# Collective Liberty

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*The story of our Constitution is a tale of two liberties: individual freedom and collective freedom. The inherent tension between these two is well known. Judicial protection of individual liberty inhibits the collective from freely arranging society through the democratic process. In contrast, judicial protection of this collective freedom to structure society may infringe on individual liberty, especially for those out of the mainstream. Like a pendulum, over the last century, the rights of free speech and exercise have swung between the individual and the collective, between right and left. This Article traces these arcs from individual liberty to collective liberty, and back.*

*Historically, progressives tended to favor broad conceptions of individual rights with respect to protecting unpopular speech and minority religious groups. Conservatives, in contrast, often disfavored such rights to the extent they impeded the preservation of traditional social norms and structuring society. In recent years there has been a reversal, as the right has asserted the mantle of individual liberty against claims of governmental intrusion into time-honored institutions. But for the left, a robust freedom of speech and religion—no longer serving progressive causes of social justice and equality—can now more easily be subordinated to what Justice Breyer referred to as "collective" liberty.*

*By looking at two controversial cases in this arena—*McCutcheon v. FEC *and* Burwell v. Hobby Lobby Stores*—this Article chronicles the juxtaposition of positions on the right and left, between collective and individual views of rights. This Article concludes by explaining what this means for the development of the First Amendment on the Roberts Court, as freedom from government clashes with freedom by government.*

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## INTRODUCTION

The story of our Constitution is a tale of two liberties: individual freedom and collective freedom. The inherent tension between these two is well known. Judicial protection of individual liberty inhibits the collective from freely arranging society through the democratic process. In contrast, judicial protection of this collective freedom to structure society may infringe on individual liberty, especially for those out of the mainstream. This dynamic is particularly true for the First Amendment's guarantees of free speech and exercise. With respect to free speech, there is a never-ending struggle between the protection of speech, and the state's efforts to police the social costs of those expressions. For the freedom of exercise, the balance is struck between the state's efforts to evenhandedly apply the law, and still respect individual conscience.

For these rights, depending who and when you ask, it was the best of times, it was the worst of times. Like a pendulum, over the last century

they have swung between the individual and the collective. Free speech started as a collective right that was protected so long as majoritarian politics deemed that it promoted the goals of society.[1] But soon, this right evolved to one of individual liberty, where the speech was protected for its own sake.[2] Not because it served any higher democratic goals—and often it was antiestablishment[3]—but because the value of speech outweighed its negative externalities.[4] Yet, in recent years, as fears of the harms from dangerous speech have grown,[5] this pendulum is on the precipice of swinging back toward "collective speech."[6]

The freedom of exercise has fallen through a more complicated trajectory, yet it winds up in a similar position. Five decades ago, free exercise emerged to protect religious minorities from the democratic process that did not sanction, and indeed imposed, a "substantial burden" on their beliefs.[7] But this pendulum eventually swung to the other side when the Supreme Court held that it was up to the political process to provide special protections for specific faiths, and not the First Amendment.[8] That same political process quickly tugged the pendulum back toward the individual; the Religious Freedom Restoration Act provided that free exercise of religion could not be substantially burdened, even through the application of laws of general applicability.[9] However, as the government reached its arm further into faith, the beneficiaries of this law trended away from those of minority faiths, to those of mainstream faiths. Today, the robust protection of free exercise—that only recently enjoyed overwhelming support—is poised to swing back toward the collective: faith is protected so long as it does not interfere with the state's broader goals of equality and social justice.[10]

This Article traces the arcs from individual liberty to collective liberty, and back. Historically, progressives tended to favor broad conceptions of individual rights, with respect to protecting unpopular

1. *See* Abrams v. United States, 250 U.S. 616, 624 (1919); Debs v. United States, 249 U.S. 211, 216–17 (1919); Frohwerk v. United States, 249 U.S. 204, 206 (1919); Schenck v. United States, 249 U.S. 47, 51–52 (1919).

2. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969).

3. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971).

4. *See* Snyder v. Phelps, 562 U.S. 443, 453 (2011); Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734 (2011); United States v. Stevens, 559 U.S. 460 (2010).

5. *See* Citizens United v. FEC, 558 U.S. 310 (2010) (Stevens, J., dissenting); Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011) (Breyer, J., dissenting); *Brown*, 131 S. Ct. at 2771 (Breyer, J., dissenting).

6. McCutcheon v. FEC, 134 S. Ct. 1434, 1467 (2014) (Breyer, J., dissenting).

7. Sherbert v. Verner, 374 U.S. 398, 408–10 (1963).

8. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 889–90 (1990).

9. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb to 2000bb-4).

10. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2805–06 (2014) (Ginsburg, J., dissenting).

speech and minority religious groups. Conservatives, in contrast, often opposed such rights to the extent they impeded the preservation of traditional social norms and structures. In recent years there has been a reversal, as the right has claimed the mantle of individual liberty against claims of governmental intrusion into their time-honored institutions. But for the left, a robust freedom of speech and religion—no longer serving progressive causes of social justice—can now more easily be subordinated to the "generalized conception of the public good."[11] This Article provides a framework to understand the reversal of these values.

Part I contrasts *individual speech* and *collective speech* through the lens of *McCutcheon v. FEC*. In *McCutcheon*, Justice Breyer's dissent referred to the freedom of speech, not only as the "*individual's right* to engage in political speech, but also the public's interest in preserving a democratic order in which *collective speech* matters."[12] This notion of a "collective" First Amendment was emphatically rejected by the majority opinion, which explained that "the First Amendment safeguards an *individual's right* to participate in the public debate through political expression and political association."[13] Chief Justice Roberts retorted, "there are compelling reasons not to define the boundaries of the First Amendment by reference to such a *generalized conception* of the public good."[14]

With respect to speech, modern-day liberalism seems to be drifting away from protecting individual freedom, and more toward constitutionally guaranteeing equality. As Floyd Abrams opined, the dissent offers a very troubling vision of free expression that is "deeply disquieting."[15] The progressive preference for collective liberty is evident in the ACLU's decision not to file a brief in *McCutcheon*, reflecting a long-simmering divide among its members. In contrast, conservatives seized on expanded speech rights to repel this creeping control. The *McCutcheon* opinions, and their supporting briefs, signal a shifting trend in progressive and conservative thought on the First Amendment and individual liberty more generally.

Part II contrasts *individual exercise* and *collective exercise* through the lens of *Burwell v. Hobby Lobby Stores*. In this case, we witnessed a reorientation of the Religious Freedom Restoration Act ("RFRA"). Introduced in Congress by Senator Ted Kennedy and then-Representative Chuck Schumer, and signed into law by President Bill Clinton in 1993,

11. *McCutcheon*, 134 S. Ct. at 1449.

12. *Id.* at 1467 (Breyer, J., dissenting) (emphasis added).

13. *Id.* at 1448 (emphasis added).

14. *Id.* at 1449 (emphasis added).

15. Floyd Abrams, *Symposium: Opposing More Speech—A Disturbing and Recurring Reality*, SCOTUSBLOG (Apr. 4, 2014, 2:38 PM), http://www.scotusblog.com/2014/04/symposium-opposing-more-speech-a-disturbing-recurring-reality/.

RFRA was crafted as a bipartisan legislative override of Justice Scalia's unpopular decision in *Employment Division v. Smith*.[16] The law was perhaps intended as a shield to protect religious minorities, such as Native Americans who use sacramental peyote, from laws that infringe on their exercise. Fast forward two decades, and RFRA is now wielded as a sword to enforce the religious identities of corporations that cannot be burdened by the Affordable Care Act's ("ACA") contraceptives mandate. In her dissent in *Hobby Lobby*, Justice Ginsburg highlighted the divide, focusing on how the Court's accommodation of the religious liberties of Hobby Lobby would have an impact on "thousands of women . . . who do not share the corporation owners' religious faith."[17] For Ginsburg, the collective needs of society for covered contraception easily trumped religious liberty. The majority opinion, which begrudgingly assumed that employee-provided insurance for contraception was a compelling interest, viewed the calculus entirely backwards.

Part III charts the progression of speech and exercise on both the right and the left by posing three questions: Who is benefiting? Who is harmed? What is the purpose of the right? In the past, liberal justices have offered robust protection for free speech and exercise rights when the beneficiaries were the proverbial "have-nots." Today, the scenario has reversed as conservatives offer strong protections for the speech and exercise rights of the "haves." Contrast the hippie wearing a "Fuck the Draft" jacket with the millionaire donor Shaun McCutcheon. Or the Seventh-Day Adventist who could not work on Saturday with Hobby Lobby Stores, Inc. that refused to cover certain contraceptives for female employees. A corollary to the beneficiary of the right is who bears the cost. Earlier cases offered easy and cheap accommodations, such as providing unemployment benefits to the Seventh-Day Adventist. *Hobby Lobby* presents a different calculus, where the cost is borne by female employees who would not receive coverage for contraceptives. This Article closes by looking at the recent debate over Indiana's Religious Freedom Restoration Act, which serves as a harbinger for the growing debate between liberty and equality in the wake of *Obergefell v. Hodges*.[18]

I do not attempt to create a unifying theory of the First Amendment, nor do I try to explain *all* of this century's developments in free speech and exercise doctrine. Rather, by looking at two of the most recent and controversial cases in this arena—*McCutcheon v. FEC* and *Burwell v. Hobby Lobby*—this Article chronicles the juxtaposition of positions for collective and individual views of rights. This Article addresses what these changes mean for the development of the First

16. Emp't Div., Dep't of Human Res. of Or., 494 U.S. 872 (1990).
17. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting).
18. Obergefell v. Hodges, 135 S. Ct. 1039 (2015).

Amendment on the Roberts Court, as freedom *from* government clashes with freedom *by* government.

## I. COLLECTIVE SPEECH

The divide between individual and collective speech—though a battle that has been waged for nearly a century—was crystallized by the dueling opinions in *McCutcheon v. FEC* between Justice Breyer and Chief Justice Roberts. Justice Breyer's dissent relies on progressive-era precedents, bolstered by dubious founding-era sources, to make the case that the First Amendment was designed to promote "democracy" through "collective speech."[19] The Chief Justice, writing for the Court, counters that the First Amendment protects an individual right, independent of its utilitarian value.[20] The majority and dissent represent the newly drawn battle lines, where conservatives now claim the mantle that "speech is speech," and liberals support the power of the state to restrict speech that is not necessary to "democracy." As reflected by the evolving position of the American Civil Liberties Union ("ACLU") on campaign finance reform, the sands of the First Amendment continue to shift, while both sides dig into their trenches.

### A. *MCCUTCHEON V. FEC*

*McCutcheon v. FEC* considered the constitutionality of the annual contribution aggregate limit for individuals of "$123,200 to candidate and noncandidate committees during each two-year election cycle."[21] Though often dubbed in the media as the sequel to *Citizens United v. FEC*,[22] the case had nothing to do with corporate speech. It involved an individual, Shaun McCutcheon, who sought to contribute to more candidates that the aggregate limit cap allowed.[23]

In a 5-4 decision, the Court per Chief Justice Roberts found "that the aggregate limits do little, if anything, to . . . [combat corruption], while seriously restricting participation in the democratic process."[24] As a result, "[t]he aggregate limits are therefore invalid under the First Amendment."[25] This 5-4 split was effectively the same breakdown that

19. *McCutcheon*, 134 S. Ct. at 1467.

20. *Id.* at 1438.

21. *Id.* at 1443.

22. Josh Voorhees, *SCOTUS Strikes down Aggregate Campaign Donor Limits*, SLATE (Apr. 2, 2014, 10:50 AM), http://www.slate.com/blogs/the_slatest/2014/04/02/scotus_donor_limit_case_high_court_s_mccutcheon_opinion_strikes_down_the.html.

23. *See McCutcheon*, 134 S. Ct. 1434.

24. *Id.* at 1442.

25. *Id.*

fractured the Court with *Citizens United* four years earlier, with Justice Kagan donning the robe of the now-retired Justice Stevens.[26]

Penning the dissent on behalf of the liberal bloc of the Court was Justice Breyer. The dissent would have upheld the aggregate limits in recognition of the "importance of protecting the political integrity of our governmental institutions."[27] Mincing no words, Justice Breyer concluded that "[t]aken together with *Citizens United*, today's decision eviscerates our Nation's campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve."[28] None of this should have come as any surprise in light of the divide in *Citizens United*. But then a funny thing happened on the way to campaign finance utopia.[29] In justifying the aggregate limit, the First Amendment was whittled down from an individual right to a collective privilege. Justice Breyer referred to the freedom of speech, not only as an "*individual's right* to engage in political speech, but also the public's interest in preserving a democratic order in which *collective speech* matters."[30] A careful examination of Justice Breyer's opinion reveals a subtle, but deliberate framework to reorient the freedom of expression and civil liberties writ large.

### *1. Justice Breyer's Progressive Throwback*

The dissent's analysis begins innocuously enough: "Consider at least one reason why the First Amendment protects political speech."[31] Breyer adds "[s]peech does not exist in a vacuum."[32] Though described as "not a new idea," these two understated sentences from the usually verbose Breyer would effect a revolution in First Amendment jurisprudence.[33] By bifurcating "political" speech from "nonpolitical" speech, and stressing that speech need not exist for its own sake, Breyer extracts the fragile golden spike that united the Promontory Point of the First Amendment. For the dissent, speech is to be judged based on its character and utility for greater social goods, such as democracy.

To justify this bold departure from modern First Amendment jurisprudence, Breyer dials back the First Amendment not to the heyday of the Warren and Burger Courts—the apogee of free speech protections—but to the Progressive Era. First, Justice Breyer pays

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26. Citizens United v. FEC, 558 U.S. 310, 393 (2010). Coincidentally, *Citizens United* was the first case Solicitor General Kagan argued and Justice Sotomayor heard.

27. *McCutcheon*, 134 S. Ct. at 1465 (Breyer, J., dissenting).

28. *Id.*

29. T. DAN SMITH: A FUNNY THING HAPPENED ON THE WAY TO UTOPIA (Amber et al. 1987).

30. *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting) (emphasis added).

31. *Id.*

32. *Id.*

33. *Id.*

homage to the crown prince of this epoch, Justice Oliver Wendell Holmes, Jr. What is the utility of "political" speech for Breyer? The First Amendment protects "political communication [that] seeks to secure government action."[34] For "[a] politically oriented 'marketplace of ideas' seeks to form a public opinion that can and will influence elected representatives."[35] This adaptation of the oft-cited Justice Holmes' phrase "marketplace of ideas"—though limited to ideas of the political variety—restores a utilitarian vision of free speech that had lapsed into desuetude. Presumably, "political" speech that does not contribute to the "marketplace of ideas" and should not be used to "secure government action" is outside the Constitution's protections.

Curiously, Justice Breyer *does not* cite the source of the "marketplace of ideas"—Justice Holmes' dissent in *Abrams v. United States*.[36] Why? Because Holmes's then-revolutionarily robust vision of the First Amendment is incompatible with Breyer's stingy view of speech. In 1919, Holmes wrote that the "ultimate good desired is better reached by *free trade in ideas*—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[37] This sentence could have been pulled from Shaun McCutcheon's merit brief.[38] But this is not the "theory of our Constitution" that the *McCutcheon* dissenters endorse—they could not even bring themselves to cite it!

Next, the dissent turns to Holmes' free speech protégé, Justice Louis Brandeis.[39] He wrote "[e]ighty-seven years ago" the "First Amendment's protection of speech was 'essential to effective democracy.'"[40] But this too cherry picks from Brandeis' concurring opinion in *Whitney v. California*.[41] The complete sentence Breyer omits reads: "Moreover, even imminent danger cannot justify resort to prohibition of these functions *essential to effective democracy*, unless the evil apprehended is relatively serious."[42] The essence of this statement was that speech cannot be limited unless it is "imminent[ly] dangerous" and "relatively serious." Not that "political speech" can be limited when it is unnecessary to "secure government action" or that speech was protected because it was

34. *Id*.
35. *Id.*
36. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
37. *Id.* (emphasis added).
38. BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 88 (2015).
39. *See* THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA (2013).
40. *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting) (citing Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).
41. 274 U.S. at 377 (Brandeis, J., concurring).
42. *Id.* (emphasis added).

"essential to effective democracy."[43] In contrast to Breyer's assertion, Brandeis writes that the "[p]rohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society."[44] Brandeis' vision of the First Amendment was premised on "respect for the inherent dignity of the speaker as a human being [that] requires us to tolerate efforts at self-expression, even when they do not help our choice-dependent institutions to work better."[45] Individual speech is protected regardless of whether it makes democracy work.

The dissent then turns to Chief Justice Hughes' opinion in *Stromberg v. California*.[46] This case reversed a prosecution for flying a red flag as a symbol of "opposition to organized government."[47] Here is how Justice Breyer quotes the opinion: "'A fundamental principle of our constitutional system' is the 'maintenance of the opportunity for free political discussion *to the end* that government may be responsive to the will of the people.'"[48] The dissent emphasized "to the end," stressing the utilitarian nature of this speech. But what rendered the California law unconstitutional? It was, Chief Justice Hughes found, "so vague and indefinite as to permit the punishment of the fair use of this opportunity [for free political discussion and] is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."[49] Not that the speech was only valid so long as it served "the end" that "government may be responsive" to, but that the statute cannot sweep so broadly to prohibit speech that *may* be useful to this end. Justice Breyer swings and misses with his citations to both Holmes and Brandeis, and strikes out with Hughes.

Even so, the decision to dial back to the Progressive Era marks a bold departure from recent First Amendment jurisprudence. As Professor David Bernstein points out:

> [O]nce one adopts the Progressive view of freedom of speech as only going so far as to protect the public interest in a well-functioning marketplace of ideas, there is no obvious reason to limit reduced scrutiny of government 'public interest' regulation of speech to campaign finance regulations. Nor is it obvious why the Court should give strict scrutiny to speech restrictions that don't directly affect the marketplace

43. *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting).

44. *Whitney*, 274 U.S. at 377.

45. NEUBORNE, *supra* note 38, at 8.

46. 283 U.S. 359 (1931).

47. *Id.* at 363.

48. *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting) (citing *Stromberg*, 283 U.S. at 369 (emphasis added)).

49. *Stromberg*, 283 U.S. at 369.

