

1-1-1986

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Daniel A. Farber
Berkeley Law

Philip P. Frickey
Berkeley Law

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Recommended Citation

Practical Reason and the First Amendment, 34 UCLA L. Rev. 1615 (1986)

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PRACTICAL REASON AND THE FIRST AMENDMENT

Daniel A. Farber*
& Philip P. Frickey**

Modern legal scholarship increasingly aspires to intellectual grandeur. In a discipline that once celebrated the virtues of "thinking small,"¹ the current fashion is now high level abstraction. Much constitutional scholarship, for example, is no longer devoted to specific constitutional issues, but rather to philosophical debates about the nature of constitutional interpretation. A similar trend toward grand theory can be seen in first amendment writing, in which many scholars have turned to increasingly abstract theories. These writers attempt to identify a single unifying purpose to the first amendment, from which they then deduce answers to concrete first amendment problems.²

In this essay, we will question the continued viability of the "modern style" in first amendment scholarship.³ We believe that, however promising grand theory might have seemed ten or twenty years ago, the results have been disap-

* Henry J. Fletcher Professor of Law, University of Minnesota; Visiting Professor, Stanford Law School.

** Associate Professor of Law, University of Minnesota. We thank William Eskridge, Suzanna Sherry and Gerald Torres for their helpful comments on an earlier draft of this article.

1. Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 UCLA L. REV. 1 (1965). Yet even Kalven asserted that the "quest for coherent general [first amendment] theory . . . needs no apology and no defense." H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 4 (1965).

2. Judge Posner has recently termed this approach "formalism"; like us, he rejects this approach in constitutional law. See Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. 179, 181, 217 (1986-87).

3. Our concern in this essay is with the speech and press clauses, rather than the religion clauses of the first amendment.

pointing. We recognize, though, the inherent difficulty of discrediting high level theory. As Steve Shiffrin has explained:

The difficulty is that an eclectic approach affirms a negative, that is, it denies the possibility of any general theory that would dictate solutions in most concrete cases. Proving a negative in this context requires refutation of the alternatives and there is no way to assure that all alternatives have been canvassed. Some of the alternatives are not yet in mind, let alone in print.⁴

Even if we were to limit ourselves to existing first amendment theories, the task of surveying and criticizing them all would be formidable. It would also make for tedious reading, since so much has already been written about many of these theories.

Our aim in Part I of this Article, consequently, will be more modest. We will examine a fair sample of contemporary work, recognizing that the results can only be suggestive. The scholars analyzed in Part I all have proposed unified theories based on important first amendment values. Part I suggests that each of these theories works mischief in particular applications.

Is the problem simply that the most appropriate foundational value for first amendment theory has yet to be articulated? If so, there may be hope for a unified, deductive approach. Or perhaps our criticism of these theories misses the mark: adoption of a legal theory arguably requires that its logical implications be accepted, come what may. Thus, our criticisms of existing first amendment theory naturally lead to broader questions about the role of legal theory. Given the problems of grand theory, is there any alternate approach to the first amendment?

Part II explores the use of "practical reason" as an alternative to foundationalism. Practical reason is easy to praise but difficult to define rigorously. Since it refers to a cognitive activity rather than a set of rules, we could no more offer a precise formulation of what it is or how to do it well than we could write a manual on how to be a great scientist or artist.⁵ Nevertheless, if it is to offer a meaningful alternative

4. Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 Nw. U.L. REV. 1212, 1255 (1984).

5. Lon Fuller once aptly compared the judge's effort to find the right deci-

to foundationalism, it must be given some content.

We believe that practical reason, whether in law or science, is learned by example rather than through rules. In Part II, we will examine in detail what we consider to be a paradigmatic judicial example of practical reason in the first amendment context. By doing so, we hope to demonstrate how practical reason can transcend *ad hoc* eclecticism and create a coherent legal tradition.

Having attempted in Part II to give content to the notion of practical reason, we turn in Part III to an evaluation of its viability as an alternative to grand theory. A growing body of scholarship, by philosophers as well as law professors, suggests that grand theory is based on a misapprehension of the nature of human reason. These scholars have offered a trenchant critique of foundationalism, as well as a strong case for adopting a richer, more comprehensive view of reason. By confining reason to logical deduction from set premises, foundationalism curtails the use of our most powerful problem-solving abilities.

Applying the Constitution to the diverse problems of a highly pluralistic society is no easy task. Foundationalism cripples our ability to resolve constitutional issues by limiting our analytical tools to deductive reasoning. Practical reason allows the use of the full range of cognitive abilities. Solving constitutional problems, we contend, requires no less.

I. CONTEMPORARY FIRST AMENDMENT THEORY

The classic first amendment theories of Emerson⁶ and Meiklejohn⁷ gave rise to extensive scholarly debates.⁸ Some of their most perceptive critics, such as Tribe and Ely, pro-

sion to the cook's attempt to create a flaky pie crust. See Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 379 (1946). As this metaphor suggests, experimentation may lead to the discovery of good recipes, but even then an element of skill remains.

6. T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* (1963).

7. A. MEIKLEJOHN, *POLITICAL FREEDOM* (1960); see also Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.

8. For summaries of the various views about first amendment values, see M. NIMMER, *NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT*, ch. 1 (1984); J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 835-39 (3d ed. 1986).

posed their own general theories to replace these classic theories.⁹ These theories themselves have by now been extensively critiqued.¹⁰ The scholarly consensus today is that none of these attempts at grand first amendment theory was fully successful.¹¹ Once again, however, some of the leading critics of previous theories have offered newer (and sometimes even grander) theories of their own.¹²

The literature on the earlier theories is extensive. We will not burden the reader with yet another tour of familiar ground. As yet, however, relatively little has been written about the most recent theories. Even within this group, however, too many theorists are actively at work to allow a full discussion of all of their views.¹³ Consequently, our discussion will focus on several of the most noteworthy of these newer theories, those of Professors Redish, Baker, and Bollinger.

Although there are some sharp differences between their views, these three theories have some common features. First, although Bollinger makes somewhat less ambitious claims for his theory than do Baker and Redish,¹⁴ all three seek to find a single dominant value underlying free speech as a basis for developing a comprehensive first amendment theory.¹⁵ Second, all of them reject democracy as a possible fundamental value. Third, they all focus on the relationship between speech and self-realization. All three

9. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 576-736 (1978); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

10. See, e.g., M. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 102-26 (1984); Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980).

11. See L. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 43-103 (1986); M. REDISH, *supra* note 10, at 14-52, 102-26; F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 15-72 (1982); Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 967-90 (1978); Farber, *supra* note 10.

12. See L. BOLLINGER, *supra* note 11; M. REDISH, *supra* note 10. As the text suggests, Redish and Bollinger are astute critics of earlier theories.

13. Other important theories that we unfortunately cannot discuss here, include Professor Blasi's pathological perspective and Schauer's free speech principle. See F. SCHAUER, *supra* note 11; Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

14. See *infra* text accompanying notes 47-51.

15. For a particularly fine presentation of the opposing view that there are multiple values underlying the first amendment, see M. NIMMER, *supra* note 8, ch. 1.

portray free speech as ultimately serving a psychotherapeutic function, helping to give people richer, more rewarding lives.¹⁶

We see much to admire in the work of all three. Quite apart from their technical merits, their writings advance our appreciation for important human values. Those values are indeed relevant to first amendment discourse, and these writers' discussions of these values are sensitive and evocative. What we reject, however, is the claim that any of these theories can provide a foundation for first amendment law.

Taking the theories in chronological order, we begin with Professor Baker's "liberty model" of free speech.¹⁷ In his view, the first amendment "delineates a realm of individual liberty roughly corresponding to noncoercive, nonviolent action."¹⁸ More specifically, he contends that the government may not ban any activity (such as artistic expression) pursued for its own sake rather than as a means to accomplishing something else. Government may, however, sometimes require individuals to obtain the consent of others who might be affected by their actions.¹⁹ This rule, he suggests, maximizes individual self-development and creativity, and thereby in his view fosters beneficial social change.²⁰

As a theory of the first amendment, Baker's approach leaves something to be desired. First, it fails to justify the special constitutional status given to speech by the first amendment. As Baker himself seems to acknowledge, other

16. It is perhaps appropriate that, as writers in the 1980s, they all provide what might be called (perhaps a bit unfairly) "self-improvement" approaches to the first amendment, in which the primary purpose of the amendment is not to improve society but rather to help make us better individuals.

17. His views are presented in Baker, *supra* note 11; Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976) [hereinafter Baker, *Commercial Speech*]; Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's "The Value of Free Speech,"* 130 U. PA. L. REV. 646 (1981) [hereinafter Baker, *Realizing Self-Realization*]. Like the two later theorists, he begins with a thoughtful criticism of prior first amendment theory, before turning to his own theory. Baker may be too quick to reject the traditional "marketplace of ideas" rationale, under which free debate advances the search for truth. See M. NIMMER, *supra* note 8, at 1-10 n.12. If Baker doesn't believe that speech can advance the search for truth, it is hard to see why he bothers writing law review articles. See Shiffrin, *supra* note 4, at 1248.

18. Baker, *supra* note 11, at 964.

19. *Id.* at 1014-23.

20. See *id.* at 1027-28.

forms of noncoercive, noninstrumental behavior seem equally within his definition.²¹ On his theory, the rights to use heroin, to engage in any form of consensual sexual conduct, and most other recreational activities are protected by the first amendment. All are noncoercive, nonviolent activities, and all are valued for their own sake rather than simply as means to an end. Perhaps the Constitution should be construed to protect these activities. Even so, however, the first amendment seems a decidedly odd choice of a textual basis.

Second, within the area of "speech," Baker's theory seems to extend first amendment protection too far. For example, consider his discussion of espionage:

Espionage—at least secret transmission to a foreign nation of information which relates to the security of this nation—presents, for me, a difficult issue. The speaker uses speech (or writing) to change the world in a desired fashion. Creative uses of speech are usually protected. Moreover, the effect of espionage may be the same as publishing classified, previously secret information in a newspaper And normally one's choice of audience, or its size, should not affect one's first amendment rights.²²

Baker does concede that espionage is sometimes unprotected by the first amendment. "Espionage is not protected only because, and only to the extent that, one's country can reasonably conclude that information gathered through espionage increases the coercive power of another country and because the purpose of the espionage is to have that effect."²³ It rather strains credulity, however, to assert that the first amendment extends its protection to the sale of military secrets to foreign powers.²⁴

21. See *id.* at 1009–12. One of his examples is a "rule prohibiting certain types of families from living together." *Id.* at 1018. For a similar argument about the impossibility of distinguishing speech from other forms of conduct, see Alexander & Horton, *The Impossibility of a Free Speech Principle*, 78 Nw. U. L. Rev. 1319, 1321–22 (1984).

22. Baker, *supra* note 11, at 1004–05. That an author otherwise as astute as Baker finds himself taking such a position is a tribute to the pernicious power of grand theory to overcome common sense.

