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INTRODUCTION

While the doctrinal formulations so characteristic of modern American constitutional law remain in use, their power and primacy seem to be on the wane. Some justices seek to supplement standard formulaic opinion writing with common law minimalism, some with policy analysis, and some with categorical rules. Issues as disparate as discrimination against gays and congressional power to enforce the Free Exercise Clause are resolved by blunt references to illicit motivation rather than by announced doctrine.[1] Where the old three and four-part "tests" are still fully in use, there is a discernable lack of conviction. The fearsome "strict scrutiny" test is now applied in affirmative action cases, as well as in some free speech cases, in a way that does not lead to invalidation of the challenged law.[2] On the other hand, the supposedly deferential "rational basis test" rather frequently does lead to invalidation—but not for reasons that have any necessary connection to irrationality.[3] In one notable instance involving discrimination against aliens in the public schools, the elaborately crafted distinctions that make up the three tiers of equal protection "scrutiny" literally collapsed into a formless jumble.[4] In

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1. City of Boerne v. P. F. Flores, 521 U.S. 507, 509 (1997) (enforcement of Free Exercise Clause); Romer v. Evans, 517 U.S. 620, 632 (1996) (discrimination against homosexuals).

2. *E.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (emphasizing that application of strict scrutiny does not necessarily lead to invalidation); Buckley v. Valeo, 424 U.S. 1, 29 (1976) (upholding campaign contributions limitations under "rigorous" free speech standard of review).

3. *E.g.*, *Romer*, 517 U.S. at 632 (1996) (public animosity as basis for invalidation); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (desire to harm a politically unpopular group impermissible).

4. Plyler v. Doe, 457 U.S. 202, 223–24 (1982) (asserting that a statute cannot be considered rational unless it furthers "some substantial goal of the State").

short, the heart seems to be going out of an intellectual enterprise that dominated modern American constitutional law for many years.

A few years ago I tentatively suggested that this decline might reflect a generalized loss of confidence in the possibility of achieving programmatic reform, at least while maintaining a distinctively legal voice.[5] Even more tentatively I suggested that because the urge to use courts to implement social reform had not vanished and legal formalism had not regained intellectual ascendancy, we could expect to see intensifying efforts to fashion new modes of judicial discourse that might serve the purposes once served by doctrinal discourse. Based on early indications in the Court's decisions and also (I should admit) on my doggedly pessimistic nature, I guessed that the results might be even more unattractive than the misleading, overbearing language of calibrated doctrine.

The purpose of this Essay is to test this prediction on a very modest scale by examining several recent opinions written by Justice John Paul Stevens. For a number of reasons, Stevens' work may well be indicative of underlying trends. He is, as these six opinions demonstrate, a justice who exhibits considerable self-confidence, both about his views of proper public policy and about using judicial power. For the most part, however, Stevens does not attempt to achieve his vision for the future by virtuoso doctrinal performances. On the contrary, his opinions have long displayed an invigorating (if sometimes eccentric) willingness to rethink and, some would say, to disregard established doctrinal formulations.[6] In contrast to some others, such as Justices Scalia or O'Connor, who also appear dissatisfied with doctrinalism, Stevens has not tried to return to any traditionally legalistic modes of explanation. Nevertheless, Justice Stevens has not given up on the need for a distinctively legal role and voice; indeed, he emphatically denies that judging should involve the imposition of a "personal point of view" and thinks that judicial speech—even during election campaigns—should be different from

5. Richard Fallon et al., *Will the Brennan Legacy Endure?*, 43 N.Y.L. SCH. L. REV. 177, 181–86 (1999) (Nagel-authored section of article). This speculation was an extension of my earlier assessment of the nature and function of formal constitutional doctrine. ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW ch. 7 ("The Formulaic Constitution") (1989).