> of ideas, instead of just using a malleable test balancing 'speech interests' versus other interests.[50]

If the precedents of the Warren Court concerning the First Amendment no longer ground the Justices, then Breyer's "collective speech" goes much further than campaign finance laws.

### *2. The Dissent's Faulty Originalism*

After reimagining the views of Holmes, Brandeis, and Hughes, Breyer turns back the clock further to Madison, Wilson, and Rousseau. Breyer begins by citing the works of Jean-Jacques Rousseau,[51] to explain that the "Framers had good reason to emphasize this same connection between political speech and governmental action."[52] Breyer observed that Rousseau "argued that in a representative democracy, the people lose control of their representatives between elections, during which interim periods they were 'in chains.'"[53] Citing absolutely no evidence that the Framers ever even considered this statement, Breyer states that "[t]he Framers responded to this criticism."[54] He offers two methods that the Framers apparently employed to respond to this problem. (There is no evidence that the Framers were ever aware of either approach.) The first method was "requiring frequent elections to federal office."[55] There

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50. David Bernstein, *Breyer's Dangerous Dissent in* McCutcheon *(the Campaign Finance Case)*, WASH. POST (Apr. 2, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/02/breyers-dangerous-dissent-in-mccutcheon-the-campaign-finance-case/.

51. Justice Breyer refers to Rousseau as "[a]n influential 18th-century continental philosopher," but offers no evidence to support the conclusion that Rousseau had *any* influence on the framing generation or American constitutional jurisprudence more broadly. *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting). A search revealed only a single citation to Rousseau in the U.S. Reports, and it had no connection with founding-era thoughts on constitutional law. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2753 (2011) (Thomas, J., dissenting); *cf.* Alden v. Maine, 527 U.S. 706, 715 (1999) ("Blackstone—whose works constituted the preeminent authority on English law for the founding generation . . . ."); Steven Menashi, *Cain as His Brother's Keeper: Property Rights and Christian Doctrine in* Locke's Two Treatises of Government, 42 SETON HALL L. REV. 185 (2012) (noting the influence of John Locke on American property law).

52. *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting).

53. *Id.* (citing JEAN-JACQUES ROUSSEAU, AN INQUIRY INTO THE NATURE OF THE SOCIAL CONTRACT 265–66 (transl. 1791)). This exact quote from Rousseau appears in ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 8 (2014) in a chapter titled "A Short History of Representation and Discursive Democracy." When *McCutcheon* was decided on April 2, 2014, this book was not yet released. The book authored by the Yale Law School Dean was released on June 23, 2014. Yet, Breyer still cited the book. *McCutcheon*, 134 S. Ct. at 1468 (Breyer, J., dissenting). As discussed *infra*, Breyer also referenced Post's book without citation in several other places. *See* Josh Blackman, *Talk About Citing Facts Outside the Record! Justice Breyer Cites Unpublished Book in* McCutcheon *Dissent*, JOSH BLACKMAN'S BLOG (Apr. 19, 2014), http://joshblackman.com/blog/2014/04/19/talk-about-citing-facts-outside-the-record-justice-breyer-cites-unpublished-book-in-mccutcheon-dissent/.

54. *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting). Of course, Dean Post makes an identical point in his book. POST, *supra* note 53, at 8 ("The answer to Rousseau's challenge was to forge a living connection between the people and their representatives.").

55. *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting).

is no further elaboration of how Senators, who served terms of six years, rather than two years, *without any election by the people*, fit within this mold. Second, Breyer explains, the Framers achieved this goal by "by enacting a First Amendment."[56] Also, there is no explanation that the First Amendment was not part of the original Constitution, and as the Court has recognized, the structural provisions of our Constitution operate to protect liberty even if the Bill of Rights had never been ratified.[57]

Citing the *Commentaries on the Constitution of the United States of America*, Breyer explains that the First Amendment "would facilitate a 'chain of communication between the people, and those, to whom they have committed the exercise of the powers of government.'"[58] This is a misleading mischaracterization of Wilson's 1792 lecture on the Constitution. As Professor John McGinnis points out, Wilson's comment had *absolutely nothing to do with the First Amendment*,[59] for it was not free speech, but "representation" that would be the "chain of communication between the people."[60] McGinnis observes that Wilson was discussing "the novelty and virtue of representative government, as opposed to 'monarchical, aristocratical, and democratical' forms of government."[61]

Worse still is that Wilson was making the *exact opposite* point that Breyer cited it for. In the very next sentence, Wilson stated, "This chain may consist of one or more links; but in all cases it should be sufficiently strong and discernible."[62] As Dean Robert Post accurately notes in the original source Breyer relied on, "The *chain of communication* needed to be 'sufficiently strong and discernible' to sustain the popular conviction that representatives spoke for the people whom they purported to represent. Only in this way could the value of self-government be maintained."[63] McGinnis explains, "In the context of discussing the nature of electoral representation, Wilson posits that representation may be direct (one vote between the people and choice of representative) but may also be indirect like the Constitution's own establishment of the electoral college (at least two votes between the people and the choice of representative)."[64] Rather than establishing a direct and accountable

56. *Id.*

57. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012).

58. *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting) (citing JAMES WILSON & THOMAS MCKEAN, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES OF AMERICA 30–31 (1792)).

59. John O. McGinnis, *Justice Breyer Needs an Originalist Law Clerk*, LIBR. OF L. & LIBERTY (Apr. 6, 2015), http://www.libertylawsite.org/2015/04/06/justice-breyer-needs-an-originalist-law-clerk/.

60. *Id.*

61. *Id.*

62. WILSON, *supra* note 58, at 31.

63. POST, *supra* note 53, at 8 (emphasis added).

64. McGinnis, *supra* note 59.

democracy, our Constitution imposes many layers of separation between elected branches and the electorate—totally orthogonal from Breyer's "democratic" vision of the First Amendment.

Breyer next trains his sights on James Madison. Citing *The Federalist No. 57*, Breyer writes, "[t]his 'chain' would establish the necessary 'communion of interests and sympathy of sentiments' between the people and their representatives, so that public opinion could be channeled into effective governmental action."[65] This citation is confounding for several reasons. First, Breyer attempts to tie together an out-of-context statement Wilson made in 1792 with a phrase Madison never used, in a Federalist paper authored five years earlier. Second, this statement was made *before* the ratification of the Constitution, let alone the Bill of Rights. Third, and most importantly, Madison's comments, like Wilson's, have *nothing to do with the First Amendment*. In *The Federalist No. 57*, Madison was not talking about free speech, or even democracy, but the fact that the House of Representatives "can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society."[66] In other words, everything Congress does will impact society. Indeed, Madison's answer to this problem was not democracy but liberty: "the vigilant and manly spirit which actuates the people of America—a spirit which nourishes freedom, and in return is nourished by it."[67]

At the end of a string citation, Breyer references several quotes from James Madison during the debates over what became the First Amendment,[68] writing that the Amendment "will strengthen American democracy by giving 'the people' a right to 'publicly address their representatives,' 'privately advise them,' or 'declare their sentiments by petition to the whole body.'"[69] Again it seems that Breyer used these quotations from Dean Post's book, but entirely disregarded their context.[70] Madison made these comments in response to a proposal to include "a right of instruction," that provided, "the people should have a right to instruct their representatives."[71] In other words, the people could tell their representatives how to vote, similar to how the states could instruct and

65. McCutcheon v. FEC, 134 S. Ct. 1434, 1467 (2014) (Breyer, J., dissenting) (citing THE FEDERALIST No. 57, at 386 (James Madison) (Jacob E. Cooke ed., 1961)).

66. THE FEDERALIST No. 57, *supra* note 65, at 386 (James Madison).

67. *Id.* at 387.

68. It was the third proposed Amendment.

69. *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting) (citing THOMAS HART BENTON, 1 ABRIDGEMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856 141 (1857)).

70. POST, *supra* note 53, at 12–13.

71. *Id.*

recall representatives under the late Articles of Confederation.[72] Madison rejected this proposal, and argued that there was no need to specify a "right of instruction" because of the wide-ranging protections of what became the First Amendment.[73] It gave "the people . . . a right to express and communicate their sentiments and wishes. . . . The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government; the people may therefore publicly address their representatives, may privately advise them, or declare their sentiments by petition to the whole body."[74]

Madison explained that the multifaceted protections of liberty ensured that the people could communicate with their representatives. There was no need to specify a "right of instruction." It is in this sense, Post writes, that "the First Amendment established a *chain of communication* that would connect the people to their representatives,"[75] and not in the narrow sense Breyer describes. As McGinnis explains, "Madison is actually arguing *against* a provision that would have required representatives to reflect more closely the sentiments of the people, thus undercutting Justice Breyer's point that the government's representatives may regulate expression to make what they claim is a closer connection between them and their constituents."[76] Once again, the history Breyer cherry picks proves just the opposite point. In 1792, the year after the First Amendment was ratified, James Madison explained the divide between these two schools of freedom. "In Europe, charters of liberty [have been] granted by power."[77] But in America, Madison counters, "charters of power have been granted by liberty."[78] Speech was not designed to serve democracy—speech preexisted and exists independently of democracy. Democracy exists because of speech, not the other way around.

Following this topsy-turvy magical mystery tour of the First Amendment, Justice Breyer finishes with a jarring, and unjustified conclusion: "Accordingly, the First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which *collective speech* matters."[79] No such assertion was proven. The dissent adduced not a scintilla of evidence that this was how the First Amendment was *ever*

72. ARTICLES OF CONFEDERATION of 1781, art. V ("[W]ith a power reserved to each state, to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the Year.").

73. THE FEDERALIST No. 57, *supra* note 65, at 385 (James Madison).

74. POST, *supra* note 53, at 13.

75. *Id.* (emphasis added).

76. McGinnis, *supra* note 59.

77. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 55 (1992).

78. *Id.*

79. McCutcheon v. FEC, 134 S. Ct. 1434, 1467 (2014) (Breyer, J., dissenting) (emphasis added).

understood. A thorough search failed to discover a single instance where the phrase "collective speech" was ever used in the U.S. Reports. While this may be a salient and contemporary progressive vision of the First Amendment—one embraced by several prominent ACLU alumni—attempts to support it based on the Court's precedents, and even the founding generation's views on democracy, are entirely lacking. Even Burt Neuborne, who agrees with Breyer's approach to the First Amendment, charitably describes his theory as justified by only an "emerging intuition," rather than the "text itself."[80]

### *3. Active Liberty and "Collective Liberty"*

On the merits, "collective speech" fares no better. To the *McCutcheon* dissenters, what determines if "political speech" is protected is whether it "preserv[es] a democratic order" for the "collective" good.[81] Traditionally, a lot of speech may serve individualistic ends, and under strict scrutiny, it is the government's burden to show why a compelling interest exists to limit that expression. It is not the individual's burden to show that her expression is made pursuant to some nebulously defined common good.

But the *McCutcheon* dissent turns this analysis on its head. Rather than protecting speech, the "collective" campaign finance laws, Breyer explains, "strengthen, rather than weaken" the First Amendment.[82] They "create a democracy responsive to the people."[83] The dissent even goes so far as to suggest that the First Amendment favors "the expression" of ideas that "reflect the very thoughts, views, ideas, and sentiments" of the people, rather than speech that is at odds with that consensus.[84] To this view, the First Amendment exists to ensure that all voices can be heard equally, not that an individual can speak. This "collective" right—better termed a power[85]—permits the state to limit speech to ensure that others can be heard.

At the end of the analysis, Breyer attempts to limit the breadth of his dissent by noting the "potential for conflict between" the fact that "contributions" are needed to "pay for the diffusion of ideas," and the "need to limit" those contributions "in order to help maintain the integrity

80. NEUBORNE, *supra* note 38, at 178.

81. *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting).

82. *Id.* at 1468.

83. *Id.*

84. *Id.*

85. District of Columbia v. Heller, 554 U.S. 570, 579–80 (2008) ("Three provisions of the Constitution refer to 'the people' in a context other than 'rights'—the famous preamble ('We the people'), section 2 of Article I (providing that 'the people' will choose members of the House), and the Tenth Amendment (providing that those powers not given the Federal Government remain with 'the States' or 'the people'). Those provisions arguably refer to 'the people' acting collectively—but they deal with the exercise or reservation of powers, not rights. Nowhere else in the Constitution does a 'right' attributed to 'the people' refer to anything other than an individual right.").

of the electoral process." Yet Breyer's preceding analysis makes clear how that cookie crumbles—the democratic process can trump any individualistic political expression that falls outside of "collective speech."

These collective ideals are not novel for the former Harvard Law School professor. *Active Liberty*, Breyer's 2007 tome, explains that the First Amendment is "designed to further a basic constitutional purpose: creating and maintaining democratic decision-making institutions."[86] Expressions inconsistent with that goal are deemed second-class utterances. Breyer explained in a 2006 interview that the most important part of the Constitution was "basically about . . . democracy,"[87] notwithstanding the fact that "the word democracy is nowhere to be found in either the Constitution or the Declaration of Independence."[88] To Breyer, "strong free speech guarantees" would "require, depriving the people of the democratically necessary room to make decisions, including the leeway to make regulatory mistakes."[89]

While *McCutcheon* primarily concerned so-called "political" speech, Breyer's collectivist mentality is not so limited, but also extends to speech about "economic" or "social" matters. For the types of expression that warrant "especially strong pro-speech judicial presumptions" and "careful review" are those that "shape public opinion, particularly if that opinion in turn will affect the political process and the kind of society in which we live."[90] Other types of speech that do not serve democracy are not so fortunate.

Breyer's "solution" to the campaign finance problem requires us to "understand" the First Amendment "as protecting more than the *individual's* modern freedom," but as "seeking to facilitate a *conversation among ordinary citizens* that will encourage their informed participation in the electoral process."[91] That is, a collective right (or power), rather than an individual right. It is not about "protecting the *individual* from government restriction of information about matters that the Constitution commits to *individual, not collective, decision-making*," but rather as "seeking *primarily to encourage* the exchange of information and ideas necessary for citizens themselves to shape" the "democratic state."[92] In other words, the First Amendment treats less favorably speech that affects individuals than speech that promotes "democracy."

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86. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 39 (2005).

87. Interview by Robert P. George, Professor, Princeton Univ., with Justice Stephen Breyer, in Princeton, N.J. (Apr. 30, 2006).

88. TIMOTHY SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY 5 (2014).

89. BREYER, *supra* note 86, at 41.

90. *Id.* at 42.

91. *Id.* at 46 (emphasis added).

92. *Id.* at 47 (emphasis added); *see also* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 252–53 (2002).

With this framework, Justice Breyer tries to strike a balance between providing *too strong* of speech protection, which would "prevent a democratically elected government from creating necessary regulation,"[93] and *too weak* of speech protection, which would not allow for the "free exchange of ideas necessary to maintain the health of our democracy."[94] This balancing test, which seeks to strike that happy middle ground—not too hot and not too cold—is less Goldilocks and more Janus. Both sides of the equation serve the same master: protecting speech that promotes *democracy*. If judicial protections of speech are too strong, the collective speech rights of society to promote democracy are hampered. If judicial protections of speech are too weak, the political speech rights of individuals to promote democracy are hampered. Both routes wind up at the same destination, and require judges to pick and choose what types of speech are consistent or inconsistent with democracy.

*4. The Conservatives Strike Back*

Responding forcefully and vigorously to Breyer's "collective speech" vision of the First Amendment, ironically, was the conservative bloc of Chief Justice Roberts, joined by Justices Scalia, Kennedy, Thomas, and Alito. Even more paradoxically, draping themselves in the First Amendment as interpreted by the Warren Court were the Justices who came of age seeking to roll back that generation of jurisprudence.

Chief Justice Roberts begins his analysis by citing *Cohen v. California*, a case where the Court upheld the right of a person in courthouse to wear a jacket blaring "Fuck the Draft." The First Amendment, Roberts explains, "is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us" as individuals.[95] It represents "the belief that no other approach would comport with the premise of *individual* dignity and choice upon which our political system rests."[96] The First Amendment protects not a "collective" power of society, but "an *individual's* right to participate in the public debate through political expression and political association."[97] Stressing this point, Roberts repeats, "[g]overnment may not penalize an *individual* for 'robustly exercis[ing]' his First Amendment rights."[98] The word "individual" is repeated throughout to emphasize the contrast.

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93. BREYER, *supra* note 86, at 41.

94. *Id.* at 42.

95. McCutcheon v. FEC, 134 S. Ct. 1434, 1448 (2014) (citing Cohen v. California, 403 U.S. 15, 24 (1971)).

96. *Id.* at 1448 (emphasis added).

97. *Id.* (citing Buckley v. Valeo, 424 U.S. 1, 15 (1976)) (emphasis added).

98. *Id.* at 1449 (emphasis added) (citing Davis v. FEC, 554 U.S. 724, 739 (2008)).

After establishing that the aggregate limits were inconsistent with the First Amendment, Roberts directly engages with Breyer's dissent: "[t]he dissent faults this focus on 'the *individual's* right to engage in political speech, saying that it fails to take into account 'the *public's interest*' in '*collective speech*.'"[99] Not so, Roberts explains: "there are compelling reasons not to define the boundaries of the First Amendment by reference to such a generalized conception of the public good."[100] The majority proceeds to dismantle, one plank at a time, the basis for Breyer's communal freedom.

First, the Court explains that democracy enforces the "will of the majority."[101] In this way, the democratic "'collective speech' . . . plainly can include laws that restrict free speech" to the extent the expression conflicts with majority will.[102] If the democratic process deems speech unnecessary, "collective speech" would allow the state to eliminate the speech. The First Amendment, Roberts counters, exists to "afford individuals protection against such infringements," *not to* "protect the government" when it "reflect[s] 'collective speech.'"[103] The First Amendment does not operate as an instrumental tool to protect deliberations, but is designed as a restraint on government itself. Speech is a personal, not a shared, right.[104] In response to Breyer's collective speech, free speech icon Floyd Abrams similarly notes that,

> [T]he core First Amendment interest is that of protecting freedom of expression *from* the government. Relegating that to a subsidiary position behind permitting the government, in the name of advancing democracy, to limit the amount of speech about who to vote for, risks much that the First Amendment was adopted to protect.[105]

Second, the value of speech should in no way be tethered to a "legislative or judicial determination that [it] is useful to the democratic

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99. *Id.* (emphasis added).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* (contrasting against United States v. Alvarez, 132 S. Ct. 2537 (2012)); Wooley v. Maynard, 430 U.S. 705 (1977); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)). *See* Timothy Sandefur, *Wow, Talk About Getting It Backwards*, FREESPACE (Apr. 2, 2014, 10:09 AM), http://sandefur.typepad.com/freespace/2014/04/wow-talk-about-getting-it-backwards.html.