23. *Id.* at 1005. It is hard to know what "noncoercive espionage" means; perhaps Baker is thinking of an idealist who gives military secrets to a country that she believes will only use them for defensive purposes. (Surely self-defense does not fall within the category of "coercion.")

24. And of course, if there really was an inescapable logical nexus between

A third flaw in Baker's approach is its apparent susceptibility to manipulation. While some espionage is protected,²⁵ corporate speech is not, nor is commercial advertising. The reason supposedly is that these activities are instrumental rather than being done for their own sake, so they are not tied to self-actualization.²⁶ As Redish cogently argues, these conclusions need not follow from Baker's premises.²⁷ After all, although a corporation cannot attain self-actualization, its employees and customers can do so. In contrast to these views about business-related speech, Baker views labor union speech as protected even when it is "coercive" in the sense of allowing individuals to exert power over others.²⁸ It is hard not to see in this some reflection of Baker's own political sympathies.

The most attractive feature of Baker's approach is that it focuses attention on the cultural aspect of speech. He paints an attractive picture of a world in which discrete sub-cultures pursue diverse modes of human fulfillment.²⁹ One of the values of free speech is that it promotes this kind of cultural diversity. But it also has other obvious benefits, such as its contribution to the democratic political process, which Baker ignores.

Redish's self-realization theory of the first amendment somewhat resembles Baker's, but avoids some of its weaknesses. Redish begins with democracy as a central value. He then attempts to establish that belief in democracy must in turn be based on the value of self-realization, which he views as the ultimate value underlying the first amendment.³⁰ He argues that all forms of communication enhance self-realization, either by allowing the speaker self-express-

the proposition "the first amendment is valid" and the proposition "citizens have the right to give military secrets to foreign powers if they reasonably believe the secrets will only be used for defensive purposes," a good many people would question whether *either* proposition was true.

25. See *supra* text accompanying notes 22-24.

26. See Baker, *Realizing Self-Realization*, *supra* note 17, at 652-58. This aspect of Baker's theory is critiqued in Shiffrin, *supra* note 4, at 1245-51. For an insightful analysis of the corporate speech problem, see Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235 (1981).

27. See Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 120 U. PA. L. REV. 678 (1982).

28. See Baker, *supra* note 11, at 1031-35.

29. See, e.g., *id.* at 1027.

30. See M. REDISH, *supra* note 10, at 19-29.

sion or by giving listeners information they need to make their own decisions. Thus, for Redish, soap ads are just as much protected by the first amendment as literature or political speech.³¹

As Redish himself concedes, the concept of self-realization is far broader than even the most expansive notion of "speech." Why, then, give special protection to speech? Redish's initial reply is that we must make this distinction simply because the framers happened to make it, and we are stuck with the language they used in the first amendment.³² This is hardly a satisfactory response, since it purports to explicate the first amendment by rendering its scope entirely arbitrary. Recognizing this, Redish goes on to explain why the framers might have drawn such a distinction: they "could reasonably decide that speech is less likely to cause direct or immediate harm to the interests of others and more likely to develop the individuals' mental faculties than is purely physical conduct, and that speech thus deserves a greater degree of constitutional protection than does conduct."³³ But if this is true, we should be able to draw lines within the area of communicative conduct based on the same criteria—soap ads or pornography (both of which Redish views as protected³⁴) having a lesser capacity to "develop the individuals' mental faculties" than Kafka, quantum mechanics, or Redish's book. Yet, inconsistently, Redish adamantly argues that relative value cannot be a factor in determining the extent of protection for speech.³⁵

Some of the sting is taken out of this critique by Redish's development of his theory. He admits that the risk of government abuse can be taken into account in determining the degree of protection for particular kinds of speech.³⁶ Political speech may deserve particular judicial protection because "[i]n the words of the noted social commentator, Bret Maverick, 'the dealer always cheats.'"³⁷ And Redish's general balancing test allows him to avoid any truly horrible

31. *See id.* at 55–68.

32. *See id.* at 18.

33. *Id.* at 19.

34. *See id.* at 60–76.

35. *See id.* at 66–70.

36. *See id.* at 65.

37. *Id.* (quoting J. ROCHE, COURTS AND RIGHTS 130 (1961)).

results by finding a strong government interest in regulation.³⁸

Still, in some ways Redish's view of free expression seems astigmatic. For example, after concluding that ideological calls to arms are protected speech, Redish then asks whether the same is true of ordinary criminal solicitations. "True," he admits, "it is difficult to engender a significant degree of enthusiasm for protecting one man's urging another to commit murder for pay."³⁹ Once again, however, the voice of common sense is stilled by the seduction of grand theory, and Redish finds himself extending qualified constitutional protection to such murder proposals. People must be allowed to propose committing murder, he argues, "[f]or while particular thoughts or suggestions may ultimately be rejected, there is independent value in allowing people to think through the comparative advantages and disadvantages of various options. This is not merely because it will aid them in making decisions . . . , but because it stimulates intellectual development."⁴⁰ Again, the problem is not that Redish reaches a ridiculous result—his version of the "clear and present danger" test does allow the government to punish criminal solicitation⁴¹—but rather that his theory induces a radical telescoping of values, in which a political dissenter can no longer be distinguished from a Mafia boss giving orders to a hit man. His constitutional world seems oddly distorted and out of focus, not because he is unperceptive, but because of the Procrustean demands of his theory.

Redish's argument for the value of self-realization is useful and enlightening in demonstrating its links to our other values. Although he reveals what we think is an unfortunate attraction to the tidiness of universalistic theories, the legal tests he ultimately adopts tend to be flexible and attuned to the nuances of different situations.⁴² Thus, like Baker, Redish has important insights, but his ambition to

38. *See id.* at 125–26, 173–211.

39. *Id.* at 84.

40. *Id.*

41. *See id.* at 173–211.

42. In Part III, we will propose a view of first amendment law that bears some resemblance to Redish's, except that where he sees a unified test applied flexibly to a broad range of cases, we see a more loosely connected series of tests unified by an overall judicial attitude.

wrap up all of the first amendment in one tidy package distorts his thinking.

The final approach we will discuss is Bollinger's toleration theory of the first amendment.⁴³ Like the others, Bollinger spends much of his time in a thoughtful demonstration of the inadequacies of previous theories.⁴⁴ Unlike Baker and Redish, his main focus is on a particular incident: a proposed Nazi march through the Chicago suburb of Skokie, a primarily Jewish community with many Holocaust survivors.⁴⁵ Bollinger convincingly argues that traditional first amendment approaches do not do justice to what was really at stake in Skokie. Instead, he assays a "tolerance" theory to provide a deeper perspective on Skokie.⁴⁶

In Bollinger's view, previous first amendment theories, while not entirely invalid, no longer correspond to the problems facing our society.⁴⁷ The "new social meaning" of the first amendment relates to the value of tolerance. Human beings tend to be intolerant of others who do not share their views or way of life. To compensate for this inherent tendency toward intolerance, they need to be taught to tolerate the repugnant. One purpose of the first amendment, then, is to inculcate tolerance by forcing people to put up with repugnant speech.⁴⁸ Thus, the judicial opinions allowing the Nazis to march through Skokie taught a valuable lesson in tolerating the intolerable.⁴⁹

In the course of his analysis, Bollinger has some penetrating insights to convey. It is somewhat unclear to what extent he claims to have more than that. He speaks of "An Agenda for the General Tolerance Theory," which suggests some ambition toward grand theory. Yet, he concedes in the

43. See L. BOLLINGER, *supra* note 11. For a fuller discussion of Bollinger's views, see Sherry, *An Essay Concerning Toleration*, 71 MINN. L. REV. 963 (1987).

44. See L. BOLLINGER, *supra* note 11, at 43-104.

45. See *id.* at 23-34.

46. See *id.* at 104-44.

47. *Id.* at 218.

48. See *id.* at 119-37.

49. One of us has previously argued that allowing the Nazis to march with swastikas through Skokie served the contrary purpose of increasing our *intolerance* of them. If they were forced to "clean up their act" and behave presentably, a false impression would be created that they simply represented another respectable (if extreme) political position. See Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of Cohen v. California*, 1980 DUKE L.J. 283, 299-302.

very chapter with that title that traditional considerations (such as the role of free speech in the democratic process, the marketplace of ideas, etc.) still have some validity today.⁵⁰ It may be too strong to say he claims to have a unified theory. Nonetheless, Bollinger does seem at least to be calling for a radical shift in perspectives.⁵¹

It is here that he is most vulnerable. It is by no means clear that previous perspectives can be dismissed as *passé*, or that his new perspective can be usefully applied to the full range of first amendment problems.⁵² Is public access to criminal trials or pretrial proceedings a way of increasing our tolerance—and if so, our tolerance of whom: the police, the press, or criminals? And what of commercial speech—should we give it constitutional protection to increase our tolerance for hucksterism? In these and other areas of litigation, such as the expanding public forum area⁵³ or campaign finance, Bollinger's tolerance theory seems to have very little to say.

For example, consider his explanation of why graffiti on public buildings are not protected by the first amendment:

The problem with graffiti is that they are done secretly, like an obscene telephone call. Like that sort of behavior, the messages that tend to be communicated are frequently of the most offensive and troublesome kind. . . . The anonymity of the act makes the vast web of social, unofficial constraints and penalties ineffective, and as a consequence there will be too much of the behavior and too much social injury. With free speech, we wisely use natural curbs whenever we can, and limiting free speech (perhaps not entirely but nevertheless largely) to *public* speech acts provides a natural and desirable degree of containment.⁵⁴

50. L. BOLLINGER, *supra* note 11, at 241.

51. *Id.* at 248.

52. Government attempts to suppress criticism are by no means things of the past. Nor is the attempt to censor genuine literature something we have put behind us. See *Board of Educ. v. Pico*, 457 U.S. 853 (1982) (school board removes various works from school libraries, characterizing them as "anti-American," *id.* at 857); Lachman, *Celebrating Secrecy*, 3 CONST. COMM. 31, 31 n.1 (1985). Tolerance theory has little to contribute to these traditional first amendment problems.

53. See Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984).

54. L. BOLLINGER, *supra* note 11, at 212.

Certainly the courts have given no hint of this motivation.⁵⁵ And the justification itself is rather weak, since (1) more people would write their graffiti in public if it were legal to do so; (2) we could deal with this concern by requiring graffiti to be signed; (3) the U.S. mails are just as private but fully protected by the first amendment; and (4) it is perverse to say that the first amendment should only apply when non-governmental censorship is sufficiently effective. Bollinger is obviously capable of conceiving of these objections himself, but he is seemingly hypnotized into insensibility by his theory.⁵⁶

The three theories we have discussed share some common flaws. First, none of them seems consistently able to provide sensible answers to concrete problems. This is an important failing in a legal theory, since a major purpose of legal theories is to guide courts in deciding individual cases. Second, each theorist assumes that the first amendment must rest on some more basic foundation. Yet none of them gives any reason for believing this to be true. Third, none of them is successful in excluding all of the other intuitively plausible attractions of free speech (including the values stressed by the other two).

