonists with evenhanded disdain. *See* Texas v. Johnson, 491 U.S. 397, 436 (1989) (Stevens, J., dissenting) (arguing for the constitutionality of a state prohibition on flag

concludes that the Justice's approach to free speech cases is "opportunistic rather than iconoclastic"[191] and even accuses him of "drawing on—and giving voice to—the dark fears and suppressive urges that lie very near the surface of modern political life."[192]

The white supremacists who burn crosses, the Boy Scout leaders who perpetuate a policy of antigay discrimination, and the pro-life protesters who accost patients at abortion clinics can be grouped in the category of politically marginal speakers.[193] To that extent, they all generically resemble the civil rights insurgents[194] and minor political parties[195] whose free speech claims Justice Stevens has strongly supported. That apparent similarity underwrites Nagel's charge that Justice Stevens chooses which speakers to protect under the First Amendment based upon a "parochial if not narrowly ideological" bias.[196] However, even leaving aside the fact that Justice Stevens's positions in the inexpensive media, minor party, and campaign finance decisions produce no politically consistent group of winners or losers, Nagel's polemic ignores the element that Justice Stevens himself identifies as driving his views in the cross-burning, Boy Scout, and abortion protest cases. All of these claimants sought First Amendment cover for assaults on weak or vulnerable people. Justice Stevens objects to that use of the First Amendment for the same reason he invokes the First Amendment in the cases discussed in Part II: He believes the First Amendment serves to include people in democratic discourse, not to facilitate actions that threaten their capacities to participate in it. His pragmatic assessment of the circumstances in each case dictates how he should resolve the case in order to maximize the inclusiveness and vitality of public debate.

In *R.A.V. v. City of St. Paul*,[197] Justice Stevens strongly disputed a 5-4 majority's reasoning in striking down a bias-motivated crime ordinance that St. Paul officials employed to prosecute a white supremacist for burning a cross on an African-American family's lawn. His opinion begins with a statement that perfectly ties his rejection of substantive First Amendment protection for such expressive activity to his pragmatic philosophy:

burning, even as applied to political protests). I address the cross-burning cases in this section because Justice Stevens analyzes them in a manner that resonates strikingly with his opinions in the abortion protest cases and *Dale*.

191. Nagel, *supra* note 184, at 523.

192. *Id.* at 528.

193. My intention in this discussion is not to conflate these very different contingents. I group them together because of how I will contend they relate to Justice Stevens's free speech jurisprudence. They all advance political messages whose viewpoint could be thought to inspire Justice Stevens's antipathy toward their claims; as I will show, however, he disdains all of their claims to the extent they exercise undue power over vulnerable groups or individuals, and not out of any political animus.

194. *See supra* notes 115-19 and accompanying text (discussing NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)).

195. *See supra* notes 139-58 and accompanying text.

196. Nagel, *supra* note 184, at 528.

197. 505 U.S. 377 (1992).

"Conduct that creates special risks or causes special harms may be prohibited by special rules."[198] He uses the case as an occasion for broadly critiquing the Court's categorical prohibition on content-based regulations of speech. "I believe," he insists, "our decisions establish a more complex and subtle analysis, one that considers the content and context of the regulated speech, and the nature and scope of the restriction on speech."[199] In light of that pragmatic approach, Justice Stevens would allow carefully drawn restrictions on intimidating speech that poses an exceptional risk of harm: "Threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot . . . ."[200] He stresses the practical damage that racist speech can cause, chastising the majority for "fundamentally miscomprehend[ing] the role of race, color, creed, religion and gender in contemporary American society."[201] Justice Stevens joins the majority's disposition of the case because he concludes the St. Paul ordinance swept in too much protected speech, but he would not treat "severe trauma" and "riot" as acceptable consequences for public discourse of a First Amendment adjudication.[202]