104. *See* Dist. of Columbia v. Heller, 554 U.S. 570, 579 (2008) ("The unamended Constitution and the Bill of Rights use the phrase 'right of the people' two other times, in the First Amendment's Assembly-and-Petition Clause and in the Fourth Amendment's Search-and-Seizure Clause. The Ninth Amendment uses very similar terminology ('The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people'). All three of these instances unambiguously refer to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body.").

105. Ronald K.L. Collins, *Guest Contributor—Floyd Abrams, "Liberty Is Liberty,"* CONCURRING OPINIONS (Mar. 18, 2015), http://concurringopinions.com/archives/2015/03/guest-contributor-floyd-abrams-liberty-is-liberty.html.

process."[106] Citing the Court's recent 8-1 decision in *United States v. Stevens*—invalidating a federal law that prohibited depictions of animal cruelty—the Chief Justice restated that the "First Amendment does not contemplate such 'ad hoc balancing of relative social costs and benefits.'"[107] Or, as the Court stated a decade earlier, "'[w]hat the Constitution says is that' value judgments 'are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.'"[108] Or, as the Court stated four decades earlier, "[t]he constitutional protection [of speech] does not turn upon 'the truth, popularity, or *social utility* of the ideas and beliefs which are offered."[109] Speech cannot be restricted because the democratically elected majority thinks some things are better off not said.

Third, the Court notes that our First Amendment jurisprudence "already takes account of any 'collective' interest that may justify restrictions on individual speech" by measuring any restrictions on speech "against the asserted public interest."[110] Ceding the dissent's conclusion, the Chief Justice notes combating "corruption in the electoral process" is "no doubt . . . compelling."[111] But this is only part of the equation. The Court must also determine whether the restriction on speech is sufficiently narrowly tailored, or if it has substantial negative social costs to others.[112] Otherwise, the regulation is presumptively invalid. The validity of prior restraints is the rare exception to the rule, not the norm. Congress can "pursue that interest only so long as it does not unnecessarily infringe an *individual's right to freedom of speech*; [the Court does] not truncate this tailoring test at the outset."[113] Unlike the Janused scales of the dissent, burdened by the presumption of constitutionality, the equipoise struck by the majority exudes the presumption of liberty.[114]

Abrams observes that a "battle . . . rages in academia and on the Supreme Court as to what the First Amendment is all about. And in that conflict . . . it is the ideological Left that seems increasingly less supportive of the First Amendment—or, to put it more fairly, to more speech or speech-like activity being protected by the First Amendment."[115]

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106. *McCutcheon*, 134 S. Ct. at 1449.

107. *Id.* (quoting United States v. Stevens, 559 U.S. 460, 470 (2010)).

108. *Id.* at 1449–50 (quoting United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818 (2000)).

109. N.Y. Times v. Sullivan, 376 U.S. 254, 271 (1964) (quoting NAACP v. Button, 371 U.S. 415, 445 (1963)) (emphasis added).

110. *McCutcheon*, 134 S. Ct. at 1450.

111. *Id*. at 1451. The Chief Justice was more willing to combat potential corruption in judicial elections. Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1665 (2015).

112. *See* Josh Blackman, *The Constitutionality of Social Cost*, 34 HARV. J.L. & PUB. POL'Y 951 (2011).

113. *McCutcheon*, 134 S. Ct. at 1450 (emphasis added).

114. *See* RANDY E. BARNETT, RESTORING THE CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

115. Collins, *supra* note 105.

"The division between the Roberts and Breyer opinions," Abrams notes, "is vast."[116] There is no doubt that "jurists on both sides of the divide care about both freedom of speech and democracy."[117] However, "only one side believes that the best protection of democracy is *more* rather than *less* speech."[118] This, Abrams concludes, "is a disturbing and recurring reality."[119]

From the other perspective, Professor Neuborne (more from him later), highlights the "heated exchange between" Roberts and Breyer.[120] He observes that "under current constitutional ground rules American judges confronted with a case having significant implications for the functioning of American democracy are not required—indeed, they may not even be permitted—to ask whether the outcome is good or bad for democracy."[121] Whereas Breyer grounds his opinion entirely in making democracy work, Roberts will not deign to even consider the ramifications of his decisions, placing his faith in the mantra that more speech will lead to the optimal outcome, whatever that may be. This obtuseness, or perhaps what the dissent might characterize as naïveté, highlights the growing divide within the First Amendment.

## B. The Shifting First Amendment

The "collective speech" dissent in *McCutcheon* should not have come as a surprise. Over the past two decades, fissures have formed in the First Amendment, so much so that the most zealous defenders of free speech are now conservatives, and the largest critics have become liberals. Crystallizing this fracture has been the ACLU. After a bitterly divided internal vote, the ACLU at long last embraced regulations on speech once unthinkable by the premier civil liberties organization. The story of this change is a microcosm for how our First Amendment has shifted.

### *1. The Divide in the ACLU*

For a century, the ACLU has stood at the vanguard of protecting civil liberties, and in particular the freedom of speech. Consider "the late 1950s and 1960s," a period in which the "foundation for the modern First Amendment" was laid by the Warren Court.[122] During this era, the organization, and the First Amendment more broadly, enjoyed breathtaking successes, and the landmark First Amendment cases came, fast and furious.

116. Abrams, *supra* note 15.
117. *Id.*
118. *Id.*
119. *Id.* (emphasis added).
120. Neuborne, *supra* note 38, at 74.
121. *Id.*
122. *Id.* at 111.

In *New York Times Co. v. Sullivan*,[123] the Court found that "public officials" had to prove "actual malice" in order to sue a newspaper for libel. The state's interest in protecting the reputation of public figures was subordinated to the right of individuals to criticize government officials. In *Tinker v. Des Moines School Board*, the Court found that students could not be punished for wearing a black armband as a protest against the Vietnam War unless it results in a "substantial disruption" to school activities.[124] Even in an institution where discipline and order are paramount, the Court sided with the individual student's right of expression. In *Cohen v. California*, the Justices extended First Amendment protections to the right to wear in a courthouse a jacket bearing the message, "Fuck the Draft."[125] The state was no longer even able to impose a sense of decorum for collective order in—of all places—a courthouse. "The majority made it clear that an involuntary hearer's interest in being shielded from offensive speech cannot be deemed a compelling interest justifying government censorship."[126] The individual's right to speak prevailed. (I wonder how the present-day Supreme Court would treat an attendee wearing the exact same jacket at One First Street.[127]) One of the few outliers in this series was *United States v. O'Brien*, where the Court held that a war protestor could be prosecuted for burning his draft card, as the federal government's interest in maintaining an effective selective service draft system trumped the individual right.[128]

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123. 376 U.S. 250, 283 (1964).

124. 393 U.S. 503, 514 (1969).

125. 403 U.S. 15, 16, 26 (1971).

126. NEUBORNE, *supra* note 38, at 112.

127. In oral arguments in *Cohen v. California*, Chief Justice Burger instructed counsel for petitioner, Mel Nimmer: "Mr. Nimmer, you may proceed whenever you're ready. I might suggest to you that . . . the Court's thoroughly familiar with the factual setting of this case and it will not be necessary for you, I'm sure, to dwell on the facts." Transcript of Oral Argument, Cohen v. California, 403 U.S. 215 (1971) (No. 299). His admonition to avoid cursing did not work as Nimmer said "fuck" roughly two minutes into his argument. *Id.* In stark contrast, in the 2008 oral arguments for *Fox v. FCC*, which considered whether the FCC could issue a fine for Bono, who said during a live broadcast "really, really fucking brilliant," unfolded without expletives. During arguments, the advocates shied away from saying the actual word at the Supreme Court. Though, as Dahlia Lithwick recalls, the lawyers and judges "swore like sailors when this case was argued in the 2nd Circuit." Dahlia Lithwick, *Shit Doesn't Happen*, SLATE (Nov. 4, 2008, 6:51 PM), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2008/11/shit_doesnt_happen.html. The closest Solicitor General Gregory Garre came to profanity was to suggest the Court had a role to stop "Big Bird dropping the F-bomb on *Sesame Street*." Lithwick wryly observed, "it's a bitterly disappointing day for those of us who'd looked forward to hearing some filthy words at the high court." *Id.* In a related prudish moment from *Fox v. FCC II*, involving the broadcast of "buttocks" on television, former-Solicitor General Seth Waxman pointed out that there was nudity in the Court's frieze. "There's a bare buttock there, and there's a bare buttock here. I had never focused on it before." Justice Scalia replied, "Me neither." Joan Biskupic, *Top Justices Grapple with FCC Filters on Cursing, Nudity*, USA TODAY (Jan. 1, 2012, 1:55 AM), http://usatoday30.usatoday.com/news/washington/judicial/story/2012-01-10/supreme-court-broadcast-indecency/52482854/1.

128. 391 U.S. 367, 382 (1968).

Neuborne dubs this period "the First Amendment era of good feelings" where the "right's newly minted dedication to an expansive Free Speech clause was added to the reformist left's longtime preoccupation with free speech."[129] What was the tipping point of this *Pax Supremana*? Neuborne charts its ascent from the "1960s with the civil rights movement and reaching its apogee in the 1989 and 1990 flag-burning cases"[130] like *Texas v. Johnson*.[131] Thirty years is a good run!

One of the most noteworthy First Amendment victories during this period was *Buckley v. Valeo*.[132] The ACLU, represented by Joel Gora, successfully argued that restrictions on campaign finance laws enacted in the wake of Watergate were unconstitutional. Since its inception, the ACLU had opposed limits on contributions to political campaigns, arguing vigorously that more speech was better. But not everyone was happy with *Buckley*, or at least with what came after it.

Neuborne identifies *Buckley* as something of a turning point. To Neuborne, *Buckley* led the liberals and conservatives on the Court to "forge[] a strong free speech partnership" during the "First Amendment era of good feelings."[133] However, the decision gave the proverbial one percent a "tangible reason to celebrate a muscular First Amendment" and "corporate management a strong stake in the First Amendment."[134] These tensions simmered for nearly two decades, but the internal dissent came two years shy of the new millennium.

On June 19, 1998, a statement was released on behalf of eight persons who have served the ACLU "in [l]eadership [p]ositions [s]upporting the [c]onstitutionality of [e]fforts to [e]nact [r]easonable [c]ampaign [f]inance [r]eform."[135] The signatories represented, except for one, "every living person to have served as ACLU President, ACLU Executive Director, ACLU Legal Director, or ACLU Legislative Director during the past 30 years, with the exception of the current leadership."[136] The letter, which nearly a decade later would become the official position of the group, stated: "the First Amendment does not

129. NEUBORNE, *supra* note 38, at 113.

130. *Id.*

131. 491 U.S. 397 (1989).

132. 424 U.S. 1 (1976).

133. NEUBORNE, *supra* note 38, at 113–14.

134. *Id.* at 114.

135. The letter was signed by Norman Dorsen (ACLU General Counsel from 1969 to 1976); Jack Pemberton and Aryeh Neier (Executive Directors of the ACLU from 1962 to 1978); Melvin Wulf, Bruce Ennis, Burt Neuborne, and John Powell (National Legal Directors of the ACLU from 1962 to 1992); and Charles Morgan, Jr. and Morton Halperin (National Legislative Directors of the ACLU from 1972 to 1976, and 1984 to 1992, respectively). Statement of Persons Who Have Served the American Civil Liberties Union in Leadership Positions Supporting the Constitutionality of Efforts to Enact Reasonable Campaign Finance Reform (June 19, 1998) (on file with author).

136. *Id.*

forbid content-neutral efforts to place *reasonable limits* on campaign spending."[137]

What is the purpose of the First Amendment? Presaging Breyer's vision, it answers "to safeguard a functioning and *fair democracy*."[138] The letter faults *Buckley*, which "failed to recognize that there is a compelling interest in defending *democracy* that justifies reasonable spending limits."[139] Providing such robust protection for free speech "magnifies the political influence of extremely wealthy individuals and *distorts the fundamental principle of political equality* underlying the First Amendment itself, causing great harm to the *democratic principles* that underlie the Constitution."[140] To this view, the First Amendment's concerns for "political equality" and "democratic principles" outweigh the harm laws might impose on the freedom of speech. The signatories conclude: "Opponents of reform should no longer be permitted to hide behind an *unjustified constitutional smokescreen*."[141]

On June 19, the same day, columnist E. J. Dionne, Jr. wrote in the *Washington Post* that "[t]here's been a major breakthrough in the battle to reform the campaign money system."[142] Dionne explained that "a group of luminaries from the [ACLU] has broken with the organization's opposition to the principles underlying" legislation then pending before the House of Representatives.[143] The divide officially spilled over into the public. For the next decade, the position of Neuborne and his colleagues would remain in the minority.

But all of that changed in 2010. On April 19, 2010, almost three months to the date from the Court's decision in *Citizens United v. FEC*,[144] the ACLU issued a press release titled "ACLU Board Addresses Campaign Finance Policy."[145] The ACLU's National Board of Directors, by a "vote of 36-30, . . . revise[d] its policy on campaign finance regulation [in] . . . two ways."[146] First, the new policy "accepts spending limits as a condition of voluntary public financing plans."[147] Second, and more strikingly, the new policy "permits *reasonable* limits on campaign contributions to candidates."[148] This novel course was charted based on

137. *Id.* (emphasis added).
138. *Id.* (emphasis added).
139. *Id.* (emphasis added).
140. *Id.* (emphasis added).
141. *Id.* (emphasis added).
142. E. J. Dionne, Jr., *Politics as Public Auction*, WASH. POST, June 19, 1998, at A5.
143. *Id.*
144. 558 U.S. 310 (2010).
145. Press Release, ACLU, ACLU Board Addresses Campaign Finance Policy (Apr. 19, 2010) (on file with author).
146. *Id.*
147. *Id.*
148. *Id.* (emphasis added).

an acknowledgement "that very large contributions to candidates may lead to undue influence or corruption and, at a minimum, have the appearance of impropriety and undermine public confidence in the electoral system's integrity."[149]

The press release acknowledges quite candidly that "[t]his contrasts with prior policy, which opposed *all such limits*."[150] The old policy stated: "Limitations on contributions or expenditures made by individuals or organizations for the purpose of advocating causes or candidates in the public forum *impinge directly on freedom of speech and association*. Their implementation poses *serious dangers* to the First Amendment. They should be opposed in candidate as well as referenda elections."[151] In the span of three decades, the ACLU shifted from seeing such regulations as facially unconstitutional to being "reasonable."

The only limiting principle offered is that the ACLU "take[s] the position that is most consistent with protecting [civil liberties] to the fullest extent possible" in light of the "implications at stake."[152] At stake for what? Presumably in this situation, the implications are of protecting speech to democracy, more broadly. Stated simply, the release explains that the "regulation of the electoral campaign process must . . . assure integrity and inclusivity, encourage participation and protect rights of association while at the same time allowing for robust, full and free discussion and debate by and about the candidates and issues of the day."[153]

The press release offers a retrospective of how the ACLU reached this narrow vote of 36-30. (Perhaps fittingly, a 36-30 majority is roughly the same share as a 5-4 vote—the former eighty-three percent, the latter eighty percent.) A committee was formed in 2007—before *Citizens United* but after *FEC v. Wisconsin Right to Life*[154]—"to review the ACLU's campaign finance policy."[155] Preceding the April 2010 Board meeting, the committee reported in June 2009, October 2009, and January 2010. (*Citizens United* was scheduled for reargument in June 2009, reargued in September 2009, and decided in January 2010). During that time, "committee members, as well as members of the full ACLU National Board, engaged in extensive deliberations and study and heard

149. *Id.*

150. *Id.* (emphasis added).

151. Mike Wendy, *First Amendment Meddling Is Against the Public Interest*, PROGRESS & FREEDOM FOUND. (May 18, 2010), http://blog.pff.org/archives/2010/05/first_amendment_meddling_is_against_the_public_int.html.

152. Press Release, *supra* note 145.

153. *Id.*

154. 551 U.S. 449 (2007).

155. Press Release, *supra* note 145.

from a panel of renowned First Amendment experts representing a broad array of diverse perspectives."[156]

The reaction to the new policy was vigorous. Two weeks later, the *Wall Street Journal* ("*WSJ*") published an editorial titled, *The ACLU Approves Limits on Speech: On Campaign Contributions, a Dramatic About-Face*.[157] It was authored by ACLU alumni Abrams, Ira Glasser (Executive Director of the ACLU from 1978 to 2001), and Joel Gora (counsel to ACLU who argued *Buckley*). The trio offered insight into the reversal of policy: "Over the objections of some key senior staff and by a very narrow vote, the ACLU National Board of Directors rejected core aspects of that longstanding policy earlier this month."[158] On the merits, the authors note that the policy is silent about what constitutes a "reasonable" limit. Therefore, they suggest, "the government will doubtless supply the definition."[159] The authors conclude that "[t]he premier First Amendment organization in America now favors limitations on the First Amendment in the area in which all agree it must have its most powerful application—political speech during election campaigns."[160] What is the reason for this reversal? The "rhetoric of egalitarianism has won a victory over freedom of speech."[161] Will it work? The authors are not so sanguine: "The new restrictions the ACLU supports will never bring about the equality it claims is its goal."[162]

The following week, Susan Herman, President of the ACLU Board of Directors, wrote a letter to the editor in response to the *WSJ* editorial, insisting that the ACLU "does not compromise [its] commitment" to serving as a "stalwart defender of the First Amendment."[163] But the reply does not challenge Abrams, Glasser, and Gora's point. Consistent with the press release, Herman writes that "[p]olitical speech and the First Amendment right to engage in it freely is a cornerstone of our democracy, as is the integrity of our electoral process."[164] Herman adds that the decision "is an acknowledgment that very large contributions may lead to undue influence or corruption that can undermine the integrity of the electoral process."[165] This concedes that the ACLU now is weighing *political equality* and *civil liberties*. With respect to "reasonable

156. *Id.*

157. Floyd Abrams, Ira Glasser & Joel Gora, *The ACLU Approves Limits on Speech*, WALL ST. J. (Apr. 30, 2010, 12:01 AM), http://www.wsj.com/news/articles/SB10001424052748704423504575212152820875486.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. Susan N. Herman, *ACLU Backs the First Amendment*, WALL ST. J. (May 6, 2010, 12:01 AM), http://www.wsj.com/news/articles/SB10001424052748704342604575222030908027658.