6. An early and consistent example of Stevens' iconoclasm has been his skepticism about the Court's standard position on content discrimination. *See* Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 650 n.17 (2002); Note, *Content Regulation and the Dimensions of Free Expression*, 96 HARV. L. REV. 1854, 1855 nn.8–10 (1983).

ordinary political speech.[7] Stevens, in short, is a man in acute need of a new way to write constitutional decisions. He needs a way to express an ambitious moral agenda in terms that convey the impersonal authority of fundamental law. To do this, of course, he has to draw upon the rhetorical resources available in the general culture, but he also must use these resources in a way that alters and elevates them.

If Justice Stevens succeeds in this audacious endeavor, he may chart an innovative and attractive course for constitutional discourse in this new century. If not, his opinions may only provide further evidence that what constitutional doctrinalism sought to combine cannot be combined.[8] I begin with an opinion where both the potential benefits and risks of Stevens' enterprise are on display.

I. ACCOMMODATION FOR THE UNWILLING LISTENER: *HILL V. COLORADO*[9]

Although criticized as an instance of specialized jurisprudence reserved for abortion issues, Justice Stevens' opinion validating Colorado's so-called "bubble law" is an intriguing indicator of the general direction of his emerging constitutional methodology. His analysis begins by defining the issue as being "whether the Colorado statute reflects an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners. . . ."[10] The phrase "acceptable balance," while slightly redolent of some existing judicial tests, in fact signals Stevens' dissatisfaction with layered, ostensibly precise doctrines. His substitute formulation is more vague and more forthrightly subjective. He proceeds to identify in concrete, candid terms the interests to be balanced. On one side of the balance, he concedes that the statute regulates leafleting, signs, and oral communications that are clearly protected by the First Amendment even if offensive and, indeed, that it regulates those activities in public places that are "'quintessential' public forums for free speech."[11] On the other side of the balance is the state's legitimate interest in "the avoidance of potential trauma to patients [seeking to use heath care facilities] associated with confron-

7. Republican Party of Minn. v. White, 536 U.S. 765, 797 (2002) (Stevens, J., dissenting).
8. *See* NAGEL, *supra* note 5, at 121–55.
9. 530 U.S. 703 (2000).
10. *Id.* at 714.
11. *Id.* at 715.

tational protests."[12] Stevens goes on to depict this interest more abstractly as the "unwilling listener's interest in avoiding unwanted communication" and, using the words of Justice Brandeis, he lionizes this "right to be let alone" as "the right most valued by civilized men."[13]

The Stevens opinion, having defined the terms of analysis in general, extradoctrinal terms, proceeds for many pages to discuss conventional free speech doctrines. The length and detail of this discussion might seem to mean that Stevens is capitulating to formulaic analysis. Except superficially, however, this impression is wrong; the discussion is aimed, not at applying free speech doctrine, but at escaping it. Indeed, at virtually every turn, Stevens finds that existing formulations do not apply at all or apply only loosely. For instance, despite the fact that the statute applies to oral communications made "for the purpose of . . . engaging in . . . protest, education, or counseling,"[14] Stevens insists that it involves neither content discrimination nor viewpoint discrimination.[15] And he finds that it is not "overbroad."[16] And that it is not void for vagueness.[17] And that it does not create a "heckler's veto."[18] Indeed, Stevens eventually concludes that the statute's requirement that unwanted communications be kept at an eight foot distance is not in fact a restriction of speech at all—it is only a restriction of "the places where some speech may occur."[19]

Accordingly, Stevens concludes that the relevant tests are those that are applicable to content-neutral "time, place, and manner" regulations.[20] Hence, says Stevens, the statute must be "narrowly tailored" to serve legitimate interests.[21] At this point in the opinion, having located the doctrine that does apply, it might seem that Stevens must become embroiled in applying conventional doctrine. But no, in application, the relevant doctrine simply recedes from view. Stevens asserts, for example, that in determining whether the restrictions impose more burdens on speech than necessary, the Court

12. *Id.*
13. *Id.* at 716–17.
14. *Id.* at 720.
15. *Id.* at 720–23.
16. *Id.* at 730–32.
17. *Id.* at 732–33.
18. *Id.* at 734.
19. *Id.* at 719, 731.
20. *Id.* at 725.
21. *Id.* at 726.

