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Re-Ordering the First Amendment

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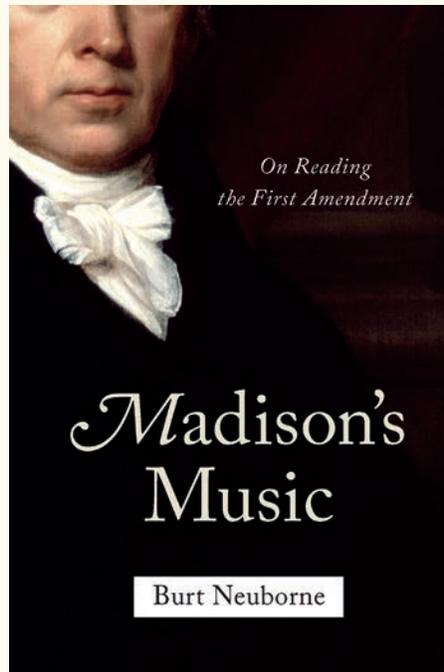
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In *Madison's Music: On Reading the First Amendment*, Burt Neuborne, the Inez Millholland Professor of Civil Liberties and the founding legal director of the Brennan Center for Justice at NYU Law School, has set out a vision of the First Amendment that is democratic, inclusive, and aspirational. The First Amendment, he argues, should be understood as a “chronologically organized blueprint of democracy in action” (page 18). After making a case for this reading, Neuborne’s engaging book sets out an array of ways that the Supreme Court’s First Amendment jurisprudence would be different if the justices recognized these democratic underpinnings.

HOW TO INTERPRET THE FIRST AMENDMENT

Neuborne begins his book by explaining why “[r]eading the First Amendment isn’t easy” (page 5). He notes, quite correctly, that the current interpretive approaches to the Constitution – whether focused on text, history, or purpose – are ultimately unsatisfying. The words of the First Amendment, for example, are either inaccurate (Congress can, in fact, make laws that abridge free speech) or meaningless without additional information (what is “establishment of religion?”). Text alone will not yield answers to the meaning of the First Amendment. History does not provide much additional information. As Neuborne notes, and many lawyers and judges either forget or did not realize, the current muscular First Amendment is entirely a creature of the second half of the 20th century. “The nineteenth and early twentieth centuries were free speech disasters,” with frequent government censorship of newspapers and other punitive measures meted out for critical speech (page 6).

But one cannot look to the purpose of the amendment for guidance without having to determine “whose purpose counts” (page 7). Neuborne explores the several often-recited purposes for



Re-ordering the First Amendment

BY MELISSA HART

the First Amendment: protecting the “free market of ideas” through an anti-regulatory approach, enhancing human dignity by protecting self-expression, keeping government out of the manipulation of communication. All of these purposes have been recognized in various decisions of the Supreme Court, and each has been ascendant at different times and in different contexts. Moreover, each can be deployed to different ideological ends. For example, Neuborne observes, the Supreme Court under Chief Justice John Roberts has included five more conservative justices who take a strong deregulatory approach to the First Amendment and four more liberal justices whose First Amendment interests focus on self-expression, tolerance, and self-governance. Neuborne argues that neither of these perspectives

MADISON'S MUSIC
BY BURT NEUBORNE
THE NEW PRESS (2014)

is complete or sufficient for answering many of the important First Amendment questions, and that the amendment should instead be understood as serving the purpose of supporting and protecting democratic governance. Neuborne wisely does not argue that he is actually demonstrating that James Madison was thinking about democracy when he crafted the First Amendment or the rest of the Bill of Rights. Instead, he says, whatever the purposes of those writing these original amendments might have been “[i]t is enough that what finally came out of Madison’s quill pen in the summer of 1789 was a precisely organized textual blueprint for a robust democracy” (page 11). The remainder of the book defends Neuborne’s reading of the Bill of Rights – and especially the First Amendment – as best interpreted as democracy-oriented and explains what that reading would mean for constitutional jurisprudence.

One of the most interesting points in *Madison's Music* comes before Neuborne turns to the First Amendment core of his argument. The first ten amendments, he argues, are not randomly ordered. Instead, there is a logic – a music – to their order that should inform how they are interpreted. Beginning with the First Amendment, which he describes as a “narrative of democracy,” Neuborne says the Amendment is structured on a “disciplined inside-to-outside axis, beginning in the two religion clauses with freedom of thought, progressing through three ascending levels of individual interaction with the community – free expression of an idea by an individual, mass dissemination of the idea by a free press, and collective action in support of the idea by the people – and culminating in the petition clause with the introduction of the idea into the formal process of democratic lawmaking” (pages 17-18). His description of the First Amendment’s inside-out order is a compelling and original one, and he returns to this idea throughout the book. ▶

Neuborne goes on to argue that the Second and Third Amendments were logical follow-ups to the First's democratic core because the Framers were most worried about overthrow of their young democracy "by force of arms" (page 23). The next five amendments – four through eight – "turn logically to the next most feared source of armed subversion of democracy – abuse of the civilian law enforcement power" (page 25). Here, Neuborne notes, the amendments are structured in an order that chronologically follows the phases of law enforcement, from investigation (Fourth Amendment), through arrest (Fourth), accusation and interrogation (Fifth), adjudication (Sixth and Seventh), and punishment (Eighth).