164. *Id.*

165. *Id.*

limits" on contributions to candidates, political equality trumps the civil liberty. The speech of the "collective" prevails over the speech of the "individual."

Three years later, the other shoe dropped. Professors Ronald Collins and David Skover note that "[b]etween 1976 and 2010, when it filed a brief contesting the campaign finance laws in *Citizens United v. FEC*, the national ACLU had filed fourteen briefs in the Supreme Court, all of them challenging various aspects of campaign reform laws."[166] The first case that broke this trend was *McCutcheon*. Before *McCutcheon*, "the ACLU participated in almost every important Supreme Court campaign finance case and took what some viewed as an absolutist First Amendment position by arguing against limitations on contributions, expenditures, or both."[167] However, following *Citizens United*, the authors explain, "the national ACLU pled the proverbial Fifth and went silent. It expressed no position in such cases either pending in or before the Supreme Court."[168]

The reasoning behind this new silence is complicated. Collins and Skover explain "there was division in the ranks. Some of the new ACLU guard broke away from the traditional party line. Some of them were no longer the tried and true defenders of the First Amendment when it came to campaign finance cases (and picketing near abortion clinics). Or as they saw it, money was ruining the American electoral system so badly that the First Amendment should not be invoked to defend its all-too-harmful impacts on that system."[169] Roll Call reported that the "ACLU's sensitivity to opposition within its ranks may help explain why the organization took no position on the *McCutcheon v. FEC* ruling."[170]

In response, Steven R. Shapiro, the legal director of the ACLU counters that Collins and Skover "are incorrect to suggest that the ACLU's absence in *McCutcheon v. FEC* reflects a new sensitivity to 'divisions' within the ACLU over the campaign finance question. The ACLU's policy on campaign finance is among the most debated policies in the organization's history."[171] Shapiro explains that campaign finance law "raises critical issues about political speech, the role of money in facilitating that speech, and democratic self-governance."[172] However, "despite repeated reexaminations, the ACLU" claims that it "has never

166. RONALD COLLINS & DAVID SKOVER, WHEN MONEY SPEAKS loc. 1380–82 (2014) (ebook).

167. *Id.*

168. *Id.*

169. *Id.*

170. Eliza Newlin Carney, *Constitutional Amendment Debate Roils ACLU; Rules of the Game*, ROLL CALL (Sept. 8, 2014, 4:17 PM), http://blogs.rollcall.com/beltway-insiders/constitutional-amendment-debate-roils-aclu/.

171. Ronald Collins, *The ACLU & the* McCutcheon *Case*, SCOTUSBLOG (Mar. 14, 2014, 1:07 PM), http://www.scotusblog.com/2014/03/the-aclu-the-mccutcheon-case/.

172. *Id.*

wavered from its position in favor of public financing and against restrictions on political expenditures."[173] The 2010 change in policy, Shapiro explains, did not concern "aggregate limits on contributions to candidates and political committees,"[174] the issue in *McCutcheon*. As a result, Shapiro relayed, the ACLU "chose not to file when that issue was presented in *McCutcheon*, and for no other reason."[175]

Collins and Skover were not persuaded by Shapiro's rejoinder concerning the "divisions" in the ACLU. First, the authors recall E.J. Dionne's 1998 column in *The Washington Post* concerning the "major breakthrough" and "bitter debate" within the ACLU concerning campaign finance laws.[176] Second, the duo note the fact that in the last six campaign finance cases, dueling briefs on both sides of the First Amendment were filed by the ACLU and "Former ACLU officials."[177] Many of these former officials signed the 1998 statement. For example, during the October 2014 term, the ACLU and "Past Leaders of the ACLU" (Norman Dorsen, Aryeh Neier, Burt Neuborne, and John Shattuck) filed briefs on both sides of the "v" in *Williams-Yulee v. Florida Bar*,[178] a judicial campaign financing case.[179]

Notwithstanding the nuanced silence in *McCutcheon*, this evolution in the ACLU is still in motion. During the summer of 2014, the Senate considered a constitutional amendment that would give Congress the power to "regulate the raising and spending of money and in-kind equivalents with respect to Federal elections" in order "advance the fundamental principle of political equality for all."[180] On June 3, 2014, the ACLU formally opposed the proposed amendment, finding that it would "would severely limit the First Amendment, lead directly to government censorship of political speech and result in a host of unintended consequences that would undermine the goals the amendment has been introduced to advance—namely encouraging vigorous political dissent and providing voice to the voiceless, which we, of course, support."[181]

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173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. 135 S. Ct. 1656 (2015).

179. Ronald K.L. Collins, *The ACLU Making (More) First Amendment News*, CONCURRING OPINIONS (Jan. 14, 2015), http://concurringopinions.com/archives/2015/01/fan-43-first-amendment-news-the-aclu-making-more-first-amendment-news.html.

180. Letter from ACLU to the Hon. Patrick Leahy & Charles Grassley, ACLU Opposes the Udall Amendment (June 3, 2014) (on file with author). For my take on the substance of the proposed amendment (which never had any chance of passing, let alone ratification, but garnered forty-four votes in the Senate), see Josh Blackman, *Democrats Are Trying to Rewrite the First Amendment*, AM. SPECTATOR (June 25, 2014), http://spectator.org/articles/59746/democrats-are-trying-rewrite-first-amendment.

181. Letter from ACLU, *supra* note 180.

Three months later, on the eve of the hearing before the Senate Judiciary Committee, six former leaders of the ACLU—including five members of the 1998 statement—wrote a letter supporting the proposal to amend the Constitution. Reiterating the 1998 letter, the signatories charged that five Justices of the Supreme Court, relying on the "ACLU's erroneous reading of the First Amendment as a fig leaf," have "added huge multi-national corporations to the list of unlimited campaign spenders, and authorized wealthy individuals to contribute virtually unlimited sums to party leaders in a never-ending search for wealth-driven political influence."[182] The letter faulted the Supreme Court and the National ACLU for "fail[ing] to recognize that political equality is a *compelling interest* that justifies reasonable limits on massive political spending."[183] In other words, political equality—and not just the elimination of corruption—is a compelling interest, so these laws survive strict scrutiny. The letter concluded by applauding the proposed amendment which would "overturn[] many of the Court's narrow 5-4 campaign finance precedents and implement[] generous, content neutral political spending limits [as] the best way to fulfill the promise of James Madison's First Amendment as *democracy's* best friend."[184]

After a divisive hearing in the Senate in September, the divide within the ACLU spilled further into the forefront. Neuborne, who "spearheaded the letter in response to" ACLU's June letter, told *Roll Call,* "[t]here is a very, very significant divide within the ACLU on this."[185] Specifically, *Roll Call* reported that the Court's decision in *Citizens United* has "put the ACLU's national leaders even more out of step with the organization's rank and file."[186] Neuborne adds, "There is within the organization very, very significant discontent with the existing position."[187]

Laura Murphy, director of the ACLU's Washington legislative office—who signed the June letter—agreed with Neuborne, saying "I think that there is a deep divide within the ACLU about this issue," but stressed that "we are taking positions that are supported by our national

182. Letter from Norman Dorsen et al., to Senator Patrick Leahy et al., Former Leaders of the ACLU (Sept. 4, 2014) (on file with author).

183. *Id.* (emphasis added).

184. *Id.* (emphasis added). This language about Madison is almost certainly based on Neuborne's new book, *Madison's Music: On Reading the First Amendment*. NEUBORNE, *supra* note 38, at 20 ("It's possible, of course, that Revolutionary-era monkeys on a typewriter (or mice with quill pens) would have randomly stumbled upon such a fine-tuned democratic chronology. But even if the disciplined order of the six textual ideas is merely the result of random good fortune, the full First Amendment, as *Madison and his friends wrote it, should be democracy's best friend*. It's tragic that the current Supreme Court majority, utterly ignoring Madison's music, has turned the isolated, artificially truncated seven-word Free Speech Clause into democracy's bad parent.") (emphasis added).

185. Carney, *supra* note 170.

186. *Id.*

187. *Id.*

board."[188] Murphy added that the "letter is meant to confuse congressional staff about who speaks for the ACLU," and she has no respect "for this eleventh hour 'sham issue advocacy.'"[189] At an event at the Cato Institute, Nadine Strossen echoed these sentiments: "Those of us who are First Amendment absolutists have been losing some ground, although I am happy to say that in contrast to *former* ACLU leaders, the *current* ACLU is very strongly opposing, and effectively opposing, the proposed constitutional amendment on this ground."[190] The emphasis on "current" is my own. It is unclear how long this line will hold, given the already fractured ACLU.

Recently, a kerfuffle emerged over the ACLU's 2015 "Workplan." As Professor Ron Collins noted, excluded from the eleven priorities the organization listed—including "reproductive rights," "freedom to marry," and "mass incarceration"—was the freedom of speech.[191] Professor Howard Wasserman offered a guess of "one possible (if not entirely accurate) answer: We won. There are no 'major civil liberties battles' to be fought or won with respect to the freedom of speech."[192] Anthony Romero, the Executive Director of the ACLU replied that "The ACLU is and has always been fully committed to protecting free speech, even when that speech may be offensive or controversial to many."[193] However, perhaps giving credence to Wasserman's theory, Romero notes that "[the ACLU's] First Amendment freedom of expression work is somewhat unique in that a large share of it involves responding to threats or incidents that occur on the local level and not generally as part of a broader, coordinated threat to freedom of expression."[194]

The ACLU does not operate in a vacuum. The position the organization adopts represents broader trends regarding speech and civil liberties.

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188. *Id.*

189. Ronald K.L. Collins, *Six Former ACLU Leaders Contest Group's 1st Amendment Position on Campaign Finance—ACLU's Legislative Director Responds*, CONCURRING OPINIONS (Sept. 6, 2014), http://concurringopinions.com/archives/2014/09/fan-30-1-first-amendment-news-six-former-aclu-leaders-contest-groups-1st-amendment-position-on-campaign-finance-aclus-legislative-director-responds.html.

190. Ronald K.L. Collins, *Cato Hosts Panel on First Amendment: Strossen Discusses* McCutcheon *and History of ACLU Stance*, CONCURRING OPINIONS (Sept. 17, 2014), http://concurringopinions.com/archives/2014/09/fan-32-1-first-amendment-news-cato-hosts-panel-on-first-amendment-strossen-discusses-mccutcheon-history-of-aclu-stance.html.

191. Ronald K.L. Collins, *ACLU "2015 Workplan" Sets out Narrow Range of First Amendment Activities*, CONCURRING OPINIONS (Feb. 25, 2015), http://concurringopinions.com/archives/2015/02/fan-49-first-amendment-news-aclu-2015-workplan-sets-out-narrow-range-of-first-amendment-activities.html.

192. Howard Wasserman, *Declaring Victory?*, PRAWFSBLAWG (Feb. 26, 2015, 4:52 PM), http://prawfsblawg.blogs.com/prawfsblawg/2015/02/declaring-victory.html.

193. Ronald K.L. Collins, *ACLU's 2015 Workplan and the First Amendment—Anthony Romero Responds*, CONCURRING OPINIONS (Mar. 4, 2015), http://concurringopinions.com/archives/2015/03/fan-50-first-amendment-news-aclus-2015-workplan-the-first-amendment-anthony-romero-responds.html.

194. *Id.*

*2. The Collective Justices*

The simmering intellectual revolt within the ACLU served as a harbinger of the shift on the high court. So goes the ACLU, so goes the Supreme Court. In 2010, Justice Stevens—as the senior member in dissent—assigned himself the *Citizens United* dissent. The opinion, which would have upheld the campaign finance regulation, attempted to adhere to longstanding First Amendment precedents. Indeed, Stevens faulted the majority for overruling the Court's 1990 decision in *Austin v. Michigan Chamber of Commerce*.[195]

But *McCutcheon* was different. The liberal bloc could have written a straightforward but powerful dissent, arguing that the aggregate limits served the purpose of reducing corruption in politics. There was no need to reimagine the First Amendment. But reimagine, it did. The effort to ground the First Amendment in distortions from Holmes, Brandeis, and Madison was entirely superfluous unless it was designed to build the basis for further rulings to promote "collective speech." The dissent reads like the foundation—albeit a cracked one—for a new vision of the First Amendment.

While Breyer has been quite open about his views of a narrow First Amendment freedom—dissenting alone in *Brown v. Entertainment Merchants Ass'n*[196] and *Sorrell v. IMS Health Inc.*[197]—what makes *McCutcheon* so significant is that he is joined by his progressive compatriots. Justices Ginsburg, Sotomayor, and Kagan all endorsed his vision of collective speech. With Justice Stevens gone, Justice Ginsburg—who now had the highest seniority—assigned the dissent to Breyer, knowing how he would approach the issue. Floyd Abrams explains that the "most surprising and disturbing" element of *McCutcheon* was the dissent, "for the first time, Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan join [] Justice Stephen Breyer's minimization of long-recognized and well-established First Amendment interests by maintaining that, after all, the side seeking to overcome those interests had at least as strong a First Amendment argument on its side."[198] In light of Breyer's dissent, this assignment—with no noted dissension—augurs a broader jurisprudential shift on the left.

Perhaps this line of thinking will be confined to the doctrine of campaign finance law. Justice Kagan had previously commented that her decision in *Brown v. Entertainment Merchants Ass'n*[199] to invalidate a

195. 494 U.S. 652, 678 (1990).
196. 131 S. Ct. 2729 (2011).
197. 131 S. Ct. 2653 (2011).
198. Abrams, *supra* note 15.
199. 131 S. Ct. 2729.

statute regulating the sale of violent video games to minors "was the case where I struggled most and thought most often I'm on the wrong side of it."[200] She added, "I sweated over that mightily."[201] She explained at an event at the Aspen Institute that she ultimately joined the majority because she "couldn't figure out how to square that with our First Amendment precedents and precedent is very important to me."[202] To Kagan at least then, precedent matters. On the other hand, Breyer discounted these precedents, and dissented in *Brown*, finding that the state has a paramount interest in limiting speech to protect children from psychological harms from violent video games.[203] But these precedents are not set in stone, and in many respects, are severely undercut by the new line of thinking established by the *McCutcheon* dissent.

Perhaps a recent case suggests the further development of this doctrine. In *Walker v. Texas Division, Sons of Confederate Veterans*,[204] Justice Breyer wrote the majority opinion in a 5-4 decision upholding the state's power to prohibit specialized license plates bearing the Confederate battle flag. In keeping with his views toward collective speech, Breyer construed the license plate as a form of "government speech," rather than the speech of the individual group that designed the plate. He explained, "When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. That freedom in part reflects the fact that it is the *democratic electoral process* that first and foremost provides a check on government speech."[205] Here too, Breyer views the political process as the check on speech, rather than the other way around. Indeed, in this case, the state openly censored license plates designed by Texans that it deemed offensive—what the dissent labeled as "blatant viewpoint discrimination."[206] As Justice Alito framed it in his dissent, "[t]he Court's decision passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that government finds displeasing."[207] This, Alito charges, is "dangerous reasoning."[208] After spending seventeen pages on the government's perspective, Breyer closes with but a mere paragraph on the "free speech rights of private persons," that clumsily equates the state being unable to compel private speech

200. Josh Blackman, *Kagan on Her First Term*, JOSH BLACKMAN'S BLOG (Aug. 3, 2011), http://joshblackman.com/blog/2011/08/03/kagan-on-her-first-term/.

201. *Id.*

202. *Id.*

203. *Brown*, 131 S. Ct. at 2761 (Breyer, J., dissenting).

204. 135 S. Ct. 2239 (2015).

205. *Id.* at 2245 (emphasis added).

206. *Id.* at 2256 (Alito, J., dissenting).

207. *Id.* at 2254 (Alito, J., dissenting).

208. *Id.* at 2261 (Alito, J., dissenting).

with an individual being unable to compel government speech.[209] This decision evinces strong shades of the collective liberty that pervades *McCutcheon*.

Floyd Abrams referred to the dissent in *McCutcheon* as a "disturbing and recurring reality," and "deeply disquieting."[210] Abrams notes that significant unanimous decisions of the Court, "would be at risk if the First Amendment were somehow viewed as anything but a limitation on the government's power to limit speech, even in the supposed service of 'preserving democratic order,' vindicating 'collective speech,' or the like."[211] First, consider *Mills v. Alabama*.[212] Alabama enacted a law that ostensibly prohibited a newspaper from publishing an editorial on election day "in support of or in opposition to any proposition that is being voted on."[213] The law was passed ostensibly with a "pro-democratic intent."[214] The Alabama Supreme Court found that the law "protects the public from confusive [sic] last-minute charges and countercharges and the distribution of propaganda in an effort to influence voters on an election day."[215]

Sounds like the rationale against releasing *The Hillary Movie* before the election in 2008, doesn't it? These were the facts in *Citizens United*. In that case, the district court observed the FEC could prohibit the release of the movie because it was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her."[216] Similarly, recall that when *Citizens United* was first argued, Deputy Solicitor General Malcolm Stewart told Justice Alito that the government could ban a book that criticized a candidate, if it was paid for by corporate contributions.[217] When then-Solicitor General Kagan

209. *Id.* at 2252.

210. Abrams, *supra* note 15.

211. *Id.*

212. 384 U.S. 214 (1966).

213. *Id.* at 216.

214. Abrams, *supra* note 15.

215. *Mills*, 284 U.S. at 219 (quoting Alabama v. Mills, 176 So. 2d 884, 890 (Ala. 1965)).

216. Citizens United v. Fed. Election Comm'n, 530 F. Supp. 2d 274, 279 (D.D.C. 2008). In an irony too rich for reality, Democratic Presidential nominee Hillary Clinton—who has tacitly endorsed at least two super PACs supporting her—told her top fundraisers of her litmus test so that any Justice she appoints would vote to overturn *Citizens United*. Matea Gold & Anne Gearan, *Hillary Clinton's Litmus Test for Supreme Court Nominees: A Pledge to Overturn* Citizens United, WASH. POST (May 14, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/05/14/hillary-clintons-litmus-test-for-supreme-court-nominees-a-pledge-to-overturn-citizens-united/.