"must accord a measure of deference to the judgment of the Colorado legislature."[22] Moreover, after acknowledging that the statute restricts some who would not threaten the physical or emotional welfare of patients, Stevens defers to the decision of the state legislature to take "a prophylactic approach."[23]

It is possible, of course, to deny that in all this Justice Stevens is unburdening his explanations from the weight of formulaic rules. It may be that he is conscientiously applying those rules and finding them satisfied. The dissents vigorously deny this possibility, and it is difficult not to agree with them. Consider the central element in the Stevens opinion: the high valuation accorded the interests of the "unwilling listener."[24] Although Stevens argues that this valuation is consistent with precedent, Justice Scalia makes a strong case that this aspect of Stevens' analysis must be understood as a rather significant departure.[25] It is not, he argues, the interest that the state claimed was served by the statute.[26] And it is not precisely the interest extolled by Justice Brandeis, because that interest had to do with insulation from the government, not insulation from public debate.[27] And, most fundamentally, Scalia argues it is not consistent with the general, well-entrenched principle that in public areas, citizens must be willing to put up with unwanted, even offensive, messages.[28] Moreover, even on the assumption that the received doctrine permits the Court to give great weight to the interest in protecting unwilling listeners on public sidewalks, Scalia says that the Court should have employed the "strict scrutiny" test because the bubble law made content discriminations and, in any event, because established doctrine does not permit judicial deference to legislative judgments about the range of speech regulated and the need for prophylactic restrictions.[29]

Assuming Justice Scalia is right about all this, he is not necessarily right to characterize Stevens' analysis as a specialized approach designed only for the abortion context. A more radical possibility is that the terms and operations of the formulae relied on in Scalia's

22. *Id.* at 727.
23. *Id.* at 729.
24. *Id.* at 716–17.
25. *Id.* at 751–52 (Scalia, J., dissenting).
26. *Id.* at 749–50 (Scalia, J., dissenting).
27. *Id.* at 751–52 (Scalia, J., dissenting).
28. *Id.* at 750–52 (Scalia, J., dissenting).
29. *Id.* at 759–61 (Scalia, J., dissenting).

critique are morally and institutionally unattractive and that Stevens' opinion in *Hill* is a part of a systematic reaction against them. Or, to put the matter affirmatively, perhaps Justice Stevens is developing new terms and new methods for resolving free speech cases. Precisely to the extent that his opinion in *Hill* is profoundly unpersuasive in traditional doctrinal terms, Stevens can be seen as taking one step in a potentially radical effort to escape the unrealistic and misleading terms of conventional free speech discourse.

At least traces of a potentially attractive reconceptualization of free speech discourse can be seen underlying Stevens' opinion. Think again about his depiction of the state's interest. While the protection of the feelings of unwilling listeners may not have been the interest asserted by the state, it was plainly and undeniably the major interest served by the law. The state distorted the statement of its interests for strategic reasons because, under standard First Amendment doctrine, protection against offensiveness is a deeply suspect objective. Stevens' departure from the usual practice of working from the state's articulation of its own interest injected into his analysis a degree of realism that conventional free speech doctrine discourages and made it possible for the justices to think about an issue that conventional doctrine treats rather dogmatically.