In short, the recent theories we have examined all have interesting and useful things to say. None of them, however, is acceptable as a general theory of the first amendment. Our discussion does not, of course, prove that a general theory is an impossibility.⁵⁷ Still, when Baker, Redish, and Bollinger—not to mention Emerson, Meiklejohn, Ely, and Tribe—have all undertaken a task and failed, the problem is

55. See, e.g., *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

56. The most troubling aspect of Bollinger's book is his general attitude of complacency concerning core first amendment issues. For example, he takes Justice Black (and Harry Kalven) to task for showing undue enthusiasm regarding free speech. See L. BOLLINGER, *supra* note 11, at 224.

57. We recognize that each of these theories really deserves more extensive discussion. We also recognize that other contemporary theorists would have to be discussed in a fuller treatment, not to mention the earlier theories we have glossed over. Our purpose in this section is not, however, to "prove" the impossibility of first amendment theory. Rather, we have tried only to suggest, by examining the work of some of its ablest practitioners, that first amendment theorizing seems inevitably to involve doing violence to some obvious truths about free speech in the interests of intellectual tidiness.

obviously not lack of intellectual ability. Perhaps the enterprise as a whole needs to be rethought.

II. BEYOND FIRST AMENDMENT THEORY

Where do we go from here? What is the alternative to high level theory? One answer might be pure eclecticism: Each first amendment case—or at least each important or difficult case—involves a unique pattern of conflicting values and policy issues. Each case, then, must be confronted on its own terms, using all of the intellectual equipment the judges can muster. To ask for more is only to attempt to fit the unruly reality of each case within a doctrinal straitjacket. Thus, what the judge must do is to ponder the intractable complexities of each new case.⁵⁸

There is much truth to this view. No ready-made formulas exist for deciding hard cases; that's exactly what makes them hard. And we agree, as we have already made clear, that no single value or system of axioms can provide an adequate foundation for first amendment law. In short, we see much virtue in "thinking small." Yet, we are also somewhat troubled by total eclecticism. There is such a thing as thinking *too* small. "Decide each case on its facts; ponder the issues deeply; reflect on the conflicting values"—surely valuable advice for a judge. But is it enough?

For several reasons, we think that this advice does not by itself give enough coherence to first amendment law. First amendment law has a particular need to give guidance and predictability. Local officials need to know what actions they can take in myriad contexts; newspapers need to know what they can print;⁵⁹ demonstrators need to know what

58. The argument for eclecticism has been made in some of our previous works, see, e.g., Frickey, *Judge Wisdom and Voting Rights: The Judicial Artist as Scholar and Pragmatist*, 60 *TUL. L. REV.* 276, 307-13 (1985), and by some other writers, most notably Steve Shiffrin. The form of total eclecticism discussed in the text is much like the approach Professor Nelson has called "anti-theoretical realism." See Nelson, *History and Neutrality in Constitutional Adjudication*, 72 *VA. L. REV.* 1237, 1286-90 (1986).

59. As Justice Harlan, who is sometimes thought to have been an advocate of *ad hoc* balancing, explained:

At least where we can discern generally applicable rules that should balance with fair precision the competing interests at stake, such rules should be preferred to the plurality's [*ad hoc*] approach both in order to preserve a measure of order and predictability in the law

they are allowed to do. The potential for vague constitutional rules to chill speech is too obvious to require elaboration.⁶⁰ Civil-rights and civil-liberties lawyers asked for advice need to be able to say something more concrete than "Don't worry. The Supreme Court will consider this case on its own facts."⁶¹

Perhaps more important, freedom of speech is not just the concern of lawyers. Pure eclecticism makes the first amendment too legalistic, too much the domain of specialized lawyers aware of the intricacies of the case law.⁶² Free speech issues frequently give rise to widespread public debate. If the courts are to help inform this debate, they must have something more to offer than *ad hoc* decisionmaking. First amendment litigation often involves marginal cases, so it is no test whether we would "march our sons and daughters off to war"⁶³ over any single litigated issue. But the first amendment as a whole should stand for something worthy of ultimate commitment.

First amendment law needs, in our view, more coherence and even grandeur than pure eclecticism can provide. Yet a unified theory seems to be impossible. Is there any middle ground between unified theories and complete eclecticism?⁶⁴

that must govern the daily conduct of affairs and to avoid subjecting the press to judicial second-guessing

Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 63 (1971) (Harlan, J., dissenting).

60. See M. NIMMER, *supra* note 8, at 2-10.

61. As Professor Blasi puts it, "[a] legal culture that talks and thinks in terms of principles is somewhat less likely, by virtue of that mode of discourse, to trivialize its ideals in the process of case-by-case adjudication, or lose the capacity to subject its *ad hoc*, pragmatic impulses to some form of discipline." Blasi, *supra* note 13, at 474.

62. Professor Schauer has spoken perceptively of the risk that first amendment doctrine will begin to resemble the Internal Revenue Code. See Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285, 309.

63. *Young v. American Mini-Theatres*, 427 U.S. 50, 70 (1976).

64. Although we disagree with his attempt to provide a unified foundation to first amendment law, we are in complete agreement with this observation by Professor Redish:

In my view, first amendment interests are generally not furthered by these attempts to resolve complex and difficult issues by means of rigid, hard-line distinctions and categorizations. Of course, to leave the judiciary with absolutely no guidance in its interpretation of the first amendment would be to invite disaster. But the issue is one of degree: the alternatives are not merely total, unguided chaos on the one hand and rigid, unbending lines of demarcation on the other.

Today, a heated jurisprudential debate revolves around the question whether law is determinate, incoherent, or neither.⁶⁵ Most law professors and virtually all practicing lawyers seem to think that law is less than determinate but more than incoherent. It is very difficult to say anything sensible, however, about just how judges can be guided without being truly constrained.

Although these questions are indeed difficult, they are not unique to law. In one of the most influential books of the past thirty years, Thomas Kuhn argued that much the same situation obtains in science. A complex undertaking such as modern physics cannot be reduced to a simple set of rules. Instead, it relies on a whole collection of shared values, assumptions, and techniques.⁶⁶ In other words, physics is as much a way of life as a body of rules. Kuhn spoke of the ongoing everyday work of the scientist as "normal science"; occasionally this process breaks down until a new paradigm can be devised.

Kuhn's "paradigms" have become part of the common intellectual vocabulary, but the term is almost always misused to mean something like "world-view." Kuhn had a much more specific—and technically more correct—meaning in mind. For him, a paradigm was not a set of assumptions or a perspective, but rather an actual example of scientific work which served as a model for future researchers.⁶⁷ Thus, Newton not only created specific theories, but his own work became the very model of what it was to be a

Instead, we must seek general guidelines of interpretation that simultaneously provide the strong deference to free speech interests that the language and the policies of the first amendment command while allowing the judiciary the case-by-case flexibility necessary to reconcile those interests with truly compelling and conflicting societal concerns.

M. REDISH, *supra* note 10, at 3.

As he says later in the book, "belief in some degree of case-by-case judicial flexibility does not imply acceptance of completely unguided, virtually emotive and unprincipled judicial decision-making." *Id.* at 261. Unlike Professor Redish, however, we believe that the solution is not so much to be found in high level doctrines as in the less explicit constraints of the first amendment tradition.

65. Compare Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985) with Tushnet, *Following the Rules Laid Down: A Critique of Interpretation and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

66. See Luban, *Legal Modernism*, 84 MICH. L. REV. 1656, 1691 (1986).

67. T. KUHN, *THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE* 292-319 (1977).

physicist. A paradigm need not involve a major conceptual breakthrough such as Newtonian theory, although this is another common misconception about Kuhn.⁶⁸ For example, he considered the discovery of Uranus as constituting a paradigm for work in astronomy.⁶⁹

As Kuhn explains, it is through such models that the scientific tradition is transmitted:

Scientists work from models acquired through education and through subsequent exposure to the literature often without quite knowing or needing to know what characteristics have given these models the stature of community paradigms. And because they do so, they need no full set of rules. The coherence displayed by the research tradition in which they participate may not imply even the existence of an underlying body of rules and assumptions that additional historical or philosophical investigation might uncover. That scientists do not usually ask or debate what makes a given problem or solution legitimate tempts us to suppose that, at least intuitively, they know the answer. But it may only indicate that neither the question nor the answer is felt to be relevant to their research. Paradigms may be prior to, more binding, and more complete than any set of rules for research that could be unequivocally abstracted from them.⁷⁰

As with legal education, scientific education is primarily intended not to communicate a body of knowledge but to create a competence to do certain kinds of work. In both fields a key method of instruction involves studying classical cases and practicing analysis on hypothetical problems.⁷¹

The concept of paradigms helps explain how traditions are held together.⁷² As Owen Fiss has recently reminded us, there is a "first amendment tradition."⁷³ It is rather difficult to describe just what holds this tradition together. In part,

68. See Hacking, *Styles of Scientific Reasoning*, in *POST-ANALYTIC PHILOSOPHY* 148 (J. Rajchman & C. West eds. 1985).

69. See T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 114-15 (1962).

70. *Id.* at 46.

71. Kuhn notes the importance of problem-solving exercises in the education of scientists. See T. KUHN, *supra* note 67, at 350-51. Kuhn also stresses the role of shared scientific values, which shape but "do not determine choice." *Id.* at 331. On the similar nature of legal education, see generally Torres, *Teaching and Writing: Curriculum Reform as an Exercise in Critical Education*, 10 *NOVA L.J.* 867 (1986).

72. For an insightful discussion of the evolving nature of tradition, see A. MACINTYRE, *AFTER VIRTUE* 206-09 (2d ed. 1984).

73. See Fiss, *Free Speech and Social Structure*, 71 *IOWA L. REV.* 1405, 1405-06 (1986).

the answer is to be found in paradigmatic judicial opinions, which stand as models of first amendment analysis. These, by and large, are the "classic" opinions that everyone studies in law school. Their language is constantly quoted in later cases; they are used as examples of what it means to "do first amendment law the right way."

Rather than attempting a survey of paradigm cases, we will focus on one, *New York Times v. Sullivan*.⁷⁴ We had several reasons for this choice. First, the case has a secure place in the first amendment canon.⁷⁵ It has been the foundation for an entire area of law.⁷⁶ Some portions of the opinion have been quoted so often as to become almost cliches.⁷⁷ Second, the case is from an important period of first amendment law, the late Warren Court period that remains the basis for most present first amendment doctrines. Third, although the author of the opinion is justifiably well regarded, he is not in the pantheon of great justices. And while the opinion itself is well done, it displays neither the high craftsmanship of a Harlan opinion⁷⁸ nor the rhetorical power and clarity of a Black opinion. This makes the opinion more representative of what can be expected from good judges, rather than an accomplishment to which only the

74. 376 U.S. 254 (1964).

75. It would be hard to quarrel with Professor Nimmer's description of *New York Times* as a "landmark case." See M. NIMMER, *supra* note 8, at 2-15.