Justice Stevens made a similar case for denying First Amendment protection to private antipathy toward minority groups in one of the cases for which Nagel criticizes him, *Boy Scouts of America v. Dale*.[203] In *Dale*, a 5-4 decision, the Court invoked the First Amendment's protection of expressive association to block New Jersey from applying an antidiscrimination statute against the Boy Scouts' policy of excluding gay scoutmasters.[204] Nagel claims that Justice Stevens's dissent from this holding ignored the sort of "strong privacy interests"[205] the Justice defends in other contexts. As in the cross-burning cases, however, Justice Stevens's position in *Dale* tracks his consistent unease with using the First Amendment to impose further disadvantages on groups traditionally excluded from democratic discourse. His opinion establishes that the case turns much more on the Boy Scouts' active discrimination against gays than on any concerted effort by the group to express antigay ideas.[206] He characterizes the Scouts' crude exclusionary practice as creating "a constitutionally prescribed symbol of inferiority."[207] Accordingly, he concludes, the state acted properly to stem "atavistic" prejudices that "are

198. *Id.* at 416 (Stevens, J., concurring in the judgment).
199. *Id.* at 428.
200. *Id.* at 416.
201. *Id.* at 433 n.9 (internal quotation and brackets omitted).
202. Justice Stevens reiterates his opposition to application of a categorical First Amendment prohibition against content-based restrictions on cross burning in his brief concurring opinion in *Virginia v. Black*, 538 U.S. 343, 368 (2003).
203. 530 U.S. 640, 663 (2000).
204. *See id.* at 661.
205. Nagel, *supra* note 184, at 525.
206. *See Dale*, 530 U.S. at 678-85.
207. *Id.* at 696 (footnote omitted).

still prevalent and . . . have caused serious and tangible harm to countless members of the class New Jersey seeks to protect."[208]

An assessment of Justice Stevens's majority opinion rejecting pro-life activists' First Amendment claims in *Hill*,[209] the locus of Nagel's attack, benefits from a look at two earlier opinions Justice Stevens wrote in abortion protest cases. In *Frisby v. Schultz*,[210] a 5-4 majority rejected a facial challenge to a municipal prohibition against residential picketing, which the town had adopted in response to a pro-life group's vigorous picketing of an abortion provider's house.[211] Justice Stevens dissented. The Justice, characteristically looking past the dispute between the majority and dissenting Justice Brennan about the proper application of the public forum doctrine to a residential neighborhood,[212] instead finds the regulation overbroad. He agrees the ordinance properly constrained the claimants before the Court because they "remain[ed] in front of [the doctor's] home and repeat[ed] [their message] over and over again simply to harm the doctor and his family."[213] Nonetheless, he advocates applying the "strong medicine"[214] of First Amendment overbreadth doctrine because, in his view, the ordinance completely prevented the picketers from "communicat[ing] their strong opposition to abortion to the doctor."[215] Justice Stevens's *Frisby* dissent creates a template for his future abortion protest votes and opinions: The First Amendment should protect the expression of a political view but should not protect assaults on vulnerable parties.

Madsen v. Women's Health Center, Inc.,[216] upped the ante by presenting a challenge to an injunction that restricted protesters' behavior toward pregnant women who entered health care facilities where they could obtain abortions. The majority split on the challenge, upholding some aspects of the injunction[217] but striking down a provision that required speakers to obtain consent before they could approach and address any person within 300 feet of a clinic.[218] Justice Stevens, likening the protesters' "sidewalk counseling" of patients to labor picketing, states his view that the First Amendment protects both activities.[219] He defends the consent

208. *Id.* at 699, 700.
209. Hill v. Colorado, 530 U.S. 703 (2000).
210. 487 U.S. 474 (1988).
211. *See id.* at 487-88 (announcing the holding).
212. *See id.* at 497 (Stevens, J., dissenting) (questioning the utility of public forum analysis); *see also supra* note 158 (discussing Justice Stevens's pragmatic antipathy toward the public forum doctrine).
213. *Id.* at 498.
214. *Id.* at 499 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).
215. *Id.* at 498.
216. 512 U.S. 753 (1994).
217. *See id.* at 768-71 (upholding a thirty-six-foot "buffer zone" around a clinic entrance); *id.* at 772-73 (upholding restrictions on noisy forms of protest); *id.* at 775-76 (upholding an injunction's application to protesters and those acting "in concert" with them).
218. *See id.* at 773-74.
219. *See id.* at 781 (Stevens, J., concurring in part and dissenting in part).