Of course, it is usually thought that there are solid reasons for shutting off thought about states' interests in regulating against offensiveness. It is said that protection from offensiveness is a boundless justification that, if accepted, could lead to the general suppression of speech.[30] And it is said that in most circumstances listeners can avoid the harm from offensive speech by leaving or looking away.[31] These claims, formalized and ossified in the doctrine, are overdue for reconsideration. After all, the fact that a justification theoretically can often be asserted does not mean that it will be. The real danger posed to free speech interests depends on complex social and psychological factors that go far beyond the nature of the justification offered, and Stevens' position might make room for a more wide-ranging and sophisticated consideration of the actual risks to free speech interests. Moreover, it defies everyday experience to believe that an unwilling listener's psychic interests are necessarily slight because the offensive message can be avoided. Averting eyes or walking away does not, of course, remove either the image or the

30. Cohen v. California, 403 U.S. 15, 22–25 (1971).
31. *Id.* at 21.

memory of an unwanted message. It may be that for some reason protection against shock, dismay, disgust, fear, and disorientation is always less important than the free speech interest involved, but the argument for this conclusion is not advanced by systematically pretending that the state's interest is less significant than it is. In short, Stevens' bold and sympathetic recognition of the range of interests actually protected by the bubble law could be a step toward a more thoughtful and realistic methodology in free speech cases.

Much the same, I think, can be said of every component of Stevens' doctrinal analysis—the conclusion that the bubble law is not a restriction on speech but only of where speech takes place; the lack of concern about content discrimination (including the legislature's viewpoint-specific motivation); the relative insignificance attached to the status of sidewalks as public forums; and the willingness to defer to political judgments. Taken together, these positions are not so much an application of free speech doctrine as they are an effort to escape from its assumptions and limitations. They could constitute part of a significant rethinking of the form and substance of free speech law. Aside from its intellectual audacity, what is attractive about this departure is that potentially it allows for greater realism and subtlety in judicial analysis, more variety and gradations in the local speech regulations, and a more appropriate distribution of decision-making authority. It also opens up the possibility that the law of free speech might be formulated and explained in ways that more closely track common experience and widespread understandings.

At its most attractive, Stevens' analysis appears to draw on the optimistic American instinct for tolerance and practicality.[32] His opinion depicts both sides in the dispute sympathetically—on the one side, he depicts law-abiding protestors exercising their undoubted rights and, on the other, vulnerable patients seeking to exercise theirs. There is, his overall approach suggests, no need to minimize or choose between these interests. As profoundly antagonistic as the parties may appear to be, the American ethic of civic tolerance can benignly embrace them both. The patients can proceed relatively undisturbed in their journey toward what the protestors regard as murder, while the protestors can get their message across from a

32. For a recent treatment of this set of instincts, with special emphasis on nonjudgmentalism, see ALAN WOLFE, MORAL FREEDOM: THE IMPOSSIBLE IDEA THAT DEFINES THE WAY WE LIVE NOW (2001).

distance of eight feet or from the many other sites that our rich political life provides. Miles from the abstract and unrelenting principles of most free speech jurisprudence, this opinion indicates that there is no need to reject anyone's vital interests or to exaggerate the stakes. All interests can be accommodated, and even the most intractable disputes can be conducted in ways that do not threaten important sensitivities, let alone our political community.

There are also unattractive aspects to Stevens' separation from standard formulaic analysis. No matter how refreshing intellectually, Stevens' adventurism creates inconsistency and unpredictability, and probably threatens authoritativeness. All that, however, might be worthwhile if *Hill v. Colorado* were one step in a profound reinvigoration of free speech discourse. But there are some disquieting indications in *Hill* about what Stevens may be substituting for conventional doctrinal analysis. Rather than bringing judicial rhetoric and values closer to the best in our political culture, his opinion may be drawing on some of the worst.

That, in any event, is the implication of the charges made in Justice Scalia's and Justice Kennedy's extraordinary dissents. Scalia goes so far as to charge that the majority opinion nullifies established law in order to favor one side in the abortion debate.[33] Justice Kennedy accuses the majority of "turn[ing] its back"—of "strik[ing] at the heart"—of the settled principle that, while abortion opponents could not effectively voice their views in the legislative area, they were free to engage in effective, individualized moral persuasion.[34] Put more abstractly, the overall critique is that the apparent nonjudgmentalism of the Stevens opinion is a fraud—its concern for the feelings of the parties is asymmetrical and masks the moral dimension of both the abortion controversy and the Court's own opinion. Taken cumulatively, the dissenters' accusations come close to characterizing the Stevens opinion as intentionally dishonest, politically opportunistic, cruelly suppressive, and morally hypocritical. These, it must be said, are elements in the American political culture no less than benevolently tolerant pragmatism.[35]

33. *Hill*, 530 U.S. at 741.