76. As one of the most perceptive commentators on defamation law has said:

Despite its relative obscurity, however, the *Times* case is one of the most important decisions of this century, for it represents not only the starting point for all discussion of modern libel law, but the intersection of three dominant themes in modern American experience: the power of the federal judiciary, the role of the press as an agent for social change, and the slow and painful struggle of black Americans for legal and social equality

Times v. Sullivan revolutionized the American law of libel because in one sudden burst of federal judicial power, state libel laws were made subject to the strictures of the First Amendment, and, with that ruling, hundreds of years of evolving state libel laws were rendered obsolete. But *New York Times* was much more than a libel suit [T]he *Times* case is the greatest exposition in the history of the Court of the central place of freedom of speech in American society.

R. SMOLLA, *SUING THE PRESS* 26 (1986).

77. See Fiss, *supra* note 73, at 1410, 1421 (referring to a "talismanic phrase" from the opinion).

78. For an extensive discussion of Harlan's craftsmanship in free speech cases, see Farber & Nowak, *Justice Harlan and the First Amendment*, 2 CONST. COMM. 425 (1985).

great can aspire. Thus, it seems a good choice of a "model" first amendment opinion.⁷⁹

On rereading, *Sullivan* comes across as a strong opinion. Justice Brennan's opening paragraph bluntly explains the issue in the case:

We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.⁸⁰

The Court then proceeds to a lengthy statement of the facts, whose dramatic interest stems from its connection with the civil rights struggle in the South.⁸¹ The alleged libel was against the Commissioner of Police, who was nowhere named in the publication, and whose reputation could scarcely have been injured by the trivial inaccuracies found in a few copies of the *New York Times* sold in Alabama.⁸² Although the state court's treatment of the case was consistent with the somewhat bizarre common law of libel,⁸³ the case was plainly an attempt to muzzle Northern critics of Southern brutality.⁸⁴

Part II is the heart of Justice Brennan's opinion. He begins by pulling together a number of prior judicial statements on the role of free speech in American society.⁸⁵ This passage culminates in the famous reference to "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."⁸⁶

79. Some other paradigms that come to mind are the classic Holmes and Brandeis dissents, Warren's opinion in *O'Brien*, and Harlan in *Cohen v. California*.

80. 376 U.S. at 256.

81. For a detailed discussion of the facts and their implications, see Kalven, *The New York Times Case: A Note on the "Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 194-200. Although we do not completely agree with Professor Kalven's reading of the opinion, we view his article as itself a paradigm of constitutional scholarship.

82. 376 U.S. at 256-64. The allegedly defamatory advertisement is included as an Appendix to the official report. *Id.* at 292-93.

83. See Kalven, *supra* note 81, at 196-97.

84. See *id.* at 200. After laying out the facts in the introductory section, a brief Part I of the opinion disposes of a couple of insignificant threshold issues.

85. 376 U.S. at 269-70.

86. *Id.* at 270.

The following eight pages of the opinion are dedicated to establishing that neither falsity, defamatory nature, nor the combination of the two traits are sufficient to justify suppressing speech.⁸⁷ Here, Brennan builds on previous cases recognizing the need for “breathing room” for free speech, on contempt cases dealing with insulting comments about judges, and on the history of seditious libel.⁸⁸

At this point, the reader may well expect a holding that criticism of government officials is absolutely immune from liability.⁸⁹ But then Brennan shifts direction:

The state rule of law is not saved by its allowance of the defense of truth. A defense for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge which, in *Smith v. California*, . . . we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale.⁹⁰

After a discussion of the effects of requiring the defendant to prove truth as a defense, Brennan concludes that such a requirement chills criticism of official conduct.⁹¹ He then announces the now famous *New York Times* test:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official

87. Much of this portion of the opinion is drawn directly from the newspaper's brief, written by a team of lawyers including Herbert Brownell and Herbert Weschler (who argued the case). See Brief for Petitioner at 38–58, *New York Times v. Sullivan*, 376 U.S. 254 (1964).

88. *Id.* at 271–78. For an insightful recent discussion of the seditious libel issue, see Van Alstyne, Book Review, 99 HARV. L. REV. 1089 (1986).

89. See Kalven, *supra* note 81, at 203. Kalven notes that the opinion had already made it clear that “there can be no test of truth in these matters,” and so is puzzled by the opinion's return to the issue of falsity. The explanation would seem to be that the previous portion of the opinion is concerned with whether speech is protected in the sense that the state could not directly ban it. It is less than obvious, however, that the state's ability to ban speech is congruent with its power to require the speaker to compensate victims. The paragraph before the “defense of truth” sentence switches to the issue of civil liability, and concludes that libel law can create grave threats to free speech. The question then is whether, in the civil context, a defense of truth is enough to avoid the impairment of free speech. (Obviously, Kalven's difficulty in following Brennan's argument does not speak well for the drafting of the opinion.)

90. 376 U.S. at 279.

91. Professor Nimmer viewed *New York Times* as a classic example of definitional balancing. See M. NIMMER, *supra* note 8, at 2-03. But language of “balancing” is conspicuously absent from the opinion, and the Court never even refers explicitly to the state's interest in imposing liability. Rather, the Court takes the legitimacy of libel law for granted, and merely asks what restrictions on liability are required by first amendment values.

conduct unless he proves that the statement was made with 'actual' malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."⁹²

The closing portion of Part II bolsters this test with a discussion of the leading state case⁹³ establishing a similar rule. Finally, Brennan analogizes to *Barr v. Matteo*,⁹⁴ in which the Court granted immunity to federal officials for libels made in the course of their official duties. The reason for the privilege was to avoid inhibiting vigorous action by officials. "Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer."⁹⁵

Part III of the opinion goes on to consider the particular facts of the case. The Court first holds that the record below did not suffice to establish malice with the "convincing clarity which the constitutional standard demands."⁹⁶ Then it goes on to consider another essential element of the tort, and concludes that general criticism of the police department cannot constitutionally be considered defamatory of the Commissioner of Police. Otherwise, any criticism of government could be transmuted into a libel of a government official.⁹⁷ Oddly, this discussion does not refer to the earlier, quite apposite, discussion of seditious libel. On the whole, this section of the opinion is less successful, perhaps because it was the result of prolonged, difficult negotiations between Brennan and several other justices.⁹⁸

We have recounted the opinion at length in order to emphasize several features. First, the holding does not rest on any single basis.⁹⁹ Rather, Brennan relies on at least

92. 376 U.S. at 279-80.

93. *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908).

94. 360 U.S. 564 (1959).

95. 376 U.S. at 282.

96. *Id.* at 285-86. The origin of this evidentiary standard is not explained in the opinion. Justice Brennan later linked it with the "no redeeming value" of obscenity law, contending that deliberate lies lack any social value. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 18-19 (1965).

97. *See* 376 U.S. at 288-92.

98. The Court's deliberations are discussed in detail in B. SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 530-41 (1983).

99. Thus, the opinion fits with the discussion of justification in Part III of this Article.

three arguments for recognizing a privilege: the analogy to seditious libel,¹⁰⁰ the “chilling effect” problem, and the civic duty of engaging in public debate. Second, he locates himself solidly within a first amendment tradition. At almost every stage of the argument he relies on propositions drawn from earlier cases. Even his statement about “robust, uninhibited public debate” is offered as a summary of excerpts from prior opinions. Where he analogizes, the analogies seem plausible; where he quotes, the tone of the quotations seems appropriate for the occasion. Third, his enthusiasm for free speech is evident. He is not simply a judge enforcing a legal provision because such is his duty. Instead, he seems genuinely to value the rude vitality of a free society. Finally, beginning with the first sentence of the opinion, Brennan indicates his awareness that he is not merely deciding the outcome of a particular case, but creating guidance for the future.¹⁰¹

New York Times v. Sullivan evokes Karl Llewellyn’s description of the Grand Manner in American law. According to Llewellyn, in the early nineteenth century, American judges exhibited a vitality, honesty, and creativity that was sadly absent by the end of the century.¹⁰² Llewellyn identifies a number of traits of these early American judges that seem applicable to Brennan in this opinion.

Perhaps the most important of these traits was what Llewellyn called “situation sense”: the ability to take a complex set of facts, identify the key relevant attributes, and understand their societal significance.¹⁰³ Having done so, the

100. Kalven’s famous article reads the opinion as resting primarily on the seditious libel ground. Kalven, *supra* note 81, at 204–10. Actually, Kalven himself admits that this is only one possible reading, and we believe that it puts too much weight on a relatively short portion of the opinion.

101. As Kalven points out,

We get a sense of difference between a legal theory of freedom of speech and a philosophic theory as we trace the career of seditious libel from seventeenth-century England through Fox’s Libel Act through the Sedition Act to the *Times* case. It is one thing to assert that vigorous criticisms of the government must be permitted. It is another to choose among the calibrations of freedom that legal institutions and procedures can provide.

Kalven, *supra* note 81, at 220–21.

102. See K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 39–41, 62–72 (1960). See also G. GILMORE, *THE AGES OF AMERICAN LAW* (1977).

103. Llewellyn, *supra* note 102, at 268–85.

judge could approach the case as an example of a broader situation, giving the peculiar facts of the case some weight but assessing them in regard to the broader implications of the case.¹⁰⁴ The judge could then decide the case, not by deductive logic, but by a less-structured, problem-solving process involving common sense,¹⁰⁵ respect for precedent,¹⁰⁶ and a sense for society's needs.¹⁰⁷ Such a decision would not be limited to the peculiar facts of a given case, but would necessarily give guidance to future cases involving the same life-reason. For some, this might seem an invitation to pure judicial policymaking, but Llewellyn had confidence in the power of craft and tradition to guide the judge's decision.¹⁰⁸

New York Times v. Sullivan fits squarely within the Grand Manner. From the beginning, Brennan made it clear that he was not deciding merely a single case, but confronting a broader problem.¹⁰⁹ He addressed this question within a first amendment tradition created by prior opinions, a tradition in which he obviously felt quite at home. But he did not

104. *See id.* at 122, 447-48. As Llewellyn said, using situation-sense to put the particular facts of the case into context,

is a formula for avoiding both "Hard cases make bad law" and any splintering of "the law" into narrow jackstraw-decisions which offer to neither bar nor tomorrow's court any helpful pattern for guidance. In my judgment this formula is always helpful, in three cases out of five it resolves the chief difficulties almost automatically and in the rest it presses things toward sound solution. The formula is simple to state, and not hard to apply. It is this: As you size up the facts, try to look first for a significant life-problem-situation into which they comfortably fit, and only then let the particular equities begin to register; so that when the particular equities do begin to bite, their bite is already tempered by the quest for and feel for an appropriate rule that flows from and fits into the significant situation-type.

K. LLEWELLYN, *JURISPRUDENCE* 222 (1962).

105. "Reason" in law-work always implies more than reasoning; it implies also the use of Reason in *choosing premises* which have a reason, and it implies in addition the use of Reason in judging the reasonableness of any outcome or any goal. "Reason" is thus the main guide and measure by which "experience" works its way into legal results, whereas "logic," in legal work, tends powerfully to take authoritative premises as given and to reason simply thence.

K. LLEWELLYN, *supra* note 104, at 180.

106. *See id.* at 217. For a more current statement of this point, see Nelson, *supra* note 58, at 1265-67.