requirement, however, on the ground that the trial judge found "that the injunction was necessary to protect the clinic's patients and staff from 'uninvited contacts, shadowing and stalking' by petitioners."[220] He emphasizes that such behavior poses a special danger to clinic patients, whom the protesters caused "higher levels of 'anxiety and hypertension' . . . increasing the risks associated with the procedures that the patients seek."[221] This distinction directly anticipates Justice Stevens's majority opinion in *Hill*, which upholds a more limited statutory version of the consent requirement struck down in *Madsen*.[222] Once again Justice Stevens emphasizes the distinctive danger that aggressive confrontation by hostile protesters poses to pregnant women in need of medical care. This precise, practical concern animates every stage of Justice Stevens's *Hill* analysis, from his assessment of the state's regulatory interest[223] to his conclusion that the regulation is content neutral[224] to his vindication of the regulation's prophylactic operation[225] to his rejection of the claimants' overbreadth challenge.[226]

Nagel seizes on language in Justice Stevens's *Hill* opinion, also present in his partial *Madsen* dissent, about the importance of protecting "unwilling audiences" from speech that disturbs them.[227] Nagel assails what he portrays as Justice Stevens's lesser concern for unwilling listeners in the Boy Scouts case; in *Watchtower Bible & Tract Society v. Village of Stratton*,[228] where the Justice wrote for the Court in striking down a municipal registration requirement for door-to-door solicitors;[229] and in *City of Chicago v. Morales*,[230] where he wrote for a plurality in striking

220. *Id.*

221. *Id.* at 781-82.

222. *See* Hill v. Colorado, 530 U.S. 703 (2000) (upholding a statutory prohibition, operative within 100 feet of any health care facility, of approaching within eight feet of any person without that person's consent).

223. *See id.* at 715 (recognizing a state's special interest in "avoidance of potential trauma to patients associated with confrontational protests").

224. *See id.* at 723-24 (explaining that the imperative "to protect those who enter a healthcare facility from the harassment, the nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching that can accompany an unwelcome approach," and not the content of any speaker's message, dictates the scope of the regulation).

225. *See id.* at 729 (stating that "the statute's prophylactic aspect is justified by the great difficulty of protecting, say, a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior").

226. *See id.* at 731 ("What is important is that all persons entering or leaving health care facilities share the interests served by the statute.").

227. Nagel, *supra* note 184, at 513 (casting "the high valuation accorded the interests of the 'unwilling listener'" as "the central element in the Stevens opinion" in *Hill*).

228. 536 U.S. 150 (2002).

229. *See generally id.* As to *Watchtower*, Nagel relies on the remarkable premise that a knock at a homeowner's door implicates the same privacy interests as a close-range verbal assault on a pregnant woman. *See* Nagel, *supra* note 184, at 520 (contrasting the *Watchtower* result with that in *Hill* and lamenting the *Watchtower* Court's lack of concern for homeowners' "sense of vulnerability or anxiety").

230. 527 U.S. 41 (1999).

down a municipal anti-loitering ordinance.[231] But the reasoning in Justice Stevens's abortion protest opinions makes clear that, just as one would expect from such a thoroughgoing pragmatist, the Justice does not advocate protecting unwilling audiences in the abstract.[232] Rather, just as in *R.A.V.*, Justice Stevens in *Madsen* and *Hill* emphasizes unwilling audiences' interests only to the extent he believes the specific audiences in question stand in a vulnerable, subordinated position relative to the First Amendment claimants—trapped in their homes, as in *R.A.V.* and *Frisby*, or accosted while pregnant and seeking medical care, as in *Madsen* and *Hill*.[233]