217. Transcript of Oral Argument at 26–28, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (No. 08-205).

reargued the case, she wisely backed off an answer that Justice Alito called a "stunner," but was compelled by the government's position.[218]

In *Mills*, the Warren Court unanimously rejected the rationale that too much speech might be a bad thing. The Court found that "no test of reasonableness"—even one that protects the collective speech rights of the populace—"can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election."[219] Abrams commented "*Mills* held the statute unconstitutional, regardless of its supposedly pro-democratic intent of protecting a potentially confused and misled public."[220] Applying the "collective liberty" approach reflected in the *Citizens United* dissent would have required upholding the Alabama law.

"What about *Miami Herald Publishing Co. v. Tornillo*?"[221] Abrams asks. In this case, the Court invalidated a Florida law that required a right-of-reply for any candidate who was criticized in a newspaper.[222] What could be "more democratic, more consistent with public participation in the creation of public policy," Abrams asks, "than a right-of-reply statute which assures that if a candidate was attacked on the basis of his personal character or official record by a newspaper, that he should have the chance to respond?"[223] Especially where—in a line right out of the *Citizens United* dissent—"the power to inform the American people and shape public opinion" has been "place[d] in a few hands" of wealthy media conglomerates.[224] Would this law not improve the strength of the "chain" between the populace and elected representatives?

Characterizing the supporters of the Florida law, Chief Justice Burger observed that "[t]he First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' is today a monopoly controlled by the owners of the market."[225] Sound familiar? This argument could have also come straight from the *Citizens United* dissent. The Court acknowledges that a "responsible press is an undoubtedly desirable goal"—paying homage to Justice Breyer's desire for democracy—but still unanimously struck down the law because "press responsibility is not mandated by the Constitution and like many

218. Josh Blackman, *Recap of Federalist Society 30th Anniversary Gala Dinner with Remarks by Justice Alito #FedSoc2012*, JOSH BLACKMAN'S BLOG (Nov. 16, 2012), http://joshblackman.com/blog/2012/11/16/recap-of-federalist-society-30th-anniversary-gala-dinner-with-remarks-by-justice-alito-fedsoc2012/.

219. *Mills*, 284 U.S. at 220.

220. Abrams, *supra* note 15.

221. 418 U.S. 241 (1974).

222. *Id.*

223. Abrams, *supra* note 15.

224. *Tornillo*, 418 U.S. at 250.

225. *Id.*

other virtues it cannot be legislated."[226] Neither of these precedents would be safe if the "collective liberty" mentality is taken to its logical conclusions.

This new progressive bloc potentially reflects a huge shift on the Court with respect to civil liberties. Neuborne characterizes the dissenting quartet as "tend[ing] to approach the First Amendment as an aspirational partnership between speakers *and* hearers aimed at preserving human dignity and improving the efficient functioning of institutions dependent on informed free choice."[227] Neuborne sees himself as continuing the new experiment from Justice Breyer, who has "begun to root his aspirational reading of the Constitution in respect for democratic governance."[228] Rather than speaking in terms of "collective speech," Neuborne posits that our individualistic "[c]urrent First Amendment doctrine . . . *aggrandizes the speaker* (including conduits dressed up as speakers), *subordinates the hearer*, ignores the speech target, and demonizes the government regulator."[229] But the costs of this doctrine have begun to chip away at the shiny veneer of "speech is speech," Neuborne explains. "A steady diet of speaker-obsessed deregulatory free-speech doctrine has begun to expose its costs to Madisonian democracy and to the larger social partnership between speakers and hearers that supports it."[230] What is the response to this demolition of democracy? "The time may be ripe for a modest political shake-up in Mr. Madison's First Amendment neighborhood."[231] In other words, collective speech.

During a discussion about Neuborne's book at NYU Law School, Justice Sotomayor asked, "You say that the focus of the First Amendment is democracy. You invite your thesis as a different way of interpreting the Constitution. So who decides what promotes democracy?"[232] Neuborne replied jokingly, "I'm sort of shocked that you asked that, because it's clear that I define it."[233] The Justice comically shot back, "No, no, no, you forget, I do."[234] Though she was no doubt kidding, based on the tenor of the event, there is a startling kernel of truth to her comment. The logical implication of Justice Breyer's theory is that the Court must place itself in the position to decide *which* speech promotes democracy and relegate all other types of speech to the constitutional ash heap. But to that, Neuborne answered, "I would rather have judges asking" what results in

226. *Id.*
227. NEUBORNE, *supra* note 38, at 109.
228. *Id.* at 11.
229. *Id.* at 115 (emphasis added).
230. *Id.* at 116.
231. *Id.*
232. *Justice Sonia Sotomayor Joins Burt Neuborne and Trevor Morrison to Discuss* Madison's Music, NYU L. (Mar. 17, 2015), http://www.law.nyu.edu/news/sonia-sotomayor-burt-neuborne-madisons-music.
233. *Id.*
234. *Id.*

"a good democracy or a bad democracy" than "pretending to decide the case by deciding what seven words" of the First Amendment means "without even thinking about the consequences for democracy."[235] So here is the divide. Rather than understanding what the Constitution actually means, the collectivists will instead disregard speech inconsistent with their personal views of democracy.

While the Justices are not quite there yet, Neuborne is onto something.[236] In my 2010 editorial, co-authored with David E. Bernstein, we worried that "Breyer's apparent ascendance as doyen of the Court's liberal wing threatens to roll back decades of pro-liberty precedents, and to destroy the consensus on the Court that freedom of speech and other essential rights must not be sacrificed to the shifting whims of legislative majorities."[237] We might be inching closer to that radical revolution in constitutional law. And unlike in the past, where stalwarts such as the ACLU could be counted on to defend this most fundamental civil liberty, the evolution on the Court has mirrored the evolution of the Bar.

## II. Collective Exercise

The Free Exercise Clause of the First Amendment, and its statutory cousin, RFRA have followed a similar trajectory as free speech, between the collective and the individual conceptions of liberty. During the heyday of the Warren Court, the Justices embraced the Free Exercise Clause as a wedge to carve out exemptions from generally applicable laws that imposed a "substantial burden" on faith. However, decades later this individual right gave way to the collectivist mentality ushered in by Justice Scalia's decision in *Employment Division v. Smith*.[238] It was for the democratic process, and not the courts, to provide extra protections for faith. However, Congress responded by tugging the religiosity of the nation back toward the individual through the then popular RFRA. After a brief period of prosperity, RFRA was dragged back into controversy, this time by the conservatives, who recognized an exemption for Hobby Lobby Stores, Inc. from the ACA's contraceptive mandate. Now, it is the progressives who lash out against the individualistic free exercise right, and instead sought to let the democratic process decide which carve outs were suitable. The pendulum continues to swing.

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235. *Id.*

236. Neuborne, *supra* note 38, at 109.

237. David E. Bernstein & Josh Blackman, *Supreme Court Justice Stephen Breyer Shows Progressive Streak*, NJ.com (July 12, 2011, 11:24 AM), http://blog.nj.com/njv_guest_blog/2011/07/supreme_court_justice_stephen.html.

238. 494 U.S. 872 (1990).

### A. *SHERBERT* INDIVIDUALIZES FREE EXERCISE

In the 1963 decision of *Sherbert v. Verner*,[239] the Warren Court set the stage for the development of an individualist notion of the Free Exercise Clause of the First Amendment. The case involved a classic clash between majority and minority faiths. Adell Sherbert, a member of the Seventh-Day Adventist Church, observed the Sabbath on Saturday.[240] South Carolina determined that the only day of rest that could excuse someone from working would be Sunday, the traditional Sabbath for almost all Christian religions. Which interest would trump: the individual's faith or society's recognition of which exercises of faith ought to be protected? Stated differently, would the state's determination that Sunday was the proper day of rest outweigh an individual's determination that Saturday was the proper day of rest? The Court, by a vote of 7-2, chose the former.

To resolve this quandary, the Court puts forth this test: for the denial of benefits to be valid, "it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'"[241] As Justice Brennan framed the issue for the majority, the lower court's "ruling forces [Sherbert] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[242] Further, compounding this injury is that the law "saves the Sunday worshipper from having to make the kind of choice which we here hold infringes the Sabbatarian's religious liberty."[243] The policy, though one of general applicability, violated the Free Exercise Clause.

The dissent by Justices Harlan and White (the latter joined the majority opinion in *Smith* twenty-seven years later), explained that the "South Carolina Supreme Court has uniformly applied this law in conformity with its clearly expressed purpose": excluding benefits if "unemployment has resulted not from the inability of industry to provide a job but rather from personal circumstances, no matter how compelling."[244] Rather than being based on any religions notions, the conclusion was mandated because "virtually all of the mills in the Spartanburg area were operating on a six-day week," and she was not "discriminated against . . .

239. Sherbert v. Verner, 374 U.S. 398 (1963).
240. *Id.* at 399.
241. *Id.* at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).
242. *Id.* at 404.
243. *Id.* at 406.
244. *Id.* at 419 (Harlan, J., dissenting).

on the basis of her religious beliefs."[245] What the Court's holding does, the dissenters explain, is require the Constitution to be read to "compel [the] to carve out [of] an exception—and to provide benefits—for those whose unavailability is due to their religious convictions."[246] The rule of *Shebert* would prevail for nearly three decades.

### B. *Smith* Collectivizes Free Exercise

The criticisms of *Sherbert* became pronounced throughout the 1970s and 1980s. The conservative wing of the Court, led by Chief Justice Rehnquist "had been championing a retreat from the 'liberal' Free Exercise Clause view for years."[247] This shift culminated in the 1990 decision of *Employment Division v. Smith*.[248] Alfred Smith was terminated by his employer for his ingestion of peyote—a powerful hallucinogen—taken in the course of his Native American religious ceremonies.[249] Smith challenged the subsequent denial of unemployment benefits based on the drug use as a violation of the First Amendment's Free Exercise Clause.[250] In a controversial decision by Justice Scalia, the Supreme Court held that the Free Exercise Clause could not be used as a defense against a law of general applicability.[251] The Court rejected the *Sherbert* framework, finding that "many laws will not meet the test" and that it "required religious exemptions from civic obligations of almost every conceivable kind."[252] Further, the Court added, "danger increases in direct proportion to the society's *diversity of religious* beliefs."[253] These exemptions include "laws providing for equal opportunity for the races."[254] The First Amendment, Scalia explained, does not require this result.[255] Justice Scalia determined that the Constitution did not allow courts to be in the business of exempting people from the laws based on their religious beliefs.

245. *Id.* at 419–20 (Harlan, J., dissenting).

246. *Id.* at 420 (Harlan, J., dissenting).

247. Eugene Volokh, *Many Liberals' (Sensible) Retreat from the Old Justice Brennan/ACLU Position on Religious Exemptions*, Wash. Post (Apr. 1, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/01/many-liberals-sensible-retreat-from-the-old-justice-brennanaclu-position-on-religious-exemptions/.

248. 494 U.S. 872 (1990).

249. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 872 (1990).

250. *Id.*

251. *Id.*

252. *Id.* at 888.

253. *Id.* (emphasis added).

254. *Id.* at 889.

255. *Id.*

How should the diverse "religious preference[s]" of our "cosmopolitan nation" be protected?[256] The answer—as Justice Breyer would explain in a different context—is democracy. "Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process," writes Scalia.[257]

> Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.[258]

In other words, the political process can protect minority religious beliefs, in much the same way that this process protects minority free speech.

Three decades after *Sherbert*, Justice Brennan found his opinion discarded by *Smith*, and joined Justice O'Connor's dissent for four justices. The dissent would have retained *Sherbert*, for free exercise is not a collective right subject to the democratic process, but rather an "*individual* religious liberty."[259] Professor Michael Stokes Paulsen laments that the majority, all "judicial conservatives," engaged in an "utterly unforced error," as the Justices who would otherwise "support a broad construction of First Amendment freedoms" failed to "embrace[] the overriding value of religious liberty."[260] The job of "defend[ing the] Free Exercise [C]lause as a substantive freedom fell to the three dissenting liberals."[261]

With this decision, free exercise immediately became more of a collective right, protected so long as the legislature deemed that it served some higher purpose—and generally the principle motivating these laws was equality and no exceptions. In the final paragraph of the Court's opinion, Justice Scalia concedes this weakness of his conclusion: "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those *religious practices that are not widely engaged in*."[262] In other words, like with speech, the political process will not protect minority beliefs.

South Carolinians who observe the Sabbath on Sunday would have no problem seeking exemptions from the legislature, but Seventh-Day

256. *Id.* at 888 (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)); *see also* Town of Greece v. Galloway, 134 S. Ct. 1811, 1849 (2014) (Kagan, J., dissenting) ("[T]he American community is today, as it long has been, a rich mosaic of religious faiths.").

257. *Smith*, 494 U.S. at 890.

258. *Id.*

259. *Id.* at 891 (O'Connor, J., dissenting) (emphasis added).

260. Michael Stokes Paulsen, *Justice Scalia's Worst Opinion*, PUB. DISCOURSE (Apr. 17, 2015), http://www.thepublicdiscourse.com/2015/04/14844/.

261. *Id.*

262. *Smith*, 494 U.S. at 890 (emphasis added); *see also* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2787 (2014) (Kennedy, J., concurring).

Adventists would be out of luck. Christians would have no problem seeking an exemption from prohibition to use sacramental wine, but Alfred Smith could not realistically seek a peyote exemption. Nonetheless, Scalia writes, the "unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[263] Justice Scalia wanted the Court to get out of the business of carving out exemptions for every religion imaginable, even noting that certain minority faiths might be burdened substantially. This is collective exercise—religious exercise is protected by the Constitution only so long as it promotes a greater societal good. The parallel between *Smith* and Justice Breyer's *McCutcheon* dissent is striking. We will return to this juxtaposition later.

### C. Restoring the Individual Free Exercise Clause

The reaction to the "collective" notion of free exercise articulated in *Smith* resulted in a massive political backlash. How could a person be punished for exercising sincerely held religious beliefs when an accommodation was so easy? How could it be that people of faith could only turn to the legislature to seek exemptions from generally applicable laws? How could religious minorities, who lack the clout of the mainstream faiths, possibly seek such largesse from state governments? These questions, occasioned by Justice Scalia's majority opinion, led to the federal RFRA.

In 1993, then-Representative Charles Schumer of New York introduced RFRA in the House of Representatives.[264] Its counterpart bill in the Senate was co-sponsored by Senator Edward Kennedy. RFRA was supported by the "ACLU joined with a broad coalition of religious and civil liberties groups, including People for the American Way [and] the National Association of Evangelicals."[265] The bill enjoyed such wide-ranging bipartisan support that it passed the House on a voice vote, passed the Senate by a vote of ninety-seven to three, and was promptly signed into law by President Clinton. Imagine such a significant law passing today with this kind of vote!

The law states that the federal "Government shall not substantially burden a person's exercise of religion" unless it "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[266] At a minimum,

263. *Smith*, 494 U.S. at 890.

264. *Chuck Schumer on RFRA* (C-SPAN television broadcast May 11, 1993).

265. *The ACLU and Freedom of Religion and Belief*, ACLU, https://www.aclu.org/religion-belief/aclu-and-freedom-religion-and-belief (last visited Apr. 10, 2016).

266. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb to 2000bb-4).

RFRA attempted to reverse the Court's collective construction of the Free Exercise Clause in *Smith* and restore Justice Brennan's individualistic notion of free exercise. Whether it did more is an open question.

The first decade of RFRA was not controversial. Consider *Gonzales v. O Centro Espirita.*[267] This case involved a "small American branch" of a "religious sect with origins in the Amazon Rainforest [that] receives communion by drinking a sacramental tea, brewed from plants unique to the region, that contains a hallucinogen regulated under the Controlled Substances Act [("CSA")] by the Federal Government."[268] In facts analogous to *Smith*, the Court applied RFRA rather than the Free Exercise Clause to unanimously rule against the government. The group was entitled to a religious accommodation from the CSA because of RFRA. Once again, free exercise was treated as an individual right.

Chief Justice Roberts, writing for the Court recognized the difficulty of applying the "compelling interest test." The Court conceded,

> [The] task assigned by Congress to the courts under RFRA is [not] an easy one. Indeed, the very sort of difficulties highlighted by the Government here were cited by this Court in deciding that the approach later mandated by Congress under RFRA was not required as a matter of constitutional law under the Free Exercise Clause.[269]

But because this was a statute that can be modified easily if it does not work well—unlike the First Amendment—the Court was comfortable in complying with Congress's mandate "that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue."[270] Viewed as a way to resurrect Brennan's protection of individual exercise, or as means to prevent the government from infringing on the rights of religious minorities, RFRA was designed to restore *Sherbert* and repudiate *Smith*. Or at least that was the plan.

### D. *BURWELL V. HOBBY LOBBY STORES*

But then a funny thing happened on the way to health care utopia. Regulations implementing the ACA imposed a mandate on all large employers—both for-profit and nonprofit—to provide insurance that covers emergency contraceptives, commonly known as abortifacients.

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267. 546 U.S. 418 (2006).

268. *Id.* at 423.

269. *Id.* at 439 (citing Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 885–90 (1990)).

270. *Id.* To this point, Justice Scalia recently noted that he "would not have enacted" RLUIPA, Congress's spending-power workaround to the partially-invalidated RFRA. Josh Blackman, *Justice Scalia Would Not Have Enacted RLUIPA? What About RFRA?*, JOSH BLACKMAN'S BLOG (Oct. 8, 2014), http://joshblackman.com/blog/2014/10/08/justice-scalia-would-not-have-enacted-rluipa-what-about-rfra/.

RFRA, which was designed to protect religious minorities, was hoisted as a tool for corporations to exempt themselves from a law of general applicability, citing a substantial burden on their religious exercise. In *Hobby Lobby*, the Supreme Court recognized that closely held for-profit corporations were protected by RFRA, and that requiring these corporations to pay for insurance plans that include certain emergency contraceptives violated their religious exercise.[271]

Before delving into the RFRA analysis, it is worth pausing to inquire *how* the contraceptive mandate came to be. Contrary to how it has been portrayed in the media, the ACA has no actual contraceptive mandate.[272] Section 300gg-13 of the ACA provides that employer-sponsored health insurance "shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . *with respect to women*, such *additional preventative care and screenings* not described in paragraph [one] as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [("HRSA")]."[273] The "preventative care and screening" products "with respect to women" were deliberately not defined.