107. *See, e.g.*, K. LLEWELLYN, *supra* note 102, at 401-03, 422-23.

108. This is the basic thesis of Llewellyn's *The Common Law Tradition*. *See, e.g.*, *id.* at 18-61, 200-35.

109. *See supra* text accompanying note 80.

leave the tradition quite as he found it. For his opinion itself became not only the foundation for a complete renovation of libel law, but another paradigm of what it means to write a first amendment opinion.

New York Times illustrates the existence of a middle ground between general theory and *ad hoc* eclecticism. Brennan did not rest his malice test on any one constitutional foundation. Probably, he could not have done so and gotten the support of a Court that included Stewart, Clark, Harlan, Black, and Douglas. Instead, he built a web supporting his legal test from many sides. But the case is not truly an example of eclectic balancing. It is much too informed by an overall vision of a free society. Brennan found this vision, not by reading political theorists or utopian authors, but in the body of case law accumulated by his predecessors.

In the course of bringing this vision to bear on a particular case, he also brought order to earlier cases. For example, he drew examples from several cases of judicial concern over chilling speech, and on this basis recognized a general principle that free speech needs breathing room. By the time he finished, he had added several things to the tradition within which he worked: a new appreciation of the generality of the "chilling effect" principle, a rediscovery of the relevance of the seditious libel debate, an eloquent restatement of the value of free speech, and—of course—a new constitutional rule of libel law. More than that, he had contributed a new example of the Grand Manner in first amendment law.

We do not mean, of course, that a "good" first amendment opinion is one that tracks *New York Times* by containing much free speech rhetoric, relying on a broad range of prior cases, and announcing a bold new doctrinal protection for speech.¹¹⁰ Rather, it is Brennan's "situation-sense," his authentic attachment to first amendment values, and his immersion in the first amendment tradition that deserve emulation.¹¹¹ These characteristics cannot dictate the re-

110. Still less do we mean to endorse the opinion and its progeny as the final answer to the problem of reconciling protection of individual reputation with the needs of a free press. See Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 47-77 (1983) (critiquing post-*New York Times* libel law). For some useful proposals for improving current doctrine, see R. SMOLLA, *supra* note 76, at 238-57.

111. It is our impression that Justice Brennan was more successful in combining these elements in his Warren Court opinions than he has been in recent years.

sults of particular cases, but they can bring coherence and authority to what might otherwise be a dismembered jumble of judicial holdings.

But can they bring enough coherence? The problem is most keenly felt by the lawyer who must give advice to a government agency or a dissident group. Does such a lawyer have a sound basis for giving advice? We think the answer is affirmative. The Court's decisions do not form a random patchwork, although they are much less than a uniform design. Rather, one can construct midlevel theories drawing out the patterns governing large areas of decisions.¹¹² One can also form a sense of the Court's values—what first amendment values it takes the most seriously, which kinds of justifications for restricting speech are received sympathetically. Of course, no area of the law offers complete predictability, and the Court's performance can always use improvement, but enough coherence is present to allow lawyers to function effectively. And cases like *New York Times* do

Today, he confronts a case law tradition that has moved in directions he finds unsympathetic, and his "situation sense" seems less reliable in an era whose political tone is so foreign to his own.

112. See Holmes, *Codes, and the Arrangement of the Law*, 44 HARV. L. REV. 725, 725 (1931)(reprinting Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870)):

It is the merit of the common law that it decides the case first and determines the principle afterwards. Looking at the forms of logic it might be inferred that when you have a minor premise and a conclusion, there must be a major, which you are also prepared then and there to assert. But in fact lawyers, like other men, frequently see well enough how they ought to decide on a given state of facts without being very clear as to the *ratio decidendi*. In cases of first impression Lord Mansfield's often-quoted advice to the business man who was suddenly appointed judge, that he should state his conclusions and not give his reasons, as his judgment would probably be right and the reasons certainly wrong, is not without its application to more educated courts. It is only after a series of determinations on the same subject-matter, that it becomes necessary to "reconcile the cases," as it is called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step. These are advantages the want of which cannot be supplied by any faculty of generalization, however brilliant. . . .

For one example of such inductive, mid-level theory-building, see Farber & Nowak, *supra* note 53.

speak of first amendment values in a way that effectively communicates their importance in a free society.

Not all of the Court's decisions, of course, are in the Grand Manner. Too often the Court seems reduced to quibbling over the application of some formula,¹¹³ or applying inappropriately inflated rhetoric to relatively trivial problems. Still, any craft-tradition has its routine productions and hacks, and must face the danger of degenerating into mediocrity. But the first amendment tradition, exemplified by paradigms such as *New York Times*, still has enough vitality to bring coherence to the Court's decisions.

III. PRACTICAL REASON AND FOUNDATIONALISM IN CONSTITUTIONAL ANALYSIS

Our critique of first amendment theorists points inevitably to broader issues. In purporting to answer first amendment questions by deductive reasoning from foundational principles, first amendment theorists are consistent with "the rationalist ethos of our times."¹¹⁴ The pitfalls of this approach are aptly described by Robert Nozick:

Philosophers often seek to deduce their total view from a few basic principles, showing how all follows from their intuitively based axioms. The rest of the philosophy then strikes readers as depending upon these principles. One brick is piled upon another to produce a tall philosophical tower, one brick wide. When the bottom brick crumbles or is removed, all topples, burying those insights that were independent of the starting point.¹¹⁵

As we saw in Part I, the search for the foundational first-

113. See Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985).

114. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1571 (1985). In light of this ethos, Kronman continues:

We are used to thinking of our society (including our legal system) as a great blank tablet on which to inscribe whatever principles of justice and programs of reform we wish. We are confident in our power to discover the norms that ought to govern us through an abstract philosophical reflection untainted by experience or historical fact, and equally confident in our ability to implement whatever norms we choose through the systematic and self-conscious reconstruction of existing institutions from the bottom up.

Id. Ironically, these expectations of certitude may no longer hold in science, seemingly the prototype for foundationalism. See, e.g., Spragens, *Justification, Practical Reason, and Political Theory*, in NOMOS XXVIII: JUSTIFICATION 345-47 (J. Pennock & J. Chapman eds. 1986) [hereinafter NOMOS XXVIII].

115. R. NOZICK, PHILOSOPHICAL EXPLANATIONS 3 (1981).

amendment "brick" has been unavailing so far. If so many thoughtful legal commentators have failed to identify *the* foundational value that can support unified first amendment theory, the prospects for future efforts seem dubious.¹¹⁶ The alternative—the form of judicial reasoning discussed in Part II—requires us to abandon the quest for a foundational brick. But without a foundation, is a viable first amendment possible?

We propose an alternative view of the first amendment's normative status. Rather than thinking of free speech as one level in a hierarchy of values, it may be better to think of it as part of a web of mutually reinforcing values. One value is "self-realization." Professor Redish is correct that this value supports both democracy and free speech. But the converse is also true. Democracy and free speech also provide reasons to embrace self-realization: people who have freedom to develop their own unique lives will make better citizens of a democracy; and such people will produce a livelier, more exciting body of expression. Thus, democracy and free speech are both connected to self-realization, and the lines run in both directions. To complete the triangle, democracy and free speech are also connected directly. Democracy requires at least freedom for core political speech. On the other hand, one reason to support democracy is that democracies are much less likely to engage in widespread censorship than dictatorships.

Democracy, free speech, and self-realization all are supported in other ways by a host of other values. For example, free speech is helpful to scientific research—look at Galileo or at the Lysenko affair in the Soviet Union. One can support self-realization for psychiatric reasons (it makes for saner people), for social reasons (it is the foundation for a deeper, richer community life), or for the classical "liberal" reasons based on individual autonomy. In particular, free speech is itself a value with its own appeal. It can be considered good in and of itself. Other related values acquire additional strength because of their relationship to it.

116. Cf. D. HERZOG, *WITHOUT FOUNDATIONS* 21–22 (1985) (asserting that since all "foundationalist" political theories—those based on rigid deduction from immutable first principles—have failed even though developed by "countless brilliant" thinkers, "the reasonable hypothesis is that they were trying to square a circle").

In short, we don't have a tower of values, with free speech somewhere toward the middle, and more basic values underneath. Instead, we have a web of values, collectively comprising our understanding of how people should live. Foundationalism errs in seeking to reduce the complex relationships among our values to a linear arrangement in which a few values have privileged status as fundamental.

Moreover, "tower building" has another flaw. It distorts the relationship between values and applications. Each of the theories we examined in Part I leads to highly dubious applications, which the theorist presents as logically inescapable inferences from his premise. Even if we are satisfied that, in Nozick's analogy, the "bottom brick" suggested by a commentator is an important insight, we may not be committed to accepting the additional bricks on top of it. "[T]he fact that deduction necessitates its conclusions gives rise to an important objection to the deductive thesis—namely, that deduction cannot [accommodate] the distinction between the applicability of a rule and its warranted application."¹¹⁷ When a concrete application of grand theory cannot be squared with our complex, situationally sensitive web of beliefs, it is the former that is likely to give way.¹¹⁸

117. Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45, 107 (1985); *see id.* at 69–74.

118. As Don Herzog has explained:

Suppose for a moment that someone succeeds, where so many have failed, in discovering the foundations of political theory. He arrives at some remote premises that we all concede are undeniable. Then he triumphantly unfolds the implications contained in the junction of the premises and the true minor premises he adds The outcome he counts on, of course, is agreement, the end of doubt—the best sign that he has developed a stunning justification. But contrast our political commitments to our commitment to his foundations. The political commitments are staunch, even fervent, carefully considered in vivid and concrete contexts; the foundational view is new, tentative, probably fuzzy because the foundations are so abstract. If it turns out they are incompatible, which are we more likely to abandon. . . ?

Our foundationalist may protest vociferously. We cannot just pick and choose our commitments this way. His premises are more than attractive; they are genuinely undeniable Our procedure is whimsical, subjective, arbitrary, the death of reason. The protest, though, fails to come to terms with perfectly sensible features of the way our web of beliefs does evolve. We evaluate abstract views by examining their concrete implications.

D. HERZOG, *supra* note 116, at 222–23. *See also* J. FISHKIN, BEYOND SUBJECTIVE MORALITY 118 (1984) ("the basis for any given [rationalist decisional] procedure

In our view, a strong social institution should not rest on a uniquely determined justification. If it does, it will gain the support of only those segments of society that agree with that justification. It is far stronger to have multiple justifications. For example, Redish asks us to determine the foundation for our belief in democracy. But there are a lot of unrelated reasons to support democracy. First, it spreads power in a more egalitarian way than any alternative. Second, in practice, it has proved less subject to horrible abuses than nondemocratic societies.¹¹⁹ No modern democracy has murdered millions of its own citizens; compare the leading nondemocratic alternatives: Hitler, Stalin, and the Maoist Cultural Revolution. Another possible utilitarian justification is that democracy fits best with market economies, which are more productive than state controlled economies. Furthermore, democracy fosters self-realization, just as Baker and Redish say. Quite a different kind of reason is that democracy is the kind of government we happen to have, and we should support our society's basic institutional practices as a way of affirming our group identity. Different individuals are likely to be attracted to these various justifications, although most of us will find at least several appealing. An institutional practice with this kind of diverse normative support is much more likely to gain widespread social allegiance. Analytical tidiness is less important than social robustness.