In refusing to employ the First Amendment to shield hate crimes, homophobic shunning, and assaults on pregnant women, Justice Stevens vindicates not merely regulatory interests but, more importantly, the interest in inclusive public debate. Justice Stevens in these cases characterizes the claimants' behavior as nominally expressive conduct[234] that threatens democratic discourse by exploiting the social vulnerabilities of groups

231. *See id.* Nagel attempts to cast Justice Stevens's lead opinion in *Morales* as favoring the liberty interests of gang members over the privacy (and safety) interests of their "unwilling audiences" and thus proving his *Hill* analysis disingenuous and/or politically biased. *See* Nagel, *supra* note 184, at 517-18. Nagel's charge finds no support in the *Morales* opinion. First, the opinion unambiguously endorses the city's interest in preventing gang members from intimidating citizens. *Morales*, 527 U.S. at 51-52 (plurality opinion). Second, Justice Stevens's vagueness analysis, far from expressing solicitude for gang activity, emphasizes that the ordinance's broad language sweeps in non-gang activity and that the ordinance fails to deter much of the most threatening gang activity. *See id.* at 62-63. Finally, Justice Stevens virtually invites the city to redraft its ordinance in a constitutional manner by adding a requirement of some overt harmful act. *See id.* at 51-52 (contrasting the challenged ordinance with other Chicago regulations).

232. Justice Stevens's allegedly undifferentiated concern for unwilling listeners leads Nagel to write off the Justice's majority opinion in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), which upheld an Establishment Clause challenge to an amplified prayer at a high school football game as merely another protection of "unwilling listeners" against ordinary speech. *See* Nagel, *supra* note 184, at 528 n.85 (claiming that Justice Stevens's concern for unwilling listeners precludes him from assigning any special danger to public prayer). In reality, however, the decision aimed to protect religious nonbelievers against social pressure to conform to the dominant religion. An even more vague characterization of *Hill* as a privacy decision inspires Nagel's attempt to contrast *Hill* with *Bartnicki v. Vopper*, 532 U.S. 514 (2001), in which Justice Stevens wrote a narrow opinion that overturned a finding of liability against media outlets that broadcast an illegally intercepted conversation they had lawfully acquired. *See* Nagel, *supra* note 184, at 523 (suggesting the alleged contrast between *Hill* and *Bartnicki* "root[s] Stevens' constitutional discourse in some of the shabbier aspects of American culture").

233. Justice Stevens explicitly states this distinction in *Hill*:

> [W]hether there is a "right" to avoid unwelcome expression is not before us in this case. The purpose of the Colorado statute is not to protect a potential listener from hearing a particular message. It is to protect those who seek medical treatment from the potential physical and emotional harm suffered when an unwelcome individual delivers a message (whatever its content) by physically approaching an individual at close range, *i.e.*, within eight feet.

Hill v. Colorado, 530 U.S. 703, 718 n.25 (2000).

234. *See* Stevens, *supra* note 33, at 1310 ("Even though the communication of intolerant messages of hate may constitute protected 'speech,' some harmful conduct that intentionally communicates the same kind of message may not be speech at all.").

whose experiences give rise to distinctive viewpoints.[235] Expressive attacks "used by members of a powerful group against an individual already disadvantaged by a hostile environment,"[236] just like anonymity bans,[237] unfettered campaign spending,[238] and legal favoritism toward the two major political parties,[239] threaten to remove important ideas from public debate. In Justice Stevens's view, the First Amendment should not provide the dynamite to destroy whatever fragile bridges give socially marginal speakers access to democratic discourse.