Finally, Neuborne argues, the Ninth and Tenth Amendments are properly understood as a necessary message to future generations about how to read the Bill of Rights and its balance of individual rights and government powers. The Ninth Amendment is an effort to ensure that the enumeration of some rights in the Bill of Rights should not be read to exclude other rights, and therefore should be read expansively. By contrast, the Tenth Amendment, which seeks to limit overreaching government power, "instructs future generations to read the power-granting text narrowly and to refrain from implying new powers through analogy and structural need" (page 29). Neuborne's explanation of the Ninth Amendment is important to his argument about the proper reading of the First Amendment, as he ultimately argues that courts should recognize a right to vote, a right to run for office, and a right to fair representation as rights implied in the First Amendment. While they are not explicitly included in the text of the amendment, Neuborne argues that the structure of the amendment and the rights that are explicitly protected are best read to suggest these implied rights of democratic participation. It is the Ninth Amendment, he argues, through which James Madison and the other authors of the Bill of Rights gave courts the enduring power to recognize rights that are not explicitly listed in the first ten amendments if those implicit rights – like the now well-established implied right of association – are necessarily intertwined with those granted.

The Court's decisions on a host of election and campaign-related questions, [Neuborne] contends, would have reached fundamentally different answers under a democracy-focused reading of the First Amendment.

THE FIRST AMENDMENT AND OUR DEMOCRATIC PROCESS

Having elaborated on the structure of the First Amendment and its neighbors, and the importance of that structure for interpreting these provisions, Neuborne turns to the Supreme Court's current jurisprudence. The Court's decisions on a host of election and campaign-related questions, he contends, would have reached fundamentally different answers under a democracy-focused reading of the First Amendment. The Supreme Court, Neuborne argues, has tolerated anti-democratic practices and surrendered politics to the wealthy, and it has done so through readings of the Constitution that were neither inevitable nor attractive. The root of the problem was the decision, which Neuborne refers to as "Justice Brennan's Strategic Blunder," to locate the right to vote in a "one person, one vote" equality principle, rooted in the Equal Protection Clause (page 40). Grounding the right to vote – an implied right, since there is no right to vote explicit in the Constitution – in the Fourteenth Amendment instead of the First may protect against intentional efforts to deny the vote to particular groups of people, but it does not do a very good job of protecting against more subtle forms of vote suppression or over-regulation. The "one-person, one-vote" ideal, moreover, has led to regular redrawing of district lines as populations change, which in turn has facilitated partisan gerrymandering and fewer contested legisla-

tive elections. If the right to vote were grounded in a First Amendment that was understood as embodying a democracy-reinforcing principle, Neuborne argues, laws that make voting more difficult or less meaningful would be invalidated. A democracy-focused view of the First Amendment also would not have led to the conclusion that the right of association permits the major political parties to hold closed primaries or to impose rules that make it harder for nonparty members to participate in voting. And it would have led to entirely different outcomes on all of the Supreme Court's campaign finance rulings, which Neuborne assails as irrational and deeply harmful to democracy.

Neuborne's critique of the current state of Supreme Court jurisprudence on redistricting, protecting the right to vote, and campaign finance is articulate and persuasive. His argument that understanding the First Amendment as a "democracy-friendly" provision would lead to a complete revision of this jurisprudence is a heavier lift. For example, Neuborne suggests that a democracy-focused interpretation of the First Amendment would treat campaign spending as "communicative conduct" rather than as "pure speech," thereby permitting greater regulation of campaign spending (page 80). While the Court's decision to treat money as equivalent to speech is justly criticized, it is not immediately apparent why a democracy-focused approach would convert spending to "communicative conduct." Perhaps, instead, a focus on functioning democracy would recognize the state's interest in avoiding undue influence and the potential for corruption as a strong enough interest to permit more robust regulation of money in politics. As to gerrymandering and the power of the major political parties, it may well be that a focus on functioning democracy would cast greater suspicion on these aspects of our political system, but it is not clear what standards could be imposed on those establishing voting boundaries or other election rules. Neuborne suggests that, at a minimum, a democracy focus would prohibit line drawing that eliminates contested elections, permit greater ballot access for minor political parties, and limit the control that the major parties hold over the primary process.