34. *Id.* at 791 (Kennedy, J., dissenting).

35. On dishonesty, see WOLFE, *supra* note 32 at 100; *see also* MURRAY EDELMAN, THE POLITICS OF MISINFORMATION (2001); CARL HAUSMAN, LIES WE LIVE BY: DEFEATING DOUBLE-TALK AND DECEPTION IN ADVERTISING, POLITICS, AND THE MEDIA (2000). On the hypocrisy of moral discourse, see ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN

In sum, the Stevens opinion in *Hill v. Colorado* appears to be a step in the process of grounding constitutional discourse more directly in the vocabulary of ordinary political life. It can be characterized as drawing on either the best or the worst of that vocabulary. Deciding which of these competing characterizations is more accurate will help determine whether Stevens' audacious assault on conventional doctrinal analysis is hopeful or dangerous. One way to begin to make this assessment is to put *Hill* in the context of other opinions authored by Justice Stevens.

II. PRIVACY SUBORDINATED

A. City of Chicago v. Morales[36]

In *City of Chicago v. Morales*, decided a year before *Hill*, Justice Stevens authored an opinion invalidating an antiloitering ordinance aimed at gang members. In *Morales*, Stevens identifies the city's purpose as protecting the public—who were "afraid even to leave their homes"—from the "presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways. . . ."[37] Now, plainly, this interest in walking the streets without feeling vulnerable or besieged is remarkably similar to the interest of women seeking to work their way past intimidating crowds into an abortion clinic, and, if anything, is even more stark. Nevertheless, while Stevens, of course, acknowledges that the purpose is legitimate,[38] he does not employ the elevated terms that he would later utilize in *Hill*. In *Morales* there are no references to Justice Brandeis and no talk of "the right most valued by civilized men."[39] Indeed, what engages Justice Stevens' sympathies is not the right to be left alone, but instead the competing interest in what he calls the constitutional right to loiter—"an individual's decision to remain in a public place of his choice" or (quoting *Blackstone*) the right to move "to whatsoever place one's own inclination may direct."[40]

MORAL THEORY (2d ed. 1984). On cultural conflict and the urge to suppress, see JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991).

36. 527 U.S. 41 (1999).

37. *Id.* at 51.

38. *Id.* at 51–52

39. *Compare Hill*, 530 U.S. at 717.

40. *Morales*, 527 U.S. at 54.

It is possible that this difference in emphasis can be explained and justified, perhaps on the ground that Stevens fully concedes that the city can protect the right of citizens to walk the streets without intimidation if it uses more specific language.[41] The Colorado bubble law at issue in *Hill*, however, could have been written in more precise terms and still have achieved many of its purposes, if not its general prophylactic objective.[42] Moreover, one might have expected a less exacting demand for precision in *Morales* inasmuch as the interest competing with privacy there is not, as Stevens concedes, freedom of speech.[43] Nevertheless, he examines the terms of the antiloitering ordinance with a flinty eye, noting, for example, that when ordered to disperse and leave the area, loiterers would have to decide how far to move and how long to remain apart.[44] Even assuming that Justice Stevens is correct that the antiloitering ordinance was unconstitutionally vague while the bubble law later approved in *Hill* is not, it is impossible to miss the distinct shift in tone and empathy. In *Hill*, for instance, Stevens swiftly dismisses as a "hypertechnical" theory the argument that a protestor might not know whether an outstretched arm constituted "approaching" within the meaning of the law.[45]