B. *Commercial Advertising and Democratic Discourse*

Arthur Hellman mounts his attack on Justice Stevens's First Amendment record by contrasting Justice Stevens's free speech decisions and votes with those of Justice Clarence Thomas. Hellman declares Justice Thomas, not Justice Stevens, the true champion of expressive freedom because Justice Thomas beats Justice Stevens two falls out of three: While Justice Stevens undeniably shows greater solicitude for the First Amendment claims of sexually oriented speech claimants, he "repeatedly takes a niggardly view of the protection accorded by the constitutional guarantee"[240] when political advocates or commercial speakers seek its protection.[241] As to political speech, Hellman ignores the long-established insight that campaign finance cases, to take the classic example, fairly present expressive interests on both sides,[242] which renders any simple count of pro-claimant and antigovernment votes misleading. This Article has made a case that Justice Stevens's votes against First Amendment claimants in some political speech cases advance the cause of expressive freedom.[243] Even if one disputes the understanding of the First Amendment that supports that case, no thoughtful

235. Justice Stevens's opinions in these cases did not seek to create forums for civil rights, gay rights, or prochoice activism. *See* Boy Scouts of America v. Dale, 530 U.S. 640, 691-96 (2000) (Stevens, J., dissenting) (denying any effort by an opponent of the Boy Scouts' antigay policy to express a pro-gay message through the organization). The expressive dimension in Justice Stevens's analysis relates to the importance of protecting weak and vulnerable members of society from attacks that threaten to undermine their capacities to express their perspectives in democratic discourse.

236. Stevens, *supra* note 33, at 1311.

237. *See supra* notes 72-77 and accompanying text (discussing McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995)).

238. *See supra* notes 167-83 and accompanying text.

239. *See supra* notes 133-58 and accompanying text.

240. Hellman, *supra* note 185, at 418.

241. *See id.* at 425-29 (setting forth data on Justices' votes in Hellman's three categories of free speech cases).

242. *See, e.g.*, Burt Neuborne, *One Dollar-One Vote: A Preface to Debating Campaign Finance Reform*, 37 Washburn L.J. 1, 11 (1997) (positing campaign finance regulation as a way "to impose direct limits on the ability of wealthy individuals to exercise undue influence over the political process based solely on money, as opposed to the power of their ideas").

243. *See supra* notes 159-63 and accompanying text (discussing Cal. Democratic Party v. Jones, 530 U.S. 567 (2000)); *supra* notes 167-83 and accompanying text (discussing campaign finance cases).

assessment of Justice Stevens's political speech opinions can accuse him of willfully disregarding expressive freedom.[244]

Hellman's criticism of Justice Stevens's commercial speech doctrine, although less developed, warrants closer attention. As Hellman acknowledges, Justice Stevens sometimes embraces commercial speech claims.[245] His record in commercial speech cases reveals two consistent themes in support of commercial speech protection. First, he has broken with decisions to apply the less protective commercial speech standard where the speech at issue included significant noncommercial elements. In *Central Hudson Gas and Electric Corp. v. Public Service Commission*,[246] the case in which the Court announced its distinctive test for assessing commercial speech claims,[247] Justice Stevens's concurrence contends that the speech at issue, an electric utility's promotional advertising, deserves full First Amendment protection.[248] Subsequently, writing separately in *Rubin v. Coors Brewing Co.*,[249] the Justice criticizes "the misguided approach adopted in *Central Hudson*" as perpetuating "the artificiality of a rigid commercial/noncommercial distinction."[250] Second, Justice Stevens has deplored government attempts to justify commercial speech restrictions by reference to the benefits of withholding information from the public. He has repeatedly extolled "the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information."[251] His persistent

244. Arthur Hellman, criticizing Justice Stevens's account of his First Amendment views in *The Freedom of Speech, see* Stevens, *supra* note 33, makes the puzzling claim that "[t]here is almost nothing in the lecture that recognizes the connection between the First Amendment and democratic theory." Hellman, *supra* note 185, at 433. In fact, the bulk of Justice Stevens's essay explores the role and value of expressive freedom within our broader constitutional and political system. *See* Stevens, *supra* note 33, at 1295-1308.

245. *See* Hellman, *supra* note 185, at 429 (placing Stevens "exactly in the middle" of the Court in support for commercial speech claims).

246. 447 U.S. 557 (1980).

247. *See id.* at 564 (articulating a variation on intermediate scrutiny as a test for commercial speech claims under the First Amendment).