HRSA "in turn consulted the Institute of Medicine, a nonprofit group of volunteer advisers, in determining which preventive services to require."[274] On February 15, 2012—nearly two years after the ACA was signed into law—HRSA issued a proposed regulation that "nonexempt employers are generally required to provide 'coverage, without cost sharing' for '[a]ll Food and Drug Administration [("FDA")] approved contraceptive methods, sterilization procedures, and patient education and counseling.'"[275] That included drugs viewed as abortifacients. The contents of the contraceptive mandate came from the Institute of Medicine, not Congress. The leadership in Congress no doubt knew this would happen, as reflected in the legislative history cited in Justice Ginsburg's dissent, but they did not have the votes to do so themselves.

Why is this history relevant? Because had majoritarian politics been involved in 2010, the ACA would have never included such a mandate.

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271. *O Centro*, 546 U.S. at 439.

272. *See* JOSH BLACKMAN, UNRAVELED: OBAMACARE, RELIGIOUS LIBERTY & EXECUTIVE POWER chs. 3–4 (forthcoming 2016) (manuscript available at bit.ly/1JxTdYn). For purposes of full disclosure, I'd like to note here that I authored an amicus brief on behalf of the Cato Institute in support of the Little Sisters of the Poor's petition for certiorari. *See* Brief for the Cato Institute as Amicus Curiae Supporting Petitioners at 7–9, Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151 (10th Cir. 2015) (No. 15-105) (discussing the history of the contraceptive mandate). I also filed a merits-stage brief in the granted case, also on behalf of the Cato Institute. *See* Brief for the Cato Institute and Independent Women's Forum as Amici Curiae Supporting Petitioners at 7–10, Zubik v. Burwell, Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191 (U.S. 2015).

273. 42 U.S.C. § 300gg-13(a)(4) (2010) (emphasis added).

274. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2762 (2014) (citing 77 Fed. Reg. 8725–26 (Feb. 15, 2012)).

275. *Id.*

The specific birth control products were deliberately not named. In order to avoid even more controversy with Pro-Life Democrats, led by Bart Stupak[276]—who only signed onto the ACA based on a feckless executive order from the President[277]—Congress kicked the can and delegated the all important task of deciding which contraceptives must be provided by employer-sponsored plans to the HRSA. Had these details been in the bill, it likely would have never passed. Indeed during oral arguments, Justice Kennedy questioned how an administrative agency could determine what a compelling interest is and which religious groups should be exempted. He stated (for Justice Kennedy seldom asks actual questions), "But when we have a First Amendment issue of this consequence, shouldn't we indicate that it's for the Congress, not the agency, to determine that this corporation gets the exemption on that one, and not even for RFRA purposes, for other purposes."[278]

But the faceless bureaucracy that imposed the contraceptive mandate—with little attention for religious conviction[279]—may well be a harbinger of future decisions by a more secular state. When individual exercise begins to exert negative externalities on nonbelievers, a collective free exercise right becomes much more attractive. And so the pendulum has swung back.

## III. From Individual Liberty to Collective Liberty

How do we make sense of the shifting of positions of individuals and organizations of conservative and liberal persuasions on speech and exercise? The calculus reduces down to three questions: Who is benefiting? Who is harmed? What is the purpose of the right? For the first question, consider whether the beneficiary is someone like Mary Beth Tinker, who wore a black armband at school to protest the war, or like Shaun McCutcheon, who sought to donate millions of dollars to dozens of candidates nationwide. For the second question, consider the relatively trivial costs associated with providing unemployment benefits

276. Brief of Democrats for Life of America & Bart Stupak as Amici Curiae Supporting Hobby Lobby et al., Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos.13-354 & 13-356).

277. Josh Blackman, Unprecedented: The Constitutional Challenge to Obamacare 75 (2013) ("Hours after Stupak reached this compromise, Tribe emailed Kagan, expressing incredulity that the ACA was about to be passed 'with the Stupak group accepting the magic of what amounts to a signing statement on steroids!' Tribe stated the obvious, and what any first-year constitutional law student would know—that Schmidt was right. The president's signing statement with respect to abortion was legally impotent.").

278. Adam J. White, *Kennedy's Question: How Will the Court Decide* Hobby Lobby?, Wkly. Standard (Apr. 28, 2014), http://www.weeklystandard.com/articles/kennedy-s-question_787038.html; *see also* Ilya Shapiro & Josh Blackman, *What Next Year's Attack on Obamacare Will Look Like*, Daily Beast (Sept. 29, 2015, 1:00 AM), http://www.thedailybeast.com/articles/2015/09/29/what-next-year-s-attack-on-obamacare-will-look-like.html.

279. *See* Brief for the Cato Institute as Amicus Curiae in Support of Petitioners, Little Sisters of the Poor Home for the Aged v. Burwell (No. 15-105).

to Alfred Smith, the Native American who ingested peyote, compared to the significant costs of denying contraceptive coverage for female employees of Hobby Lobby. For the third question, consider whether the purpose of rights is to promote the unburdened liberty of Hobby Lobby Stores, Inc. to exercise its religious beliefs, or to ensure the equality of its female employees to have coverage for contraceptives. The answers to these questions speak volumes of how the Justices, from both flanks, as well as liberal and conservative groups in the public, have perceived rights as individual or collective liberties.

### A. The Beneficiary of Individual Liberty

In different generations, free speech benefited different groups. During the Warren and Burger Courts, many First Amendment cases involved a puritanical state attempting to suppress some sort of antiestablishment message. Consider the parties asserting the First Amendment: Mary Beth Tinker, who sought to wear a black armband at school to protest the Vietnam War;[280] Paul Robert Cohen who wore a jacket emblazoned with "Fuck the Draft" in a courthouse;[281] David Paul O'Brien who burned his draft card.[282] First Amendment cases not concerning the war dealt with civil rights: *The New York Times* published a potentially libelous attack on the Police Commissioner of Montgomery, Alabama;[283] the NAACP refused to publish their membership list.[284] For speech, these judgments concerned war protesters and civil rights advocates. In all instances, the proverbial establishment was attempting to suppress speech that conflicted with the state's goals. In response, the activists were sticking it to the man.

A similar dynamic prevailed for Free Exercise cases. All of the parties before the Court were members of minority faiths, that the state was not interested in creating exemptions for: Sherbert, the Seventh-Day Adventist who declined to work on Saturday;[285] the Amish Jonas Yoder who refused to send his teenage children to compulsory public schools;[286] Roy Torcaso the atheist who was denied a commission as a Maryland notary public because he would not declare his belief in God;[287] (from a different era) Alfred Smith who was denied unemployment benefits because he ingested peyote in a Native American ceremony.[288]

280. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
281. Cohen v. California, 403 U.S. 15 (1971).
282. United States v. O'Brien, 391 U.S. 367 (1968).
283. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).
284. NAACP v. Alabama, 357 U.S. 449 (1958).
285. Sherbert v. Verner, 374 U.S. 398 (1963).
286. Wisconsin v. Yoder, 406 U.S. 205 (1972).
287. Torcaso v. Watkins, 367 U.S. 488 (1961).
288. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

It was against this backdrop that many scholars viewed RFRA—the Free Exercise Clause's statutory cousin—as designed to protect "minority" religions, not the "majority" Christian faiths. Professor Howard Friedman wrote on his influential blog, *Religion Clause*, "Traditionally it was assumed that the federal RFRA would be used by *minority religions* to fend off broad regulations that might be enacted without a careful weighing of idiosyncratic religious practices that are important to often discrete and insular groups with comparatively small numbers of adherents."[289] Professor Eric Segall adds that "RFRA was enacted in response to a kind of inequality among religions . . . [and practices that] had a discriminatory impact on religious minorities."[290] How so? Traditionally, any law that intruded on religion would have legislative carve outs to suit the needs of majority religions. For example, laws prohibiting alcohol would invariably have carve outs for sacramental wine because Christians would lobby the legislative process. However Native Americans who ingest peyote would be out of luck when the legislature is considering drug laws.[291] For exercise, these rulings protected religious minorities from the puritanical views of the mainstream faiths.

Today, we have very different plaintiffs. Gone are Mary Beth Tinker and Alfred Smith. Instead, we have Citizens United that uses corporate contributions to produce a film critical of Hillary Clinton; Shaun McCutcheon who refuses to abide by an aggregate cap of $123,200; and Hobby Lobby Stores, Inc. that refuses to provide insurance covering abortifacients for its employees. Adam Liptak cogently summarized the shift in *The New York Times*: "Liberals used to love the First Amendment. But that was in an era when courts used it mostly to protect powerless people like civil rights activists and war protesters."[292] The juxtaposition between the protestor wearing the "Fuck the Draft" jacket in *Cohen v. California* and the partisan *Citizens United* corporation could not be starker.

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289. Howard Friedman, *Why Is Indiana's RFRA so Controversial? This Blogger's Analysis*, RELIGION CLAUSE (Mar. 30, 2015, 9:05 PM), http://religionclause.blogspot.com/2015/03/why-is-indianas-rfra-so-controversial.html (emphasis added); *cf.* Josh Blackman, *Is Indiana Protecting Discrimination?*, NAT'L REV. (Mar. 30, 2015, 4:00 AM), http://www.nationalreview.com/article/416160/indiana-protecting-discrimination-josh-blackman (discussing how the recent backlash against Indiana's RFRA overlooks the context from which other state RFRAs evolved).

290. Eric Segall, *Religious Exemptions, Religious Equality, and Religious Preferences,* DORF ON L. (Apr. 10, 2015), http://www.dorfonlaw.org/2015/04/religious-exemptions-religious-equality.html.

291. Compare American Indian Religious Freedom Act and its post-*Smith* 1994 amendments protecting the use of peyote as a sacrament in traditional religious ceremonies. *See* American Indian Religious Freedom Act, 42 U.S.C. § 1996a (1994).

292. Adam Liptak, *First Amendment, 'Patron Saint' of Protestors, Is Embraced by Corporations*, N.Y. TIMES, Mar. 24, 2015, at A14.

Lincoln Caplan observed that the First Amendment's "most fervent champions are not standing up for mistrusted outsiders . . . or for the dispossessed and powerless. Today's advocates do the bidding of insiders—the super-rich and the ultra-powerful, the airline, drug, petroleum and tobacco industries, all the winners in America's winner-take-all society."[293] Empirically, the liberals might be right. As Professor John C. Coates, IV told Liptak, based on a new study he conducted,[294] "'Corporations have begun to displace individuals as the direct beneficiaries of the First Amendment [and the trend is] recent but accelerating.'"[295]

Floyd Abrams concedes the point: "There is truth in the proposition that a number of recent First Amendment victories in recent years have been on behalf of the 'haves'—some of them corporations, some individuals. But that is no basis for concluding that the decisions were wrongly analyzed or wrongly decided."[296] In other words, who cares who is benefitting from free speech? Picking and choosing the correct and incorrect beneficiaries of the First Amendment is a task ill-suited for courts and one that undermines the free flow of ideas from all groups that wish to speak. Abrams adds,

> My First Amendment leads me to favor more speech, not less, on campus. And more speech, not less, in our elections. And more speech, not less, by corporations. And unions. And individuals. To me, then, the issue is not who benefits from reading the First Amendment broadly. It is that we all lose by reading it narrowly.[297]

Nadine Strossen, former president of the ACLU, dismisses the concerns of the "many pundits who have been saying, 'Oh, this is going to benefit Republicans, or benefit conservatives, or benefit big business.' Not at all!"[298] Rather, *Citizens United* "unshackle[d] all corporations, including nonprofit corporations, such as the ACLU, which itself was mentioned.[299] Strossen stressed that the "[t]he benefits of added free speech, and added voices, and added opinions will go across the political spectrum."[300] Strossen explained at the Cato Institute's Constitution Day panel on the First Amendment that "[m]any of us believe that [what] democracy is all about is that you vote for a candidate [and] you give

293. Collins, *supra* note 105.

294. John C. Coates, IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 224 (2015) (finding "[n]early half of First Amendment challenges now benefit business corporations and trade groups, rather than other kinds of organizations or individuals").

295. Liptak, *supra* note 292.

296. Collins, *supra* note 105.

297. *Id.*

298. COLLINS & SKOVER, *supra* note 166.

299. *Id.*

300. *Id.*

money to a candidate because you want that person to share and be responsive to your concerns. That's is [sic] not corruption; that is democracy."[301] Strossen also recognized the cost of her First Amendment support, stating that her "defense of letting money speak has, in most of [her] circles, caused [her] to be called a 'puppet of plutocracy' and not a champion of liberty."[302]

Should it matter that the First Amendment is now being used to shield the proverbial one percent at the cost to the ninety-nine percent? This framing of the question presumes that speech is only protected so long as it protects the correct audience. This conclusion underscores the significance of the *McCutcheon* dissent's adoption of a utilitarian vision of speech, which is protected, so long as it contributes to "democracy." With this framework, the interests of Citizens United or Shaun McCutcheon are not viewed on the same level as Mary Beth Tinker or Paul Robert Cohen. Similarly, the visceral reaction to affording RFRA protections to Hobby Lobby, a profitable corporation, was premised on a tacit acceptance that the beneficiary belonged to the powerful and majority faith in society. To this view, free exercise exists to protect minority religious groups could not seek redress through the legislative process.

The shift in who has benefited from recent First Amendment decisions helps to explain the shift on the right and left toward individual and collective liberty. But, more pronounced than the identity of the beneficiary is who absorbs the negative externalities of individual liberty.

### B. The Internalizers of Individual Liberty's Externalities

In many of the First Amendment cases discussed in the previous Subpart, the beneficiaries of the liberty interest were the proverbial have-nots. In those cases, the social cost, or externality, of accommodating the downtrodden's liberty interest was slight and easily absorbed by the state.[303] Consider the costs: the minimal disruption to Mary Beth Tinker's classroom; the lack of decorum from Cohen's "Fuck the Draft" jacket; the frustration of the selective service process from draft card burning (this more weighty impact was found to be sufficient to suppress the speech interest); the cost to the reputation of L.B. Sullivan who could not pursue his libel suit; and the State of Alabama that could not access the membership roster of the NAACP. For free exercise, the costs were even more minimal: providing unemployment benefits to Sherbert the Seventh-Day Adventist; accepting that the Amish youth would suffer from a lack of education; not having a public notary swear to god; and having to pay benefits to Alfred Smith who

301. Collins, *supra* note 190.

302. *Id.*

303. See Blackman, *supra* note 112, for a discussion of the "social cost" of constitutional rights.

ingested peyote, notwithstanding drug laws. In all cases, the costs were small and were absorbed by the state, not third parties.

Where are we today? The costs are greater and are inflicted on private parties. Groups like Citizens United can seek contributions from profitable corporations to influence public opinion and shape the outcome of elections. Millionaires like Shaun McCutcheon, and even billionaires, can make contributions to as many political races as they wish, no longer subject to an aggregate cap. Professor Tim Wu stated the issue succinctly with respect to the First Amendment: "Once the patron saint of protesters and the disenfranchised, the First Amendment has become the darling of economic libertarians and corporate lawyers who have recognized its power to immunize private enterprise from legal restraint."[304] With respect to free exercise, corporations like Hobby Lobby are not required to provide insurance covering emergency contraceptives for their female employees. Under the Health and Human Services ("HHS") accommodation, the insurance companies pick up that bill and that cost is ultimately passed onto government and taxpayers. Unlike the religious accommodation cases of days gone by, today's accommodations impose social costs on nonbelievers.

*The New York Times* summarized the reversal:

> An informal coalition of liberals and conservatives endorsed the Religious Freedom Restoration Act because it seemed to protect members of vulnerable religious minorities from punishment for the exercise of their beliefs. [. . .] But over time, court decisions and conservative legal initiatives started to change the meaning of those laws, according to liberal activists. The state laws were not used to protect minorities, these critics say, but to allow some religious groups to undermine the rights of women, gays and lesbians or other groups.[305]

*The New York Times* quoted Eunice Rho, an ACLU lawyer, who noted the "coalition broke apart over the civil rights issues."[306] Stated differently, the civil rights issue of equality trumped the civil liberties issue of free exercise. Consider the next wave of cases that will test the intersection of religious freedom and equality: RFRA as applied to antidiscrimination laws.

### *1. RFRA and Discrimination*

After *City of Boerne v. Flores*[307] invalidated the federal RFRA as applied to the federal government, nineteen states enacted local RFRAs

304. Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, NEW REPUBLIC (June 2, 2013), http://www.newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation.

305. Erik Eckholm, *Religious Protection Laws, Once Called Shields, Are Now Seen as Cudgels*, N.Y. TIMES, Mar. 31, 2015, at A12.

306. *Id.*

307. 521 U.S. 507 (1997).

that were substantially similar to the federal law.[308] One of the biggest questions over both the federal and state RFRAs concerns whether they can be used as a defense in a private cause of action where the government is not a party. In other words, could a private party, when sued under some law of general applicability, seek an accommodation from the court by claiming that the enforcement of the law would impose a "substantial burden" on her exercise of religion. This issue has divided the federal courts. The Second, Eighth, Ninth, and D.C. Circuits held that RFRA could be used as a defense; the Sixth and Seventh Circuits held that it could not.[309]

In 1996—three years after RFRA was enacted—the D.C. Circuit held that the Catholic University of America could raise RFRA as a defense against a sex discrimination claim brought by a nun and the Equal Employment Opportunity Commission ("EEOC") alike.[310] In 1998, the Eighth Circuit Court of Appeals found that a church could assert RFRA as a defense against a trustee in bankruptcy proceedings.[311] In a 2000 decision by the Ninth Circuit Court of Appeals, one church sued another church for unlawfully using materials copyrighted by its late pastor.[312] The court allowed the infringing church to raise the defense, but found that the application of the copyright law did not impose a "substantial burden" on its exercise of religion.