The first amendment illustrates the benefits of having diverse normative support for a legal principle. Some people may support it because they are concerned about political censorship, some because they are libertarians, some because they want vitality in the arts, some because it's the American thing to do, maybe even some like Bollinger be-

is not so strong that we must cling to it regardless of *any* of its implications for particular cases").

119. "The pragmatists' justification of toleration, free inquiry, and the quest for undistorted communication can only take the form of a comparison between societies which exemplify these habits and those which do not, leading up to the suggestion that nobody who has experienced both would prefer the latter." Rorty, *Solidarity or Objectivity*, in *POST-ANALYTIC PHILOSOPHY* 11 (J. Rajchman & C. West eds. 1985). We disagree with Rorty's use of the word "only." Rorty's view of pragmatism is itself too unpragmatic, by attempting to specify in advance and in the abstract what considerations a pragmatist may find relevant in making a decision.

cause it's an exercise in tolerance. Free speech is a powerful idea precisely because it appeals to so many diverse values. To demonstrate that commitment to free speech logically entailed adherence to some single value (like "self-realization") would actually weaken it. This is perhaps just another example of the web versus tower idea. Here, the importance of the web is that it provides a basis for broader social consensus. The tower is more vulnerable, not only to logical refutations of the kind Nozick is concerned about, but also to social dissension.

This preference for practical belief over grand deduction seems especially appropriate in legal theory. Lest it lose its vital human component, law must be concerned not only with the applicability of legal rules, but also their appropriateness in particular circumstances. Moreover, legal outcomes cannot survive if they are incompatible with the webs of belief of the community in general and the legal community in particular.¹²⁰ First amendment theory, in particular, cannot live long if it abstracts away important contextual concerns. As Shiffrin has stated, "[s]peech interacts with the rest of our reality in too many complicated ways to allow the hope or the expectation that a single vision or a single theory could explain, or dictate helpful conclusions in, the vast terrain of speech regulation."¹²¹

If constitutional grand theory is so vulnerable, why is it so fashionable? The answer, undoubtedly, lies largely in its promise of a definitive answer to skepticism and relativism. As Anthony Kronman has suggested, the "rationalist" trend in academic legal discourse

has its roots in two related events: the realist attack on Langdell's notion of a doctrinal science of law, and the post-realist effort to rehabilitate the idea of a legal science by devising methods for the rational analysis of legal issues, both factual and normative, that could themselves be made consistent with the iconoclastic premises of legal

120. See S. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 132-38, 170-71, 181-85 (1985). Of course, in particular cases, more than one result may be compatible with community beliefs, but this does not mean that every result to every case is compatible with community norms.

121. Shiffrin, *supra* note 4, at 1283. See, e.g., M. NIMMER, *supra* note 8, at vi ("[first amendment] theory will never be fully matured nor definitively articulated"); Schauer, *Must Speech Be Special?*, 78 Nw. U. L. REV. 1284, 1303-04 (1984) (suggesting that "we might in fact have several first amendments" directed at distinct problems and justified by distinct theories).

realism (methods, it should be emphasized, which had to have their own foundations in disciplines other than the law—economics, for example, or philosophy).¹²²

That is, if the common law method cannot create objectively valid law, then perhaps some other, more rigorous methodology can do so.¹²³ Yet a universally applicable, objective grand legal theory may be simply impossible.¹²⁴ As Don Herzog put it:

Foundationalism and skepticism . . . feed one another. The failure of each new attempt at creating a foundational justification makes skepticism more attractive. And skepticism makes foundationalism seem imperative; it confirms our intuitive view that only a foundational argument could count as a justification. A skeptic, we might say, is nothing but a disappointed foundationalist.¹²⁵

We are seemingly caught in what Richard Bernstein has called the "Cartesian Anxiety," the desire for objective justification counterposed with the instinct that all justifications are relative.¹²⁶

122. Kronman, *supra* note 114, at 1607 (footnotes omitted). See generally G. GILMORE, *supra* note 102, at 99–111.

123. See generally S. BURTON, *supra* note 120, at 169–70. Cf. D. HERZOG, *supra* note 116, at 18 (noting the allure of "the geometric proof, an argument commencing from self-evident axioms and proceeding by rigid deduction to its conclusions").

124. See generally J. FISHKIN, *supra* note 118. Fishkin attempted to demonstrate that "ordinary reasoners" think that, to be "objective," a moral position must satisfy these criteria: (1) it "must have a basis that is rationally unquestionable," *id.* at 52; (2) it "must consist in principles that hold without exception," *id.* at 56; (3) it "must determine answers to any moral problem," *id.* at 61; (4) it "must be justifiable from the perspective of a strictly unbiased observer, that is, one who was completely neutral between alternative possible moral perspectives and initial assumptions," *id.* at 70; (5) it "must be consistent with truly conscientious moral decisions (that is, those motivated only to determine what is morally right)," *id.* at 74; and (6) it "must determine obligations with strict impartiality, that is, it must determine obligations with no special regard for the agent's interests, situation, or relations with others." *Id.* at 81. Fishkin argued that no moral theory can satisfy all of these criteria. See *id.* at 82–129. He does suggest that "minimally objectivist" theories are available if these criteria are softened. See *id.* at 129–57. See also Fishkin, *Liberal Theory and the Problem of Justification*, in NOMOS XXVIII, *supra* note 114, at 207–31. For discussion of Fishkin's analysis, see, e.g., Bayles, *Mid-Level Principles and Justification*, in NOMOS XXVIII, *supra* note 114, at 59–66; Schroeder, *Liberalism and the Objective Point of View*, in NOMOS XXVIII, *supra* note 114, at 100–23 (applying Fishkin's analysis to rebut the Critical Legal Studies critique of liberal legal thought).

125. D. HERZOG, *supra* note 116, at 223; see also S. BURTON, *supra* note 120, at 183–84.

126. See R. BERNSTEIN, *BEYOND OBJECTIVISM AND REALISM: SCIENCE, HERMENEUTICS, AND PRAXIS* 16–20 (1983), discussed in Michelman, *The Supreme Court, 1985*

Even if the rationalist goal is not a theoretical impossibility, the results to date give little reason for optimism. The danger is that future scholarship will continue to cycle between grand theory, devastating critique, and revised grand theory. Ultimately, the failure of grand theory may simply collapse legal scholarship into absolute skepticism about judicial outcomes, that judge-made law consists merely of judicial personal preferences.

Is there a way out of this downward spiral? Not unless we forego objective, deductivist justifications for first amendment outcomes. In place of such searches for *the* right answer, we propose eclectic¹²⁷—but by no means unfamiliar—methodologies to construct the best answer available. A supportable answer may sometimes descend from deductive analysis alone. More often such an answer will ascend from a combination of arguments, none of which standing alone would constitute a sufficient justification. Such “supporting arguments” are “rather like the legs of a chair and unlike the links of a chain.”¹²⁸

An impressive array of recent legal commentary has suggested a movement away from grand theory toward something new,¹²⁹ variously called “intuition-

Term—Foreword: Traces of Self-Government, 100 HARV. L. REV. 4, 24–25 (1986). Bernstein, of course, considers this anxiety to be misplaced. See Bernstein, *John Dewey on Democracy*, in R. BERNSTEIN, *PHILOSOPHICAL PROFILES: ESSAYS IN A PRAGMATIC MODE* 260–72 (1986), for an approving analysis of John Dewey’s objections to “the tendency of philosophers to reify and hypostatize changing, fluid, functional distinctions into metaphysical and epistemological dichotomies” *Id.* at 263.

127. See Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103 (1983).

128. R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 156 (1982). Summers attributes the “chair analogy” to John Wisdom.

129. See S. BURTON, *supra* note 120; G. CALABRESI, *IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM* xv (1985); Alexander, *Interpreting Legal Constructivism* (Book Review), 71 CORNELL L. REV. 249 (1985); Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985); Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987); Frickey, *supra* note 58; Gordley, *Legal Reasoning: An Introduction*, 72 CALIF. L. REV. 138 (1984); Gutmann, *The Rule of Rights or the Right to Rule?*, in NOMOS XXVIII, *supra* note 114, at 165–77; Kronman, *supra* note 114; Lyons, *Justification and Judicial Responsibility*, 72 CALIF. L. REV. 178 (1984); Michelman, *supra* note 126; Michelman, *Justification (and Justifiability) of Law in a Contradictory World*, in NOMOS XXVIII, *supra* note 114, at 71–99; Regan, *Community and Justice in Constitutional Theory*, 1985 WIS. L. REV. 1073; Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Shiffrin, *supra* note 4; Shiffrin, *supra* note 127; Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986);

ism,"¹³⁰ "prudence,"¹³¹ and "practical reason."¹³² Several of these commentaries are connected to the emerging interest in republicanism,¹³³ others to reappraisals of important personages in American academic legal analysis,¹³⁴ and still others to more general inquiries about legal reasoning.¹³⁵ Although they differ greatly among themselves, all share some fundamental characteristics. Among them are a concern for history and context; a desire to avoid abstracting away the human component in judicial decisionmaking; an appreciation of the complexity of life; some faith in dialogue and deliberation; a tolerance for ambiguity, accommodation, and tentativeness, but a skepticism of rigid dichotomies; and an overall humility.¹³⁶ Moreover, all are linked to a familiar Anglo-American legal method of the kind we saw in Part II. As Frank Michelman has put it:

Situational practical judgment seems always to involve a combination of something general with something specific, endorsement of both a general standard and a specific application, or of both a general value and a specific means to its effectuation. Judgment mediates between the general standard and the particular case. In order to

Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); Sunstein, *Legal Interferences with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986); Teachout, *The Soul of the Fugue: An Essay on Reading Fuller*, 70 MINN. L. REV. 1073 (1986); Wellman, *supra* note 117; West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673 (1985). Some of these themes are critically analyzed in Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502 (1985).

For related work in the broader stream of philosophy, in addition to the works cited in previous notes, see, for example, N. DAHL, PRACTICAL REASON, ARISTOTLE, AND WEAKNESS OF THE WILL (1984); HERMENEUTICS AND PRAXIS (R. Hollinger ed. 1985); A. MACINTYRE, *supra* note 72; 3 H. PUTNAM, REALISM AND REASON—PHILOSOPHICAL PAPERS 199–204, 387–403 (1983); R. RORTY, CONSEQUENCES OF PRAGMATISM (1982); M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); M. WALZER, SPHERES OF JUSTICE (1983). In addition, see the symposium on justification in NOMOS XXVIII, *supra* note 114.