248. *See id.* at 583 (Stevens, J., concurring in the judgment) ("I do not consider this to be a 'commercial speech' case."); *see also* Rubin v. Coors Brewing Co., 514 U.S. 476, 491 (1995) (Stevens, J., concurring in the judgment) (contending that "the 'commercial speech doctrine' is unsuited to this case," which dealt with regulation that prevented brewers from printing beer's alcohol content on labels); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 420 (1993) (positing "[t]he absence of a categorical definition of the difference between 'newspapers' and 'commercial handbills'" as a reason for questioning the city's selective regulation of commercial newsracks).

249. *Rubin*, 514 U.S. at 476.

250. *Id.* at 493-94 (Stevens, J. concurring in the judgment).

251. Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 108 (1990); *see also* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 195 (1999) (positing "the presumption that the speaker and the audience, not the Government, should be left to assess the value of accurate and nonmisleading information about lawful conduct"); *Rubin*, 514 U.S. at 497 (Stevens, J., concurring in the judgment) (stating that "[a]ny 'interest' in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment").

opposition to "paternalism, and informational protectionism"[252] reflects fealty to the idea that commercial speech deserves protection because of its public information value,[253] an idea integral to Justice Harry Blackmun's analysis in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[254] but often subordinated to autonomy arguments in subsequent commercial speech decisions.

At the same time, Justice Stevens has advocated two important limiting principles for commercial speech protection, both of which reflect his pragmatic populism. First, Justice Stevens has resisted commercial speech claims that turn merely on the advertiser's expressive autonomy rather than the public's interest in information. Thus, in *Glickman v. Wileman Bros. & Elliott*,[255] the Justice wrote for the Court in upholding a mandatory joint advertising program for fruit growers as "simply a question of economic policy for Congress and the Executive to resolve,"[256] not a speech regulation, because the program "impose[d] no restraint on the freedom of any producer to communicate any message to any audience."[257] In *Greater New Orleans Broadcasting Ass'n v. United States*,[258] Justice Stevens's majority opinion strikes down a federal constraint on gambling advertisements in part because "the proposed commercial messages would convey information . . . about an activity that is the subject of intense public debate in many communities."[259] Conversely, when commercial speech does not implicate an issue of public concern, it presents a less compelling claim for First Amendment protection. "Transaction-driven speech," Justice Stevens explains in *Rubin*, "usually does not touch on a subject of public debate, and thus misleading statements in that context are unlikely to engender the beneficial public discourse that flows from political controversy."[260]

Second, Justice Stevens has contended that the peculiar harms commercial speech can cause consumers provide special justifications for regulating commercial speech. One of his earliest commercial speech opinions, anticipating his rhetoric in *R.A.V.*,[261] warns, "The fact that a type of communication is entitled to some constitutional protection does not

252. United States v. Edge Broad. Co., 509 U.S. 418, 439 (1993) (Stevens, J., dissenting).

253. Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 763-64 (1976) (positing the informational value of commercial speech as a basis for First Amendment protection).

254. *Id.* at 748.

255. 521 U.S. 457 (1997).

256. *Id.* at 468.

257. *Id.* at 469 (footnote omitted).

258. 527 U.S. 173 (1999).

259. *Id.* at 184; *see also* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 553 (1981) (Stevens, J., dissenting in part) (emphasizing the absence of impact on "public debate" in defending an ordinance that singled out commercial billboards for restriction).

260. Rubin v. Coors Brewing Co., 514 U.S. 476, 496 (1995) (Stevens, J., concurring in the judgment).

261. R.A.V. v. City of St. Paul, 505 U.S. 377, 416 (1992) (Stevens, J., concurring in the judgment); *see supra* notes 197-202 and accompanying text.

require the conclusion that it is totally immune from regulation."[262] He defines the danger to the public of "commercial harm" as "a justification for regulation that is not present when the communication has no commercial character."[263] A portion of his lead opinion in *44 Liquormart, Inc. v. Rhode Island*[264] that did not garner majority support proposes exercising "less than strict review" over any commercial speech regulation that "protect[s] consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information."[265] Such deference would dramatically expand the boundaries of permissible commercial speech regulation beyond the *Central Hudson* allowance for restrictions on untruthful or misleading advertising.[266] Justice Stevens calls this expansion necessary "to the preservation of a fair bargaining process"[267] between advertisers and consumers.