The obvious, if cynical, explanation for Stevens' relative disinterest in the right to be let alone in *Morales* is that the issue of abortion was absent. Recall the charge of the dissenters in *Hill* that the deck was "stacked" in that case, that their solicitude for the interests of the unwilling listeners protected by the bubble law was one of "many aggressively proabortion novelties announced by the Court. . . ."[46] Even if this charge is accurate, the treatment of privacy in *Morales* remains puzzling. After all, those who remained in their homes for fear of gang intimidation presumably included some who were foregoing activities of which Justice Stevens would heartily approve, including, perhaps, trips to the local library or city council meeting or, for that matter, to abortion counselors. This raises the question: Why would Justice Stevens' moral sensibility be fully engaged by those intimidated in a setting involving only particularized activities while less engaged by those intimidated in a setting that could involve virtually any activity and purpose?

41. *Id.* at 51–52.
42. *Hill*, 530 U.S. at 727–29.
43. *Morales*, 527 U.S. at 52–53.
44. *Id.* at 59.
45. *Hill*, 530 U.S. at 733.
46. *Id.* at 764 (Scalia, J., dissenting).

At one level, a moral preference for the particularized setting seems entirely perverse. Almost by definition, the greater the range of activities foregone because of street intimidation, the more offensive the intimidation would seem to be. Or, to put it another way, the greater the range of activities foregone and the wider the range of people inhibited, the more certain one can be that the intimidation is harming sensitive people engaged in valuable activities. Stating this argument in this way suggests what might be at work, beyond ideological predisposition, in the differing sensibilities displayed in *Morales* and in *Hill*. To appreciate the concrete kinds of harm created in the more general setting would have required a higher level of imaginative effort. In *Morales*, it would have been necessary to imagine the various types of people, including the infirm or the timid, affected by gang loitering, and it would have been necessary to imagine in concrete, empathetic terms the range of activities inhibited. In *Hill* the specificity of the setting does much of this work. It is a short step, indeed, to connect, as the Court does, abortion services with young, "vulnerable" women who "may be under special physical or emotional stress. . . ."[47] A preference for the immediate, the concrete, and the personal is, needless to say, common. It is the basis for much of the sentimentality that passes for moral judgment in modern American entertainment.[48] It is disquieting, to say the least, to think that Justice Stevens' bracing dissatisfaction with formulaic decision making may be only a prelude to injecting that thin moral sensibility into constitutional interpretation.

B. Watchtower Bible and Tract Society v. Village of Stratton[49]

Perhaps because it was decided well after *Hill*, many of the impulses evident in *Hill* can also be seen in *Watchtower Bible and Tract Society v. Village of Stratton*, in which the Court, again speaking through Justice Stevens, struck down an ordinance that required the registration of door-to-door solicitors. Even more definitively than in *Hill*, Stevens rejects the need to apply standard free speech doctrine, stating that "[w]e find it unnecessary [to decide what standard of review to apply] because the breadth of speech affected . . . and the

47. *Id.* at 729.

48. *See, e.g.*, Jeffrey Rosen, *And Prime Time for All*, NEW REPUBLIC, Aug. 5 & 12, 2002, at 25–29 (noting society's preference for familiar, personalized events over the mostly nondramatic reality of the law).

49. 536 U.S. 150 (2002).

nature of the regulation make it clear that the Court of Appeals erred in upholding it."[50] Moreover, as in *Hill*, he forthrightly acknowledges the importance of the interests on both sides of the controversy and defines the relevant inquiry in generalized, commonsensical terms: "We must also look . . . to the amount of speech covered by the ordinance and whether there is an appropriate balance between the affected speech and the governmental interests. . . ." [51]

On a more fundamental level, Stevens appears once again to draw on the pragmatic nonjudgmental strain in American political life. Everyone's interest can be protected: the solicitors' free speech interests require that the registration requirement not cover such a broad range of speakers, while the homeowners' interest in privacy can be adequately protected by rules enforcing individual "No Solicitation" signs.[52] No need for standards of review, calibrated weighing, and so on; a sensible, tolerant people can work out a solution.[53]