In a 2005 decision by the Second Circuit Court of Appeals, a priest was forced to retire by the New York Methodist Church when he turned seventy.[313] The priest brought an age discrimination claim, and the Church countered that enforcing the law would burden its religious exercise. The Second Circuit found that "RFRA's language surely seems broad enough to encompass" the Church raising RFRA as a defense against the age discrimination claim.[314] In short, Judge Ralph Winter wrote that RFRA "easily covers" the Church's claim that applying the antidiscrimination law could "substantially burden" its exercise of religion.[315]

These four cases, and many others, concerned similar facts—private parties brought suits against corporations. (Yes, Catholic University and churches are corporations.) In each case, the corporate defendants were

308. Hunter Schwarz, *19 States That Have 'Religious Freedom' Laws Like Indiana's That No One Is Boycotting*, WASH. POST (Mar. 27, 2015), http://www.washingtonpost.com/blogs/the-fix/wp/2015/03/27/19-states-that-have-religious-freedom-laws-like-indianas-that-no-one-is-boycotting/.

309. Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 VA. L.R. 343, 344 (2013).

310. EEOC v. Catholic Univ. of Am., 83 F.3d 455, 468–69 (D.C. Cir. 1996).

311. Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854, 863 (8th Cir. 1998).

312. Worldwide Church of God v. Phila. Church of God, 227 F.3d 1110, 1120–21 (9th Cir. 2000).

313. Hankins v. Lyght, 441 F.3d 96, 99 (2d Cir. 2006).

314. *Id.* at 103.

315. *Id.* at 103–04.

allowed to raise RFRA as a defense to assert that the enforcement of federal law—Title VII's prohibition against discrimination, bankruptcy law, and even trademark law—burdened their religious exercise. In some cases, the defenses were successful, and in most they were not. This is the rule of law in virtually half the states in the union under the jurisdiction of these four circuits—and until recently, it was not particularly controversial.

Joining the Second, Eighth, Ninth, and D.C. Circuits in finding that RFRA can be asserted as a defense in a private cause of action was the Justice Department. In August of 2012, the U.S. Government stated that Wheaton College, if sued by an employee for failing to provide contraceptives under the ACA's mandate, "in its defense of such an action, would have an opportunity to raise its contention that the contraceptive coverage requirement violates" RFRA.[316] (Granted, this position was taken before the Court made clear that RFRA extends to for-profit corporations, a position the Justice Department opposed.)

But not everyone agreed. Taking the opposing view was then-circuit judge and now-Justice Sotomayor, who dissented in the Second Circuit's *Methodist Church* case.[317] She found that RFRA "does not apply to disputes between private parties."[318] Second Circuit Judge Ralph Winter responded forcefully to Sotomayor's suggestion: "The [dissent's] narrowing interpretation—permitting the assertion of the RFRA as a defense only when relief is also sought against a governmental party—involves a convoluted drawing of a hardly inevitable negative implication. If such a limitation was intended, Congress chose a most awkward way of inserting it."

Joining Justice Sotomayor's dissenting view are the Sixth and Seventh Circuit Courts of Appeal. Shruti Chaganti dubs these courts the "non-defense circuits" that held that RFRA was meant to "provide a defense only when obtaining appropriate relief against a *government* and therefore cannot apply to suits in which the government is not a party."[319] In 2010, the Sixth Circuit Court of Appeals found that the "Creation Seventh Day Adventist Church" could not raise RFRA as a defense in a trademark infringement suit brought by the "Seventh-Day Adventist Church."[320] In 2006, weighing in for the Seventh Circuit was the ubiquitous Judge Richard Posner. In this age discrimination claim

316. Defendants' Reply in Support of Their Motion to Dismiss, Wheaton Coll. v. Sebelius, 703 F.3d 551 (D.C. Cir. 2012) (No. 1:12-cv-01169-ESH).

317. *Hankins*, 441 F.3d at 109 (Sotomayor, J., dissenting).

318. *Id.*

319. Chaganti, *supra* note 309, at 344.

320. Gen. Conf. Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 410–11 (6th Cir. 2010).

brought by an organist against a Catholic Diocese, Posner wrote, "RFRA is applicable only to suits to which the government is a party."[321]

The state courts, like the federal courts, have also wrestled over whether state RFRAs can be raised as defense in private suits. Most notable among these decisions is the New Mexico Supreme Court's opinion in *Elane Photography v. Wilcox*.[322] In this now famous case, as Justice Ginsburg described it in her *Hobby Lobby* dissent, a "for-profit photography business owned by a husband and wife refused to photograph a lesbian couple's commitment ceremony based on the religious beliefs of the company's owners," and was fined by the state Human Rights Commission as a result.[323] The Land of Enchantment's high court, mirroring Sotomayor and Posner's narrow reading, concluded that the photographer could not raise the state RFRA as a defense against a discrimination claim. The U.S. Supreme Court declined to review this case.

This brings us to the Hoosier State. Section 9 of Indiana's controversial RFRA provides that "[a] person whose exercise of religion has been substantially burdened, or is likely to be substantially burdened, by a violation of this chapter may assert the violation or impending violation as a claim or defense in a judicial or administrative proceeding, regardless of whether the state or any other governmental entity is a party to the proceeding."[324] In the wake of *Elane Photography*, the Indiana RFRA made explicit for its own laws what the four federal courts of appeals and the Obama Justice Department already recognized about the federal counterpart. Indiana's RFRA does no more than codify that the private enforcement of public laws—including discrimination claims—can be defended against with free exercise rights.

Neither the Indiana, nor federal RFRA provides automatic immunity to discrimination claims. It only allows a defendant to raise a defense, which a finder of fact must consider and balance against the state's compelling interest in eradicating discrimination.[325] Similar analyses pertain to other defenses that can be raised under Title VII, the Age Discrimination in Employment Act, or the Americans with Disabilities Act. In 2012, the Supreme Court unanimously held that the "ministerial exception" prevents a teacher from bringing a disability discrimination suit against her employer, a Church.[326] But what RFRA

321. Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1042 (7th Cir. 2006).

322. 309 P.3d 53 (N.M. 2013).

323. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting) (citing Elane Photography, LLC v. Willock, 309 P.3d 53, *cert. denied*, 134 S. Ct. 1787 (2014)).

324. IND. CODE ANN. § 34-13-9-9 (West 2015).

325. *Id.*; Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb to 2000bb-4).

326. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706–07 (2012).

does do is create the opportunity—though slim—for courts to carve out further exemptions from generally applicable discrimination laws. The threat of this happening yielded a massive backlash against the law.[327] As Eugene Volokh notes, "once broadly supported, [RFRAs] are now controversial. Many people, chiefly on the left, have criticized such laws, in large part on the grounds that RFRAs might let religious objectors claim exemptions from antidiscrimination law—especially with regard to state and local laws that ban discrimination based on sexual orientation."[328]

While the concern was overstated in light of how RFRA has been enforced for twenty years, the specter of exempting discrimination claims was raised by Justice Scalia's majority opinion in *Smith*, and promptly discounted by Justice O'Connor's dissent. Scalia's collectivist free exercise right would offer no refuge for discrimination defenses. But the dissent's individual right could permit this imposition of social cost on nonbelievers, even in the form of discriminations.

First, as a threshold matter, the four courts of appeals that interpreted RFRA as providing a defense in a private cause of action have a plausible claim that they are acting consistently with *Sherbert.* As Volokh observes, "the old *Sherbert*-era Free Exercise Clause would surely have applied to such private lawsuits as well."[329] Only one year after *Sherbert*, the Court decided the landmark case of *New York Times Co. v. Sullivan*[330]—again a corporation exercising First Amendment rights—holding that the First Amendment could be raised as a defense against a libel suit, even where the government is not a party.[331] Justice Brennan, author of both the *Sherbert* and *Sullivan* opinions, wrote, "It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."[332] Brennan explains, "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."[333] The law applies equally to private and public causes of action. Because of

327. Ironically, many corporations used corporate funds to oppose this law—the exact behavior the government asserted it could prohibit in *Citizens United*. Josh Blackman, *Could Indiana Block Corporations from Using Corporate Money to Criticize RFRA?*, JOSH BLACKMAN'S BLOG (Mar. 31, 2015), http://joshblackman.com/blog/2015/03/31/could-indiana-block-corporations-from-using-corporate-money-to-criticize-rfra/.

328. Volokh, *supra* note 247.

329. *Id.*

330. *See* 376 U.S. 254, 256 (1964) (citations omitted) (("He brought this civil libel action against the four individual petitioners, who are Negroes and Alabama clergymen, and against petitioner The New York Times Company, *a New York corporation which publishes the* New York Times*, a daily newspaper*.") (emphasis added)).

331. *Id.* at 265.

332. *Id.*

333. *Id.* at 277.

the "pall of fear and timidity imposed upon those who would give voice to public criticism," the "civil libel is 'a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.'"[334] In this sense, civil liberties are even more in doubt when a private party, rather than the state, can bring a civil suit.

Volokh explains that *Sullivan's* "logic extended beyond that, and the Court has routinely applied the First Amendment to a wide range of other civil litigation brought by private individuals."[335] What is true for the Free Speech and Free Press Clauses of the First Amendment "would surely have been true . . . for the Free Exercise Clause."[336] Additionally, *Shelley v. Kraemer*[337] stands for a similar proposition, as a private suit concerning a racially restricted covenant can be challenged on the grounds that its judicial enforcement violates the Fourteenth Amendment's Equal Protection Clause.

Second, it is the Brennan-esque individual notion of free exercise that allows people of conscience to seek accommodations from generally applicable laws. In contrast, *Smith* repudiated that doctrine, and got courts out of the business of carving out exemptions for faiths. Ironically, the very same progressives that ridiculed Justice Scalia's decision to stop judicially imposed religious accommodation now seek a return to his equality driven collectivist framework for religious liberty. Volokh wryly observes: "Justice Scalia's opinion [in] *Employment Division v. Smith* left most religious exemption questions to 'the political process.' The modern RFRA skeptics have embraced that."[338] The irony, Volokh explains, is that "RFRAs largely implement the religious exemption rules that Justice Brennan and the ACLU had long argued for—and that Justice Brennan and the ACLU had sharply criticized Justice Scalia and others for overruling" in *Employment Division v. Smith*.[339] But what changed? The beneficiaries of the law and who bore the cost.

Third, Justice Brennan's opinions specifically countenanced that religious freedom *could* be raised as a defense against discrimination, but courts were "quite capable" of balancing those interests. Among the "parade of horribles" the *Smith* dissent dismissed,[340] Justice Scalia mentioned that the Free Exercise Clause could be used to seek exemptions from "laws providing for equality of opportunity for the

334. *Id.* at 278.
335. Volokh, *supra* note 247.
336. *Id.*
337. 334 U.S. 1 (1948).
338. Volokh, *supra* note 247.
339. *Id.*
340. Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring).

races." Scalia referenced *Bob Jones University v. United States*,[341] that sought to employ a racially discriminatory admission policy, and prohibit interracial dating and marriage, while at the same time maintain its tax-exempt status.[342] Yes, Justice Scalia in overturning *Sherbert* specifically worried that parties might seek accommodations for discrimination based on religious belief.

How did the *Smith* dissent reply to these charges that the Free Exercise Clause could permit discrimination? The same way that supporters of Indiana's RFRA reply: RFRA only creates a balance where judges weigh the religious exercise against the state's compelling interest in eradicating discrimination. Justice O'Connor explained "that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests."[343]

As the Court held seven years earlier in *Bob Jones University*, even though the University could assert an exemption from the tax-exempt rules for its racially discriminatory standards, the federal government "has a fundamental, overriding interest in eradicating racial discrimination in education . . . [that] substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."[344] In other words, the compelling state interest of eliminating discrimination trumped religious liberty for the individual. The difficulty of applying the "compelling interest" test was not a reason "to reject" it altogether.[345] Justice O'Connor was perhaps proven correct that the courts could "strike [a] sensible balance."[346]

This precise debate reemerged in *Hobby Lobby*, which considered whether the ACA's contraceptive mandate violated the federal RFRA as applied to a closely held for-profit business.[347] During oral arguments, Justice Kagan asked whether an employer could cite RFRA as a defense, relying on a "religious objection to sex discrimination laws . . . minimum wage laws . . . [or] child labor laws."[348] Paul Clement, representing Hobby Lobby, cited the same "parade of horribles" referenced in *Smith*:

> [E]very item on that list was included in Justice Scalia's opinion for the Court in *Smith*. And Justice O'Connor responded to that in her separate opinion and she said, look, you've got to trust the courts; just

341. 461 U.S. 574 (1983).

342. *See id*. at 889 (citing *Bob Jones Univ.*, 461 U.S. at 603–04).

343. *Id.* at 902 (O'Connor, J., concurring).

344. 461 U.S. 574, 604 (1983).

345. Volokh, *supra* note 247.

346. *Id.*

347. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

348. Josh Blackman, *What About RFRA Challenges to Discrimination Laws?*, JOSH BLACKMAN'S BLOG (Mar. 26, 2014), http://joshblackman.com/blog/2014/03/26/what-about-rfra-challenges-to-discrimination-laws/.

> because free exercise claims are being brought doesn't mean that the courts can't separate the sheep from the goats.[349]

In other words, merely raising a defense does not mean the defense will work.

Justice Alito interjected, and asked Clement, "in all the years since RFRA has been on the books, has any of these claims involving minimum wage, for example, been brought and have they succeeded?"[350] Clement replied, "very few of these claims have been brought. Very few of them have succeeded, and that's notwithstanding the fact that all of these statutes we're talking about apply to employers generally."[351] Presaging the kerfuffle in the Hoosier State, Kagan contended that if Hobby Lobby prevails, "religious objectors [will] come out of the woodwork with respect to all of these laws" and judges' "hands would be bound when faced with all these challenges."[352] Presumably, when Kagan speaks of "religious objectors," she is not talking about Amish seeking draft exemptions, or Native Americans seeking to ingest peyote, but Christians seeking exemptions from antidiscrimination laws.

Following up on this exchange, in her dissent, Justice Ginsburg explained that Hobby Lobby "surely do[es] not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs."[353] Ginsburg asks, "Would RFRA require exemptions in cases of this ilk? And if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not?"[354] Was this not the *exact* question Justice Scalia posed to the *Smith* dissenters, and that Justice O'Connor shrugged off explaining courts were "quite capable" of balancing these interests? The déjà vu, between right and left, collective and individual, is striking.

To support this conclusion, Justice Ginsburg has to reach far back in time to find examples where businesses claimed exemptions from discrimination laws by citing religious exercise, including a district of South Carolina case from 1966 and a Minnesota Supreme Court case from 1985.[355] Yet, in each case, the court (unsurprisingly) ruled *against* the free exercise claim. The district court in South Carolina was not

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349. *Id.*

350. Transcript of Oral Argument at 15, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos. 13-354 & 13-356).

351. *Id.*

352. *Id.* at 16.

353. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2804 (2014) (Ginsburg, J., dissenting).

354. *Id.* at 2805.

355. *Id.* at 2804 (Ginsburg, J., dissenting). *See*, *e.g.*, Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 945 (D.S.C. 1966) (ruling owner of restaurant chain refusing to serve black patrons based on his religious beliefs opposing racial integration), *aff'd in relevant part, rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968); State by McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 847 (Minn. 1985), *appeal dismissed*, 478 U.S. 1015 (1986).

"impressed by defendant Bessinger's contention that the judicial enforcement of the public accommodations provisions of the Civil Rights Act of 1964 upon which this suit is predicated violates the free exercise of his religious beliefs in contravention of the First Amendment to the Constitution."[356] The Minnesota Supreme Court rejected the claim that a sports clubs owners' "sincere belief" and "interpretation of the Bible" allowed them to not employ "individuals living with but not married to a person of the opposite sex; a young, single woman working without her father's consent or a married woman working without her husband's consent . . . [and] fornicators and homosexuals."[357] Neither case supports Justice Ginsburg's fear.

The majority opinion in *Hobby Lobby* by Justice Alito promptly dispatched this point: "The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction."[358] Justice Alito rejects this reasoning, noting that "Our decision today provides no such shield."[359] Consistent with how the Court characterized *Bob Jones* in *Smith*, Alito explained that "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."[360] In other words, no amount of tailoring could ever permit the government to accommodate racial discrimination. These sorts of religious accommodations will never result in the social cost of permitting discrimination, the majority states. Notably, Justice Alito does not mention, gender, sexual orientation, or any other protected statuses.

Herein lies the dichotomy between speech and religion. While the conservatives on the Court profess that the freedom of expression cannot be left to the whims of the "political process," the same conservatives held that the freedom of exercise could be left to those whims. However, RFRA transforms free exercise back into the individual right for Justice Scalia and others. Meanwhile the liberals on the Court profess that the freedom of expression must be left to the higher goals of "collective speech" and at the same time they insist that the courts balance the intrusions on freedom of exercise when they conflict with the goals of the states.

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356. *Newman*, 256 F. Supp. at 945.
357. *State by McClure*, 370 N.W.2d at 847.
358. *Hobby Lobby*, 134 S. Ct. at 2783.
359. *Id.*
360. *Id.*

*2. The Social Costs of Free Exercise*

The perception of how Indiana's RFRA would be perceived was premised on the social costs it imposes onto others, or more ominously, how future (state) courts *could* interpret the RFRA in light of the Court's (imminent) ruling on same-sex marriage. In an important new article on religious liberty, Professors Douglas Nejaime and Reva Siegel compare and contrast the *old* "free exercise cases that RFRA invokes" with the *new* "complicity-based conscience claims" relied on by *Hobby Lobby*.[361] Unlike the cases of days gone by, the modern species of free exercise cases will impose significant externalities on those who do not share the same faith. Nejaime and Siegel explain that traditionally RFRA "claims were advanced by religious minorities who sought exemptions based on unconventional beliefs generally not considered by lawmakers when they adopted the challenged laws; the costs of accommodating their claims were minimal and widely shared."[362] In contrast, the "complicity-based conscience claims" of today "harm those whose conduct the claimants view as sinful."[363]

This view has gained extra salience in the aftermath of Indiana's RFRA experiment, and especially so after the Supreme Court's decision recognizing a right to same-sex marriage in *Obergefell v. Hodges*.[364] Professor Friedman explains, "Since *Hobby Lobby* and the explosion of same-sex marriage cases, it is largely the Christian majority . . . that asserts it is the victim of the majoritarian process, seeking exemptions that have a negative impact on minority groups that have broadly been the victims of past governmental discrimination."[365] Professor Dale Carpenter puts a fine point on this theory: "What started out as a *shield for minority religious practitioners* like Native Americans and the Amish is in danger of *being weaponized into a sword against civil rights*."[366] Not only has RFRA been turned on its head, they argue, but also the victims of these accommodations are minorities and disadvantaged groups.