Hellman and other critics of Justice Stevens's commercial speech jurisprudence fail to appreciate that both aspects of the Justice's approach—his speech-protective tendencies and his limiting principles—arise from his pragmatic populism. On a methodological level, Justice Stevens's commercial speech jurisprudence provides one of the most vivid illustrations of his pragmatism at work. Even aside from his ever-present attention to fact sensitivity and narrow grounds for decision,[268] he ends up on different sides of different commercial speech disputes because he fundamentally contests the Court's insistence on placing something it calls "commercial speech" in a definitional and doctrinal straitjacket. On a substantive level, all of the seemingly disparate themes that characterize Justice Stevens's commercial speech jurisprudence serve an overarching

262. Carey v. Population Servs. Int'l, 431 U.S. 678, 716 (1977) (Stevens, J., concurring in part and concurring in the judgment) (citation omitted).

263. Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 81-82 (1983) (Stevens, J., concurring in the judgment); *see also* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 (1993) (noting, in the course of striking down a regulation, the absence of any "asserted . . . interest in preventing commercial harms . . . which is, of course, the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech" (citation omitted)). Part and parcel of Justice Stevens's attack on the *Central Hudson* standard in *Rubin*, *see supra* notes 249-51 and accompanying text, is his charge that *Central Hudson* fails to place sufficient emphasis on "the reasons for permitting broader regulation: namely, commercial speech's potential to mislead." *Rubin*, 514 U.S. at 494 (Stevens, J., concurring in the judgment).

264. 517 U.S. 484 (1996).

265. *Id.* at 501 (plurality opinion).

266. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

267. *44 Liquormart*, 517 U.S. at 501.

268. *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 184 (1999) (applying the conventional commercial speech standard in order to avoid the need to "reach out to make novel or unnecessarily broad pronouncements on constitutional issues"); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 428 (1993) (emphasizing the fact specificity of the case and the narrow grounds for the decision); Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 99-100 (1990) (explaining the analysis of the case under the commercial speech standard as the narrower of available grounds for decision).

commitment to the First Amendment as a guarantor of open, robust democratic discourse. Unlike some political speech idealists, Justice Stevens takes seriously the idea that communication within the economic marketplace—communication between producers and consumers—plays an important role in public discourse. He does not want the government to restrict commercial speech that deprives the public of information useful to the discussion of important public issues. He does, however, accept government limits on commercial speech that misleads consumers, makes no contribution to public discourse, or exploits advantages in bargaining power that advertisers enjoy over the public.

Justice Stevens configures his First Amendment analysis of commercial speech just as he configures his analysis of Internet regulation, campaign finance reform, and constraints on abortion clinic protesters: by considering how the regulation in question, and the arguments against it, would actually affect opportunities for disparate groups, with different degrees of social power, to debate matters that bear on the common good. Both the underlying theory of Justice Stevens's approach, whereby expressive freedom should produce socially beneficial results, and its overarching method, whereby the jurist should assess the likely results of any conflict by reference to his or her accumulated knowledge about how the world works, exemplify pragmatism. The conclusion the Justice consistently reaches—that First Amendment law must serve the function of protecting access to public discourse for speakers whose relative lack of social power might otherwise result in their exclusion—embodies pragmatic populism.