However, in certain other respects, *Hill* and *Watchtower Bible* are strikingly different. Even more so than in *Morales*, in *Watchtower Bible*, Stevens is mechanical and unimaginative in his treatment of the right to be let alone. After asserting that "'No Solicitation' signs" provide "ample protection" for unwilling listeners within their homes, Stevens writes that for those without such signs, "[t]he annoyance caused by an uninvited knock on the front door is the same whether or not the visitor is armed with a permit."[54] Perhaps the rather cold word "annoyance" is justified in this context, but it is at least possible that for some of those unwilling to post a sign preventing all solicitation there is nevertheless a sense of vulnerability or anxiety that would be alleviated by public registration. And on the question of whether any such enhanced sense of security would in fact be justified by the deterrent effect of the registration rule, a reader of *Hill* might have expected some sign of deference to local authorities.

Stevens' assessment of the significance of the burden of the registration requirement on free speech interests is as imaginative as his assessment of the privacy interest is limited. He worries, for example, about the inhibiting effects on the spontaneous speaker, who wishes

50. *Id.* at 164.
51. *Id.* at 165.
52. *Id.*
53. *Id.* at 175–76.
54. *Id.* at 168–69.

to go door-to-door when the registration office is closed, and even about the principled speaker, whose "religious scruples" might prevent her from registering even if a permit is assured.[55] What, one inevitably wonders, about the spontaneous anti-abortion protestor whose sense of urgency suddenly impels her across the eight-foot line? Or the principled protestor who would rather stay silent than have the details of her demonstration regulated by the state legislature? Or to put the matter in less quibbling terms, if an eight-foot "bubble" is not a restriction on speech at all—if it is, merely, as Stevens asserts in *Hill*, a regulation of where and when speech can occur—surely a registration requirement that any speaker can satisfy is not a significant restraint on speech either. But it is, writes Justice Stevens, who goes so far as to assert that such a restriction "constitutes a dramatic departure from our national heritage and constitutional tradition."[56] Indeed, the ordinance is offensive "not only to the values protected by the First Amendment, but to the very notion of a free society. . . ."[57] So much, the cynic might say, for the Court's brief liberation from dogma and exaggeration.

The apparent inconsistencies between *Hill* and *Watchtower Bible* might or might not in the end be defensible, but they certainly highlight disturbing signs of a degenerative discourse. Stevens' description of the interests of solicitors is personalized, somewhat sentimental, and exaggerated. When combined with his disinterest in the variety of anxieties and concerns that homeowners might have, his opinion verges once again toward melodrama, an impression only confirmed by Stevens' vainglorious depiction of the Court as protector of "the little people."[58]

C. *Bartnicki v. Vopper*[59]

A year after *Hill*, Stevens, writing for the Court in *Bartnicki v. Vopper*, again weighed freedom of speech against the right to be left alone. At issue was the extension of federal and state wiretap acts to "the repeated intentional disclosure of an illegally intercepted cellular telephone conversation about a public issue" when the broadcaster

55. *Id.*
56. *Id.* at 166.
57. *Id.* at 165–66.
58. *Id.* at 163 (quoting Martin v. City of Struthers, 319 U.S. 141, 146 (1943)).
59. 532 U.S. 514 (2001).

had not participated in the illegal interception.[60] As in *Hill*, Stevens begins by depicting the issue as a "conflict between interests of the highest order—on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy. . . ."[61] The privacy interest in *Bartnicki*, obviously, is not precisely the same as that involved in protecting the sensitivities of unwilling listeners, but, as Stevens himself emphasizes, it does involve insulating the individual from public exposure and embarrassment.[62] Thus, as is true of laws protecting unwilling listeners, wiretap acts protect against a sense of personal vulnerability and unwanted visibility.