Professor Michael Dorf similarly explained, "although the federal RFRA was inspired by a case involving a *minority religion*, RFRAs lately been used [sic] by people who adhere to *conservative branches of*

361. Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2520 (2015).

362. *Id.* at 2520.

363. *Id.*

364. Obergefell v. Hodges, 135 S. Ct. 2584 (2015). For a discussion of *Obergefell*, see Josh Blackman & Howard Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243 (2016).

365. Friedman, *supra* note 289.

366. Dale Carpenter, *The Clash of "Religious Freedom" and Civil Rights in Indiana,* WASH. POST (Mar. 30, 2015) (emphasis added), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/30/the-clash-of-religious-freedom-and-civil-rights-in-indiana/.

*mainstream religions*."[367] The necessary consequence of increasing the "number of people who seek eligibility for a RFRA exemption," Dorf notes, is the "burden of providing accommodations becomes more concentrated."[368] Dorf adds, "the cost of the accommodation now falls on a non-believing subset of the population who are either themselves a minority or, if a majority, a bare one—at least in particular communities."[369] In other words, accommodating Native Americans seeking to ingest peyote pales in comparison with accommodating Christian corporations who oppose paying for abortifacients. So instead of "virtually the whole community absorbing the marginally small cost of providing an accommodation to a handful of people with idiosyncratic religious beliefs"—such as Native-American peyote use—"in the new contexts a RFRA begins to look like it enables one large faction of the population impose its religious beliefs on the rest of the population."[370] With this understanding, Dorf concludes, "liberals, who hold anti-Establishment values much more strongly than conservatives do, have another reason to be wary of RFRAs."[371] Professors Nejaime and Siegel explain that "few would affirm a result in which some citizens are singled out to bear significant costs of another's religious exercise."[372]

The analogies between speech and religion are pronounced. With speech, many progressives fear that powerful, corporate interests can utilize the First Amendment to inflict negative externalities on groups with less means. This approach distorts the political process and democracy. Similarly, with religion, the liberal fear is that powerful, Christian interests can utilize RFRA to inflict negative externalities on disadvantaged groups. This approach distorts the political process and equality. In both cases, groups adverse to progressive goals are relying on constitutional individual liberties to harm others and thwart social justice. And because these groups are so much larger than the proverbial protestors burning draft cards or Native Americans ingesting peyote, the costs are far more concentrated.

Conservatives, on the other hand—perhaps because of the changing demographics of who religious and speech liberties protect today—view both forms of liberty as essential to protect as rights unto themselves. But even then, instrumental to the majority opinion in *Hobby Lobby*, and in particular Justice Kennedy's concurring opinion, was the fact that the government could accommodate Hobby Lobby's objection without

367. Michael Dorf, *How RFRA Is like a Taking and Two Thoughts on Establishment*, DORF ON L. (Apr. 8, 2015) (emphasis added), http://www.dorfonlaw.org/2015/04/how-rfra-is-like-taking-and-two.html.

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. Nejaime & Siegel, *supra* note 361, at 2521.

imposing any additional cost on its employees. According to the majority, the government simply passes the cost onto the insurance companies. (In reality, the insurance companies pass this cost onto consumers one way or the other, but we will accept this fuzzy math for argument's sake.) Had the government been unable to accommodate Hobby Lobby without imposing costs on others, it is possible the calculus might have gone the other way. In this sense, the distance between the liberals and conservatives on RFRA might not be as broad as the gap with respect to free speech.

### C. The Purpose of Liberty

What is the purpose of judicial protection of liberty? Does it exist unto itself, based on the idea that people who are free to choose will make the best decisions? Or, does it exist so long as it promotes the processes that will yield the "best" decisions for society? The problems inherent in each choice are apparent, and well-documented. For the former, people—not homo economicus—when left to their own devices, often make bad decisions that harm others. Here, liberty often yields inequality. For the latter, elites who decide what the "best" decisions are stifle autonomy and prevent individuals from deciding how to live their own lives. The desire for equality trumps liberty.

With respect to free expression, the individualistic view that "speech is speech" is premised on the notion that more speech is better, and that with more information, people will be able to make the best decisions for their flourishing. The collectivist view rejects this naïveté, and contends that the state has a strong interest in eliminating the externalities from harmful speech. For free exercise, the individualistic view holds that faith is central to our civic society, and that government should avoid substantially burdening exercise whenever feasible, even if it shifts a cost onto society. The collectivist view counters that allowing exemptions for faith harms nonbelievers who do not enjoy the equal application of the law, even if religious exercise is burdened. The individualistic view is more willing to embrace liberty, while the collectivist view is grounded in promoting equality.

The final inquiry to explain the shift from the individual to the collective is to understand how judicial protection of rights impacts liberty and equality. For speech, the failed experiment over the marketplace of ideas—where powerful voices drowned out the underprivileged—resulted in a change to promote political equality, rather than allowing speech to flow freely. For exercise, the transition from minority faiths seeking minor exemptions to majority faiths seeking substantial exemptions vitiated the importance of religion in society, to the extent that it interferes with policies of social justice.

### *1. The Failed Speech Experiment*

Has the left *left* the First Amendment? Or has the First Amendment left the left? The divide within the ACLU suggests it might be a little bit of both. Consider the explanation of Neuborne, who writes that many progressives primarily supported free speech because they believed the marketplace of ideas would yield progressive goals, such as social and political equality.[373] Through the early parts of the "twentieth century," Neuborne recalls, "left-wing reformers, certain that their ideas were on the winning side of history, viewed robust free speech as an agent of change capable of destabilizing an oppressive and unequal status quo."[374] In order to ensure that antiestablishment views—which the left was certain were the true and right ideals—were protected, other, less desirable forms of speech would receive similar scrutiny. It was worth it. This was the progressive experiment: "To the reformist American left, more speech meant more—and faster—social and economic change."[375] The road to progressive utopia was paved with more speech. As Neuborne weighed the calculus, "[t]he future potential impact of a deregulatory First Amendment on the weak and the poor was deemed a small price to pay for the ability to invoke a robust free speech principle today in support of a more equal world." With a majority on the Court, "the American left breathed a sigh of relief and awaited its inevitable triumph."[376] Giving protection to commercial speech was well worth the cost to promote equality. Or, at least, that was how the experiment was designed.

But at the height of the *Pax Supremana* where speech was protected by the right and left, Neuborne explains, liberals realized something was amiss. "By 1990, some progressives began to suspect that they had made a bad First Amendment bargain."[377] The deal was not what they expected. What did they gain? Protection for "the rights of a couple of scruffy kids to burn flags" and "tepid protection for carefully constrained street demonstrations."[378] What did they lose from this grand pact? A lot more. The First Amendment now protected "uncontrolled campaign spending by the superrich—including corporations," the "concentration of media power in a handful of huge corporations," and "bursts of verbal venom aimed at historically weak hearers seeking access to education

373. NEUBORNE, *supra* note 38, at 110.
374. *Id.*
375. *Id.*
376. *Id.* at 112.
377. *Id.* at 114.
378. *Id.*

and decent housing."[379] This outcome was "hardly a prescription for progress."[380]

Neuborne cynically suggests that many liberals joined the free speech experiment with the hopes that it would yield progressive goals, and not because they believed in the civil libertarian grounds for protecting "speech as speech." Rather than the harmful speech being a necessary and ancillary evil to achieve the progressive society, the tail began to wag the dog, and it ran amok. Before they knew it, the liberals were bamboozled. "By 2000, the First Amendment era of good feelings was over, but not before the bipartisan coalition had generated an enormously powerful body of precedent establishing an imperial Free Speech Clause."[381]

The marketplace of ideas was a bold experiment. Speech was protected on the premise that if all voices were heard, the "best" idea would prevail. But what if this experiment turned out to be a failure? Or, what if liberals were wrong about what was actually "best"? Rather than serving as a marketplace, the arena of ideas turned into an auction, with the most powerful speech going to the highest bidder. This might explain why in *McCutcheon*, Justice Breyer could not bring himself to cite Holmes's *Abrams* dissent as he no longer believed the experiment was worth trying. What if the incidental protection of those ancillary harmful expressions began to drown out the true, progressive ideals? What if speech was used not to promote the left's "strong, redistributive government," but rather the resurgent right's "skeptical, deregulatory approach to government."[382] Speech, no longer serving the objectives of the collective, was no longer worthy of robust protection. Neuborne, perhaps speaking autobiographically of other similarly inclined liberals, began to realize that speech wasn't serving the goals of political equality. Therefore, long-standing precedents on speech became expendable.

A new framework was needed to ensure that the good speech continued, but the bad speech was regulated. Only that speech which promotes the progressive goals of "democracy" warrant scrutiny, and everything else can be cast aside. Deciding which speech does and does not serve democracy provides a judicial bypass to exclude interests inconsistent with social justice. This is the essence of "collective speech." Perhaps Breyer's shirking away from the First Amendment reflects what Neuborne sees as liberals who "began to view the bipartisan era as a Faustian bargain, far more likely to reinforce the status quo than destabilize it."[383] Returning to the progressive ideals of protecting speech

379. *Id.*
380. *Id.*
381. *Id.* at 115.
382. *Id.* at 113.
383. *Id.* at 115.

as a utilitarian concern, the argument goes, can get the country back on the right progressive track.

But what about conservatives? The left was not alone with this shift, Neuborne posits. There was a time when "robust First Amendment" protection was the "bête noire of the American right."[384] Protecting the speech rights of hippies opposing the war and burning draft cards was a threat to the establishment, and threatened to drown out the message of social unity they preached. These conservatives, "appalled by the excesses of fascist lunatics . . . and confronted by an almost unbroken phalanx of academic support for leftist programs, did not look to the future with intellectual confidence."[385] For this generation of post-WWII conservatives promoted a "weak First Amendment," shielding the country from the "likelihood of harm" posed by speech.[386] While the left awaited their victory, "[t]he right hunkered down and vowed to fight on the beaches."[387] Though, armed with vigorous scrutiny and doctrine, conservatives settled in nicely with the modern First Amendment. Today, the precedent exists to offer robust protections for all speech, regardless of whether it is consistent with democracy or political equality.

### *2. Conscience and Equality*

The identities of the beneficiaries of religious accommodations and who bears the burden of those accommodations can only explain in part the free exercise divide. Underlying these issues is the bedrock issue of the value of religion itself. As one scholar recently asked in a provocative book, why tolerate religion at all?[388] The evolution of thought with respect to free exercise must be assessed against the background principles: What is the intrinsic value of faith itself? And how does that compare to the costs it inflicts on nonbelievers? If religion does not need to be tolerated, then the accommodation question is easily answered.

Justice Breyer has explained that speech does not exist in a vacuum, and is protected so long as the democratic process deems its costs tolerable. The *Hobby Lobby* dissent, though not quite reaching this conclusion, can justify a similar understanding of free exercise. Conscience is not a value onto itself, but is protected so long as the democratic process deems its costs tolerable. Once you adopt this vision of religion, it becomes simple to disregard the intrinsic value of faith, in much the same way that the intrinsic value of speech gets brushed aside by Breyer. If the competing interests are mandating employer-provided

384. *Id.* at 110.
385. *Id.*
386. *Id.* at 111.
387. *Id.* at 112.
388. BRIAN LEITER, WHY TOLERATE RELIGION (2013).

contraceptives and not requiring a profitable company to pay for those products, discounting the value of faith makes this balance a lot easier.

Professor Mark DeGirolami points out that "[o]ne might have thought, even relatively recently, that religious freedom was a 'civil right.' But no longer: it is now said to be the enemy of 'civil rights.'"[389] Stated succinctly by Professor Rick Garnett,

> [T]he conversation about how to manage the conflict between some religious-liberty claims and some equality and non-discrimination claims has to proceed from an appreciation for the facts that "religious liberty" *is* a civil right and that the enterprise of protecting civil rights includes—it has to include—care for religious liberty.[390]

If religion is only valued so long as it serves utilitarian goals, then religion inconsistent with principles of equality or social justice, need not be protected.[391] This is the crystallization of "collective liberty."

One of the clearest examples of this shift concerns whether the federal, state, and local governments should continue to offer tax-exempt status to institutions that do not sanction same-sex marriage.[392] During oral arguments in *Obergefell v. Hodges*, Justice Alito asked the Solicitor General whether religious institutions that do not recognize same-sex marriage could keep their tax-exempt status—alluding to the Court's earlier decision in *Bob Jones*.[393] The Solicitor General answered, in what might be the understatement of the decade, "it's certainly going to be an issue." In the wake of *Obergefell*, a provocative editorial took up the Solicitor General's prediction and argued that religious institutions that

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389. Marc DeGirolami, "*Weaponizing*", MIRROR OF JUST. (Apr. 1, 2015), http://mirrorofjustice.blogs.com/mirrorofjustice/2015/04/weaponizing.html.

390. Rick Garnett, *Religious Freedom "Among," Not "Against," Civil Rights*, MIRROR OF JUST. (Apr. 1, 2015), http://mirrorofjustice.blogs.com/mirrorofjustice/2015/04/religious-freedom-among-not-against-civil-rights.html.

391. During oral arguments in *Obergefell*, Solicitor General Donald Verrilli would not deny that a religious university could lose its tax exempt status if it opposed same-sex marriage. Transcript of Oral Argument, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556).

> JUSTICE ALITO: Well, in the Bob Jones case, the Court held that a college was not entitled to tax-exempt status if it opposed interracial marriage or interracial dating. So would the same apply to a university or a college if it opposed same-sex marriage?
>
> GENERAL VERRILLI: You know, I—I don't think I can answer that question without knowing more specifics, but it's certainly going to be an issue. I—I don't deny that. I don't deny that, Justice Alito. It is—it is going to be an issue.

*Id.* at 38.

392. The *Washington Post*'s *Wonkblog* estimated that this subsidy amounts to roughly $83 billion per year. Dylan Matthews, *You Give Religions More than $82.5 Billion a Year*, WONKBLOG (Aug. 22, 2013), http://www.washingtonpost.com/news/wonkblog/wp/2013/08/22/you-give-religions-more-than-82-5-billion-a-year/.

393. Adam J. White, *Obama Admin: Religious Organizations Could Lose Tax-Exempt Status If Supreme Court Creates Constitutional Right to Same-Sex Marriage*, WKLY. STANDARD (Apr. 29, 2015, 2:05 PM), http://www.weeklystandard.com/article/934127.

discriminate against LGBT people should lose their tax-exempt status.[394] A recent survey revealed that forty percent of Americans and fifty-two percent of Democrats oppose granting tax-exempt status for religious organizations.[395]

This trend shows no sign of abating. Looking forward to the year 2050, "the spread of secularism will probably continue," as "those who claim no religion will make up about a quarter of the population," up from sixteen percent in 2010.[396] As this influential demographic expands, the political protection of faith will fade into the twilight. This decline will be accelerated by the Supreme Court's recognition that "moral disapproval" is no longer a rational basis to enact social legislation.[397] Even in the absence of a demographic shift, views toward religious accommodations have, and will change. "Without change in numbers or belief, religious actors can shift from speaking as a majority seeking to enforce traditional morality to speaking as a minority seeking exemptions from laws that offend traditional morality."[398] During his recent visit to the United States, Pope Francis aptly summarized the evolution: "Until recently, we lived in a social context where the similarities between the civil institution of marriage and the Christian sacrament were considerable and shared. The two were interrelated and mutually supportive. This is no longer the case."[399]

*Christian Legal Society v. Martinez*,[400] though not a free exercise case, demonstrates the new approach to the First Amendment. Allowing an "all-comers" policy that is inclusive of everyone, regardless of who they are—is not only socially desirable as a matter of policy, but also constitutionally required under the First Amendment. In this new normal, the only religious beliefs that are acceptable by society are those that tolerate everyone equal.[401] Individual exercise that does not coincide

394. Mark Oppenheimer, *Now's the Time to End Tax Exemptions for Religious Institutions*, TIME (June 28, 2015), http://time.com/3939143/nows-the-time-to-end-tax-exemptions-for-religious-institutions/.

395. Josh Blackman, *40% of Americans, 52% Democrats, Oppose Tax-Exemptions for Religious Organizations*, JOSH BLACKMAN'S BLOG (Sept. 27, 2015), http://joshblackman.com/blog/2015/09/27/40-of-americans-52-of-democrats-oppose-tax-exemptions-for-religious-organizations/.

396. Laurie Goodstein, *Muslims Projected to Outnumber Christians by 2100*, N.Y. TIMES, Apr. 3, 2015, at A14.

397. *See* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (rejecting "moral disapproval" as a rationale to justify DOMA); *cf.* Obergefell v. Hodges, 135 S. Ct. 2584, 2606 (2015).

398. Nejaime & Siegel, *supra* note 361, at 138.

399. Howard Friedman, *Pope Francis Addresses Clergy Sex Abuse and New Definitions of Marriage*, RELIGION CLAUSE (Sept. 27, 2015), http://religionclause.blogspot.com/2015/09/pope-francis-addresses-clergy-sex-abuse.html.

400. 561 U.S. 661 (2010).

401. *See* YOSSI NEHUSHTAN, INTOLERANT RELIGION IN A TOLERANT-LIBERAL DEMOCRACY 1 (2015) ("The . . . purpose of this book is to explain why religion should not be tolerated in a tolerant-liberal democracy. The more focused and explicit purpose of the book is to explain why a tolerant-liberal democracy should be reluctant to tolerate religious claims for accommodation.").

with the collective virtues of the state need not be tolerated, and indeed should be shunned. Increasingly so, the primary goal of society will hew toward promoting equality rather than guaranteeing exercise. Society's perception of Christianity, and other faiths, to the extent that their beliefs interfere with equality and social justice, will no longer be deemed worthy of the collective exercise rights of civil society. The concerns highlighted by Justice O'Connor's *Smith* dissent—that the "political process" could not work things out—have proven true, as the political process moves away from free exercise and toward political equality. Or, viewed differently, Justice Scalia's *Smith* opinion was vindicated, as the people, and not the courts can decide the proper scope of religious accommodations.

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