CONCLUSION

Justice Stevens's pragmatic commitment to a populist jurisprudence of expressive freedom reflects decades of thorough observation and thoughtful reasoning. In light of Justice Holmes's admonition that "the life of the law has not been logic: it has been experience,"[269] one might also speculate about how Justice Stevens's own experiences have informed his First Amendment priorities. The Justice came of age in the milieu of Chicago machine politics, and he gained notoriety that helped propel him to the federal bench as general counsel to a commission assigned to probe corruption on the Illinois Supreme Court.[270] He has never thrown himself into the sorts of partisan political activities that tend to mark the resumes of many federal judges.[271] In his own work on the Court, he appears always to have stood at arm's length from his most normatively committed colleagues: Justices Brennan and Thurgood Marshall during the first part of his tenure, Chief Justice Rehnquist and Justices Scalia and Thomas during

269. Oliver W. Holmes, The Common Law 1 (1881).

270. *See generally* Kenneth A. Manaster, Illinois Justice: The Scandal of 1969 and the Rise of John Paul Stevens (2001).

271. *See* Sickels, *supra* note 1, at 34-35 (documenting Justice Stevens's dearth of partisan entanglements).

his later years.[272] He has been, and remains, an independent force.[273] All of this suggests that Justice Stevens's commitment to the First Amendment as a guarantor of inclusive, robust, even contentious democratic discourse reflects a broader belief in the necessity of questioning and challenging political authority.

In addition, Justice Stevens's commitment to open discussion in the service of wise decisions permeates his own judicial style. He has been called "idiosyncratic, even contentious, preferring to express his own formulations than to build consensus."[274] Justice Brennan linked Justice Stevens's enthusiasm for explaining his reasoning to a substantive belief in the importance of democratic discourse. "To Justice Stevens," Justice Brennan wrote, "we are all part of a vast web that includes present and future judges, practicing lawyers, academics, and the public, all engaged in the profoundly important task of self-governance through law."[275] Justice Stevens's own words confirm this view. "I have always taken pride," he writes, "in the fact that we are the one branch of government that conscientiously tries to explain the reasons for all of its important decisions."[276] He views concurring and dissenting opinions in particular as a simulacrum of democratic discourse: "Our practice of disclosing conflicting views . . . not only gives the public an opportunity to evaluate our work more intelligently, but also reduces the danger that troublesome questions will be swept under the rug."[277] Justice Stevens's steadfast opposition to limiting *in forma pauperis* filings[278] confirms his deep regard for opportunities to air distinctive viewpoints.

Justice Stevens's pragmatic populism has greatly enriched our legal system's understanding of, and commitment to, expressive freedom. No other figure in American law has drawn the connection between a pragmatic judicial methodology and a pragmatic First Amendment theory that characterizes Justice Stevens's free speech opinions. No other Justice on the present Court has more energetically and effectively defended the rights of economically and politically marginal speakers. Justice Stevens's pragmatism bespeaks an admirable judicial humility, a sense that appellate

272. According to Robert Sickels, writing in 1989, "Stevens' move leftward, relative to the other justices, seems related to what he perceives as a crude jurisprudence of results on the right." *Id.* at 145.

273. *See id.* at ix (noting Justice Stevens's lack of consistent agreement or disagreement with other Justices based on 1970s and 1980s voting records). Justice Stevens's votes have grown somewhat more predictable over the past decade, when his seniority has made him the *de facto* leader of the Court's "liberal wing."

274. *Id.* at 159.

275. William J. Brennan, Jr., *Tribute to Justice Stevens*, 1992/1993 Ann. Surv. Am. L., at xxi, xxiii.

276. John Paul Stevens, *What I Did this Summer*, CBA Record, Oct. 2004, at 34.

277. *Id.*; *see also* John Paul Stevens, *Introduction*, *in* Manaster, *supra* note 270, at xii ("If there is disagreement within an appellate court about how a case should be resolved, I firmly believe that the law will be best served by an open disclosure of that fact, not only to the litigants and their lawyers, but to the public as well.").

278. *See* Manaster, *supra* note 270, at 272.

judges should not impose their grand visions over the more important insights of fact finders, elected officials, and the people. His ability to draw populism out of pragmatism provides one example of many in his life and career of his ability to balance that humility with an ambitious sense of purpose. Justice Stevens's First Amendment jurisprudence tells us that everyone should have the opportunity to elevate public discourse. Reading his free speech opinions reminds us how that discourse should sound.