Neuborne's concluding thoughts on how to improve the American democratic process demonstrate that much of what could be done is not a matter of constitutional interpretation, but of political will. If we wanted to expand participation in our elections and eliminate the undue influence of money in politics, he suggests, we should publicly fund elections and do everything possible to eliminate voting barriers, perhaps even considering the approach taken in Australia, where voting is a legal obligation and voting day is a holiday. Neuborne ends his exploration of how to improve our democratic process with

"this very troublesome question: is the real reason we tolerate so many unnecessary hurdles to voting that, deep down, we don't want the poor to vote? Have we found the ideal hypocritical way to limit the franchise – formally guaranteeing everyone the right to vote, but under such a lukewarm, indeed hostile, standard of legal protection that we tolerate, indeed invite, regulatory hurdles that predictably disenfranchise the poor in large numbers, allowing us to blame them, not us, for the continued exclusion of the poor from American political life?" (page 96)

It is a powerful question to end on, and one that highlights the moral underpinnings of Neuborne's critique of both the Supreme Court's jurisprudence and the regulations that define voting in the United States today.

WHO DOES THE FIRST AMENDMENT PROTECT?

In the second part of *Madison's Music*, Neuborne makes a number of very interesting observations about how we currently understand the First Amendment. One of his central critiques is that the Supreme Court has over-privileged "speakers" in its interpretation of the First Amendment and has therefore failed to adequately appreciate the rights of "hearers" as well as the full meaning of the other First Amendment clauses. Neuborne describes the First Amendment as a "neighborhood" that includes "speakers, hearers, conduits (whose principal function is to transmit the speech of others to larger audiences), speech targets (persons discussed or described in the speech), and government speech regulators . . ."

(pages 98-99). The Court, he argues, "has anointed speakers as the neighborhood aristocrats" (page 99). In focusing so entirely on the rights of the speaker, the Court has too frequently failed to consider the rights of others in the First Amendment neighborhood.

Neuborne points to several interesting consequences of this failure. If we focused on the rights of the hearer, he suggests, we might be more open to government regulation of speech that falls short of "fighting words" but is nonetheless noxious, valueless, and threatening. As examples, he points to several Supreme Court decisions that have prohibited the regulation of speech that provided no useful information to hearers. In *Snyder v. Phelps*, 131 S.Ct. 1207 (2011), the Court overturned an intentional infliction of emotional distress claim against an anti-gay church group that had picketed a funeral, concluding that the picketing had taken place on public land, and the group therefore could not face legal liability for its speech. In *United States v. Alvarez*, 132 S.Ct. 2537 (2012), the Court reversed the criminal conviction of a local politician who had falsely asserted that he was a Congressional Medal of Honor recipient. In *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729 (2011), the Court invalidated a ban on the sale to children of violent video games that depicted simulated rape, torture, and murder. And in *United States v. Stevens*, 559 U.S. 460 (2010), the Court struck down a statute that banned videos showing the wanton torture and violent killing of animals. In each of these cases, Neuborne argues, the Court is "fixat[ed] on speakers who run roughshod over others who live in the neighborhood" (page 109). Rather than being so scared of government regulation that we give speakers free reign, he argues, we should recognize the dignitary interests of hearers and establish regulatory rules with those interests, as well as speakers' interests, in mind.

Neuborne also raises the interesting question of what a right to free press would look like if we had not effectively collapsed it into the right of free speech. The right of free press is, after all, an independent clause in the First Amendment, and yet the Court has really never considered whether a free press right might include more than simply a right to

free speech by the press. Neuborne queries whether a right of free press, understood as something other than speech, might include a right of access to information or a right (and perhaps a duty) to offer voice to speakers whose voices have been silenced. A right of free press "might be both broader and narrower than the speech freedom currently enjoyed by the press." The broader rights might include access that the press is currently denied, such as prisoners or government actors beyond official spokespeople. Press rights might be narrower, however, in that the press role as a conduit of information might demand some regulation designed to ensure access by the public and to prevent "any single press entity from becoming too powerful – a kind of First Amendment antitrust law" (page 126).

Neuborne's vision of a better First Amendment, one that gives meaning to each of the words in that text, is not one with which everyone would agree. But it is appealing in its consistent commitment to the ideals of democratic participation and public access to valuable knowledge and ideas necessary to democratic engagement. At several points throughout his book, Neuborne reminds us that the First Amendment's evolution is recent history and "nothing about it is written in stone" (page 115). *Madison's Music* is fundamentally a call for a re-envisioning of the First Amendment. It is aspirational, but Neuborne ends by urging his readers to believe that this aspirational, democratic, richer First Amendment can be achieved "if only [we'll] try" (page 223).

He may not persuade a reader who does not share his vision. But his willingness to engage with the complexities of the First Amendment and constitutional interpretation make for a thought-provoking and insightful exploration of a host of particularly challenging questions.



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