130. See Alexander, *supra* note 129; Shiffrin, *supra* note 4; Shiffrin, *supra* note 127.

131. See Kronman, *supra* note 114.

132. See Michelman, *supra* note 126; Wellman, *supra* note 117.

133. See Michelman, *supra* note 126; Sherry, *supra* note 129; Sunstein, *Interest Groups*, *supra* note 129; Sunstein, *Legal Interferences*, *supra* note 129.

134. See Kronman, *supra* note 114 (analyzing the work of Alexander Bickel); Teachout, *supra* note 129 (analyzing the work of Lon Fuller).

135. See S. BURTON, *supra* note 120; Gordley, *supra* note 129; Shiffrin, *supra* note 127; Wellman, *supra* note 117.

136. On humility, G. GILMORE, *supra* note 102, at 109–11, is particularly instructive.

apply the standard in the particular context before us, we must interpret the standard. Every interpretation is a reconstruction of our sense of the standard's meaning and rightness. This process, in which the meaning of the rule emerges, develops, and changes in the course of applying it to cases is one that every common law practitioner will immediately recognize.¹³⁷

The search, then, is for contextual justification for the best legal answer among the potential alternatives.¹³⁸

Practical reason may lack the superficial appeal of foundationalism. But contextual justification has some significant advantages. It requires us to deliberate carefully about contrary possibilities, rather than simply ignoring those that are not logically cemented to some foundational value we like. We learn something even from contextual justifications that ultimately fail to persuade. Foundational justifications, in contrast, remain oddly insulated from deliberative evaluation at the place where they matter most, their application to concrete situations.¹³⁹ Moreover, practical reason can accommodate shifting understandings of empirical reality; foundational theories premised on certain empirical assumptions cannot.¹⁴⁰ If legal justification is allowed to be comparative rather than absolute, the answer seems obvious: contextual justifications are superior to foundational ones.

Unlike foundational approaches, which are channeled along the narrow confines of logic, practical reasoning is unruly. It specifies no certain starting point, follows no predestined path, may frolic as well as detour, and cannot rise above the abilities of its users. Indeed, the indeterminacy of practical reasoning might suggest that it cannot achieve the status of a theory at all. Like "prudence" and "wisdom" in everyday affairs, legal practical reasoning is ex-

137. Michelman, *supra* note 126, at 28–29 (footnote omitted); see also S. BURTON, *supra* note 120, *passim*; Kronman, *supra* note 114, at 1605–06.

138. See Stick, *supra* note 129, at 349–51. Consider the view of Lon Fuller: "[T]he problem of the relation of law and society is not the sort of issue which can be 'solved' by some 'theory' and then passed over. It is, to use Radin's suggestive phrase, one of the 'permanent problems of the law.'" Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 453 (1934), *quoted in* Teachout, *supra* note 129, at 1091 n.67.

139. See D. HERZOG, *supra* note 116, at 243; Alexander, *supra* note 129, at 258; Teachout, *supra* note 129, at 1096–1100.

140. See generally Farber & Frickey, *supra* note 129.

plained better by example than by abstract methodological prescriptions, as we saw in Part II. The absence of a formula for practical reasoning is inherent in the enterprise and should not count against its validity.¹⁴¹

Other challenges to practical reasoning are potentially more troubling. Anthony Kronman has identified four potential objections: it can serve as a mere *apologia* for the status quo; it is antimodern, running against the grain of the increasing technocratization of modern life; it fails to take legal rights sufficiently seriously; and it is an oxymoron, for "philosophy" requires reasoning from first truths.¹⁴² We have already touched on this last objection; to the extent that it is anything more than a definitional dispute, we agree with Kronman that certain activities in life may best be accomplished "non-philosophically," if philosophy means deductivism.¹⁴³ As to the objection from modernity, we also agree with Kronman that the problems of government cannot

eventually be reduced to problems of scientific administration requiring only technological expertise. . . . [Any institution] will always require, at the point of its application to human affairs, a tolerance for compromise and the ability to work, by means of a practical wisdom irreducible to rules, toward greater coherence and overall good

141. In discussing contextual justification in political theory, Don Herzog has said:

How is this a theory of justification at all? It tells us only to unite our moral and political views with social and political facts in a coherent theoretical structure. It doesn't begin to tell us how to do that; it leaves so very much wholly indeterminate. In discussing Hume and Smith, I have offered some examples and examined their particular structure. But my basic response is, quite so! Providing more of a general theory would be like trying to provide a recipe or algorithm for creativity. Political theory is like other fields: we must be opportunistic and grab progress where we can find it. It is reasonable to ask what a justification might look like. It is unreasonable to ask for detailed instructions on how to generate one. Is a foundationalist theory of justification any less a theory if it doesn't tell us where to find the first premises?

D. HERZOG, *supra* note 116, at 243; *see also* Michelman, *supra* note 126, at 73-74.

142. *See* Kronman, *supra* note 114, at 1608-16.

143. *Cf.* R. BERNSTEIN, *supra* note 126, at 6 (attributing to Richard Rorty the view that, "if we really want to overcome the scandal caused by 'philosophy's lack of a systematic methodology,' then what is needed is a form of philosophic therapy that will rid us of the illusion and the self-deception that philosophy is or can be the foundational discipline of culture").

sense.¹⁴⁴

Our responses to the other objections identified by Kronman are somewhat more extensive but by no means conclusive. Practical judicial reasoning need not prop up an ossified status quo. (Of course, reactionary judges may use practical reason for this purpose, but they will presumably make the same use of foundationalism.) To be sure, practical reasoning takes history, context, and complexity seriously—and thus must take the status quo seriously. It does not require radical change simply for the sake of logical consistency. For us, at least, these do not count as criticisms.

The objection that practical judicial reasoning improperly brakes social change seems premised on either of two debatable notions: that fundamental (and valuable) social change either would occur more readily without the inhibiting effect of judicial review or could be more readily served by alternative judicial methodologies. As to the first notion, it is surely true that in some instances judicial review has inhibited social change—the invalidation of New Deal legislation is a hackneyed example. Yet it can hardly be doubted, we think, that judicial review has sometimes promoted social reform¹⁴⁵—here the most commonly invoked illustration is *Brown v. Board of Education*¹⁴⁶ and its aftermath.¹⁴⁷ As to the second notion, in some significant ways practical reason is less hidebound than foundationalism, which can less easily accommodate change because of its rigid logical connection to its foundational values. If those foundational values become ossified, foundationalism itself becomes a systematic *apologia* for the status quo.¹⁴⁸ Moreover, whereas the foundationalist jurist has an all-or-nothing choice in considering whether law requires fundamental social change, the prudentialist jurist can tolerate experimentation, tentative-

144. Kronman, *supra* note 114, at 1611. Moreover, foundationalism based on supposed scientific expertise “exacerbates the dehumanizing effects of technocracy,” Alexander, *supra* note 129, at 259, and may lead members of the legal community to evade moral responsibilities “in the name of some unjustified technical mumbo-jumbo,” Cornell, *supra* note 129, at 351 n.330.

145. See Shiffrin, *supra* note 4, at 1211–12.

146. 347 U.S. 483 (1954).

147. Indeed, the implementation of *Brown*’s nondiscrimination principle came about in large part through the practical reasoning of lower court judges. For one discussion, see Frickey, *supra* note 58.

148. See G. GILMORE, *supra* note 102, at 108–09.

ness, and implementation strategies designed to promote ultimate social acceptance of change.¹⁴⁹ Law reform is thus likely to be ultimately both more successful and less authoritarian.¹⁵⁰

In the end, it is true that “[t]he premise of prudentialism is that gradual reform within the framework of existing institutions is almost always preferable to more dramatic and discontinuous modes of change that seek to replace one entire framework with another.”¹⁵¹ Kronman suggests that developed institutions have some presumptive time-tested value and consist of human components that, through aspiration and deliberation, allow self-reflection and revision. Indeed, judicial practical reasoning may best promote social change by devising techniques for inducing broader elements of society to deliberate pointedly about fundamental social problems.¹⁵² Even those who reject these premises out of hand must come to grips with the apparent absence of a palatable alternative—revolutionary change carries with it obvious dangers of extraordinary magnitude.

The other potential objection to practical reason identi-

149. One obvious source of support for these ideas is A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1962).

150. See generally Frickey, *supra* note 58, at 310–11. To be sure, social change might occur more rapidly if a radically different foundational theory were judicially imposed upon society, or if the judiciary abandoned justificative theory altogether and instead simply somehow began running society in fundamentally different ways. Neither is about to happen, however, for which we at least are quite thankful. One need not be as much of an advocate of judicial restraint as Learned Hand to agree with him that no court *can* save “a society so riven that the spirit of moderation is gone.” Hand, *The Contribution of an Independent Judiciary to Civilization*, in L. HAND, *THE SPIRIT OF LIBERTY* 155, 164 (3d ed. 1960). Judicial activism is simply not the panacea for all that ails society—even if we can identify those ailments in a satisfactory way. Nor could judges be successful if they attempted fundamental social change in a rapid, nonprudential fashion, whether they posited foundationalist justifications or simply relied upon fiat. If social revolution is what you want, you are approaching the wrong institution—indeed, you are fundamentally in error in approaching any institution.

151. Kronman, *supra* note 114, at 1609. See Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 188 (1980).

152. One might note that at least several recent proponents of judicial practical reasoning cannot plausibly be considered defenders of the status quo, unless that category includes all but those favoring immediate overthrow of our institutions. See, e.g., Cornell, *supra* note 129; Michelman, *supra* note 126; West, *supra* note 129. Instead of a call to revolutionary arms, each of these commentators has indicated a preference both for social change and for the use of practical reason to move us past absolute cynicism about legal reasoning and toward meaningful deliberation and, perhaps, even some level of reconciliation.

fied by Kronman—that it is perhaps antithetical to the nature of legal rights—would require many pages to rebut, in light of the complicated permutations of the various approaches and critiques of the “rights thesis.”¹⁵³ At least one attraction of foundationalism is that it promises to define rights rigorously and in advance of any concrete controversy, thereby providing a set of “trumps” that will win over countervailing interests regardless of context. Kronman makes a number of telling responses: that rights ought not be viewed as absolutes;¹⁵⁴ that even if they were, they could conflict with one another in ways irresolvable except by practical reason; that even when a right absolutely applies full and immediate enforcement may be imprudent (for example, if that would harm rather than help the beneficiaries of the right); and that absolutist approaches to rights can devalue other important human interests.¹⁵⁵ An atomistic approach to individual rights can threaten valuable interpersonal and communitarian aspects of the human condition. “Rights” that grow out of deliberation—at a minimum, judicial dialogue and prudence, but preferably broader cross-institutional¹⁵⁶ or even societal deliberation—may protect individuals far more effectively than those imposed by a judicially monopolized rights theory, for they may better reflect true human conditions and better mediate the tensions between individual and community. Deliberatively based rights, it is no small point to add, can possess a level of practical legitimacy that foundational ones must frequently lack.

The ultimate challenge to practical reasoning in this context is, perhaps, one of confession and avoidance: one can concede that practical reason is the most appropriate method for making important decisions and yet deny its legitimacy in the exercise of judicial review. Commentators as

153. For example, see generally, Murphy, *Rationality and Constraints on Democratic Rule*, in NOMOS XXVIII, *supra* note 114, at 141–64.

154. For further discussion of this point, see Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 535–37 (1979).

155. See Kronman, *supra* note 114, at 1612–14.

156. See Farber & Frickey, *supra* note 129, at 914–24 (discussing three models of due process of lawmaking that might result in better public law by encouraging important decisions to be made by comparatively appropriate institutions through deliberative procedures).

diverse as Mark Tushnet¹⁵⁷ and Henry Monaghan¹⁵⁸ have suggested, in essence, that judicial review is illegitimate if it stands only on the shifting sands of prudence.

Judicial practical reason simply cannot satisfy the objectivist aspirations of foundationalism. If the "counter-majoritarian difficulty"¹⁵⁹ of judicial review displacing the decisions of more democratic branches of government cannot be overcome except by foundationalist methodology, then the game is over, and presumably *Marbury v. Madison* must be overruled. This is, we take it, the essential point of Tushnet's probing scholarship, which posits an unresolvable dilemma between the "tyranny of the majority" over the minority, a fear traditionally invoked to support judicial review, and the "tyranny of the judiciary," which arises because of the impossibility of objectifying the judiciary's choice of judicial outcomes.¹⁶⁰

We would not ask of judges what cannot be done.¹⁶¹ But if total objectivity is not humanly attainable, something less may still suffice.¹⁶² At the least, a methodology of practical reason does not render exercises of judicial review completely subjective and hence beyond evaluation.

Judicial practical reason is subject to several kinds of inquiries. First, although the answers judges announce cannot be absolutely objective, we can fairly expect the judges to reach them by nonarbitrary methods. The difference, as expressed by Frankfurter, is between "start[ing] with an answer or with a problem."¹⁶³ "The absence of arbitrary power and the existence of absolute judgments are not analytically two sides of the same coin,"¹⁶⁴ and the former may be satisfied when judges do their best to take "the objective

157. See, e.g., Tushnet, *supra* note 129; Tushnet, *supra* note 65.

158. See Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 391-95 (1981).

159. See A. BICKEL, *supra* note 149, at 16-23.

160. See Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1061 (1980).

161. See G. GILMORE, *supra* note 102, at 108 ("The vice of the formalistic approach to law . . . is that it leads to a disastrous overstatement of the necessary limits of law.").

162. See Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445 (1984); Gordley, *supra* note 129, at 147-63.

163. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947).

164. Schroeder, *supra* note 124, at 170. See also *infra* note 170.

point of view.”¹⁶⁵ Second, all manner of prudential critiques can probe the adequacy of exercises of judicial practical reason. Indeed, just such criticisms are the staple diet of law reviews. Third, practical reason is more “bounded” in the context of judicial review than it is when ordinary people make everyday decisions, or even when judges decide common law cases. Judges exercising judicial review must pay attention to the language of our written Constitution,¹⁶⁶ our traditions of constitutional exegesis, the competing policymaking powers of the legislatures and executive branches of our federal and state governments, the expectations of the society in general and the legal community in particular, prudential problems of implementation of rights and remedies, competing notions of American individualism and community, and a host of other matters.¹⁶⁷

In practice, these factors may constrain decisions far more effectively than any foundationalist theory.¹⁶⁸ Practical

165. Schroeder, *supra* note 124, at 114.

166. See, e.g., Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797 (1982).

167. For a discussion of how some of these guide judicial decisionmaking, see Bennett, *supra* note 162, at 474–95.

168. Justice Harlan eloquently expressed this view in his concurrence in *Griswold*:

While I could not more heartily agree that judicial “self restraint” is an indispensable ingredient of sound constitutional adjudication, I do submit that the formula suggested for achieving it is more hollow than real. “Specific” provisions of the Constitution, no less than “due process,” lend themselves as readily to “personal” interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed “tune with the times.” Need one go further than to recall last Term’s reapportionment cases, [citations omitted] where a majority of the Court “interpreted” “by the People” (Art. I, § 2) and “equal protection” (Amdt. 14) to command “one person, one vote,” an interpretation that was made in the face of irrefutable and still unanswered history to the contrary?

Judicial self-restraint will not, I suggest, be brought about in the “due process” area by the historically unfounded incorporation formula long advanced by my Brother Black, and now in part espoused by my Brother Stewart. It will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms. Adherence to these principles will not, of course, obviate all constitutional differences of opinion among judges, nor should it. Their continued recognition will, however, go farther toward keeping most judges from roaming

reason's freedom from the necessity of foundationalist justifications makes many cases easy to decide. We have no doubt that constitutional commentators of widely different stripes could all agree with us on certain constitutional principles—for example, that Congress may not constitutionally bar a candidate for federal office from speaking. Simply put, “[b]ecause many principles can be justified by most plausible theories, one can be more sure of their correctness than one can of theories.”¹⁶⁹ We are also confident that where foundationalist principles conflict—for example, the extent to which, if any, commercial speech should receive constitutional protection—we could nonetheless obtain unanimous agreement in how to resolve many situations—for example, that fraudulent commercial misrepresentations are unprotected.¹⁷⁰ Even in close cases, moreover, some objective standards of evaluation are available.¹⁷¹ In our view, then, “the tyranny of the judiciary” is neither inherent in all exercises of judicial review nor beyond evaluation in individual

at large in the constitutional field than will the interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause. [Citations omitted.]

Griswold v. Connecticut, 381 U.S. 479, 501–02 (1965).

169. Bayles, *supra* note 124, at 65.

170. See Stick, *supra* note 129, at 354–58. Consider Bayles, *supra* note 124:

If a particular judgment or rule can be shown to follow from mutually accepted principles, then it is practically justified, even if the disputants disagree about the norms that support or justify the principles. If people agree about principles and what flows from them, their differences about strategies of choice or norms make no practical difference. The difference is only logical, not practical. Consequently, to the extent there is agreement on principles, liberalism can survive an ultimate pluralism of strategies of choice and fundamental norms

One must distinguish between the core applications of principles or rules and the hard cases [A] steady diet of hard cases often creates moral myopia; theorists cannot see the distant forest of easy cases, only the nearby trees of hard cases.

Id. at 61–62; see also Schauer, *supra* note 65.

171. As Bayles put it:

One must distinguish between objectivity and certainty. . . . Objectivity obtains when intersubjective standards exist for evaluating claims. These standards need not be sufficient to ensure that one of several competing claims can be shown to be more correct than the others. A standard might eliminate two of five competing claims but be unable to distinguish between the others So long as some such standards exist, the choice between theories is not purely arbitrary or subjective.

Bayles, *supra* note 124, at 64.

cases.¹⁷² The reasoned exercise of limited judicial discretion

172. The more telling objection to prudentialist judicial review, we think, allows a limited place both for *Marbury* and for practical reason. Under this view, practical reason is insufficiently bounded in the constitutional context unless it hews carefully to constitutional language and history. Efforts to update or to improve the Constitution prudentially must be rejected, distinguished commentators argue, and we must live with the Constitution the framers gave us. See, e.g., Monaghan, *supra* note 158; Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209 (1983). In short, this Constitution provides no general warrant for a prudentialist judicial attack upon the liberal problem of justice in modern society.

This argument is perhaps a form of "soft" foundationalism, in which a finite set of values are supposed to be identifiable and discernibly bounded by constitutional language, structure, and history. What perhaps separates it from the overarching vices of foundationalism is twofold: it attempts to suggest how to find foundational values in a nonsubjective way, and it acknowledges the critical difference between an objective point of view and objective answers. Under this view, difficult cases fairly calling into question foundational constitutional values are concededly the legitimate fodder for judicial review. Deciding the case requires judicial practical reason from an objective point of view, and the decision can rarely be considered clearly incorrect (unless, for example, the Court makes an error of logic in reasoning from foundational values to concrete outcome).

Thus, illustratively, for the "soft foundationalist" *New York Times v. Sullivan* is probably within the ambit of judicial review—the language and history of the first amendment provide some undefined protection for the freedom of speech and of the press in the context of criticizing government officials, and perhaps the fourteenth amendment is broad enough to apply some of this protection to state rather than Congressional interference. In essence, the language and history of the Constitution thrust the issue in that case before the Court, and the Court had to resolve it, one way or another, by good lawyering. In contrast, *Roe v. Wade* is not within that kind of narrow constitutional ambit. A legislator might, through the use of relatively unbounded practical reason, vote to repeal a statute criminalizing abortion, but constitutionally bounded practical reason does not justify judicial invalidation of such a statute. Similarly, under this view Baker's attempt to posit first amendment theory upon the value of individual liberty, see *supra* text accompanying notes 17–29, is probably out of constitutional bounds as well, for it cannot easily be tied to constitutional language and history. See generally Schauer, *supra* note 121.

This argument is, of course, familiar but powerful stuff. It does not lose its force by pointing out the difficulty of either attributing intent to the framers or construing vague or broad constitutional language, for commentators of this ilk acknowledge that judges must sometimes engage in controversial interpretive activity. What these commentators demand is a tethered Constitution, one that stops short of an open-ended warrant for judicial activism not fairly connected to the document. Otherwise, the counter-majoritarian nature of judicial review becomes, instead of a mere "difficulty," a clear usurpation of the legislative function.

An essay on first amendment theory is not the place even to attempt a thorough analysis of this argument. With that said, we must confess general agreement with the idea that, at least ordinarily, judicial review must account for a variety of factors, including constitutional language, structure, and history. We have, for example, expressed doubts about the appropriateness of any theory that would allow judicial invalidation of legislation simply because it transgresses judicially articulated "public values." On the other hand, we have endorsed rather

may not satisfy the purist, but it can hardly be considered a form of tyranny.

The entire judicial legitimacy debate is, we suspect, misguided. The underlying concerns about the tension between judicial review and majoritarianism are well-founded. The problem is the attempt to resolve these concerns through some general theory of judicial review. For all of the reasons we have already discussed in this section, we seriously doubt whether such a theory is possible. Instead of attempting to identify logical constraints on judges that will legitimate review by making law objective, we must seek to internalize the tension. Judges must constantly be aware of this tension and must seek its resolution, not in some grand theory, but in the decision of each case. A judge should always have in mind the question, "Why shouldn't the legislature decide this issue?" The mistake of the legitimacy debate does not lie in its emphasis on this question. The mistake lies instead in its assumption that the question can be asked and answered once and for all. Instead, it must be asked and answered every day, as part of the process of applying practical reason to each new case.¹⁷³

aggressive judicial strategies to encourage legislatures to adopt public law through deliberation rather than simply reflecting the equilibrium of private political pressure. See Farber & Frickey, *supra* note 129, at 908–24. The argument for judicial activism needs only persuasive support in practical reason, not foundational objectivism, but any practical reason justifying it seemingly must account for constitutional language, structure, history, and respect for legislatures.

173. As our colleague Gerald Torres has suggested to us, both legitimacy and practical reason are bounded by the evolutive social agreements that constitute our institutions and society. "Incoherence" is, in this light, a signal of social vitality, not theoretical failure.