Nevertheless, in striking contrast to *Hill*, in *Bartnicki*, Stevens resolves the conflict between speech and privacy through standard free speech methodology. While *Hill* is notable for the degree of deference given the legislature on how best to protect the sensibilities of unwilling listeners, *Bartnicki* is conventional in its unapologetic refusal to defer to Congress and some forty state legislatures on the question of whether imposing liability on third-party publishers would deter eavesdropping by "drying up the market."[63] More generally, in *Bartnicki*, Justice Stevens relies uncritically on existing First Amendment doctrines. Referring to formulations initiated in *New York Times v. Sullivan*[64] and developed in various cases, he asserts that "parallel reasoning requires the conclusion that a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."[65]

Whatever else this decision may mean, then, *Bartnicki* represents the resurgence in Stevens' thinking of conventional civil libertarian beliefs about the primacy of free speech values, the very dogmas so energetically resisted in *Hill*. Abortion, no less than the information about a public collective bargaining process that was broadcast by the defendants in *Bartnicki*, is a matter of public concern. At least, issues of the sort presumably raised by the protestors who were prosecuted under the bubble law at issue in *Hill*—such as whether abortion is murder and what personal interests might or might not justify it—are

60. *Id.* at 517.
61. *Id.* at 518.
62. *Id.* at 526, 532–33.
63. *Id.* at 550.
64. 376 U.S. 254 (1964).
65. *Bartnicki*, 532 U.S. at 535.

discussed in opinions of the United States Supreme Court and debated in Congress. It is true that open discussion of such public issues, when directed at an individual entering a medical clinic, also intrudes upon feelings and relationships that are intimate and personal. But that is true, as well, of open discussion of the content of an intercepted telephone conversation.

That Stevens should in an occasional case abandon his doubts about conventional free speech doctrine does not necessarily say much about the quality of whatever new methodology he may—with some hesitation—be developing. However, in one respect the conventionality of *Bartnicki* does raise doubts about the nature of Stevens' broader contribution. To the extent that he retains constitutional formulae when their application easily leads to desired outcomes, the suspicion arises that his new methodologies are opportunistic rather than iconoclastic. This possibility, like some others canvassed in this Essay, would root Stevens' constitutional discourse in some of the shabbier aspects of American culture. Certainly the view that argumentation is often an insincere device for engineering agreement can be seen in popular cynicism towards political debate. This cynicism is fortified by the influence of important intellectual movements offering rarified justifications for the notion that political and moral discourse is inevitably manipulative.[66] To the extent that Stevens' constitutional iconoclasm turns out to be episodic, there is at least indirect confirmation of the charge, already fiercely made by Justice Scalia,[67] that the substantive argumentation in his opinions is only strategic.

D. Boy Scouts of America v. Dale[68]

On the same day that the Court issued the *Hill* decision, it also issued another First Amendment decision, *Boy Scouts of America v. Dale*, in which Justice Stevens wrote a bitter dissenting opinion. In

66. For a critical account of postmodernistism, see KEITH WINDSCHUTTLE, THE KILLING OF HISTORY: HOW LITERARY CRITICS AND SOCIAL THEORISTS ARE MURDERING OUR PAST (1996).

67. Commenting on Justice Stevens' argument that the execution of the mentally retarded violates a "national consensus," Justice Scalia wrote: "The arrogance of this assumption of power takes one's breath away. And it explains, of course, why the Court can be so cavalier about the evidence of consensus. It is just a game, after all. . . . [I]t is the *feelings* and *intuition* of a majority of the Justices that count. . . ." Atkins v. Virginia, 536 U.S. 304, 348 (2002) (Scalia, J., dissenting).

68. 530 U.S. 640 (2000).

some ways, his dissent is consistent with his position in *Hill*. In both instances he favored subordinating free speech rights to other interests. In *Dale*, that other interest was not the protection of unwilling listeners, but the reduction of discrimination on the basis of sexual orientation. Stevens argued that requiring the Boy Scouts to employ Dale, an avowed homosexual, as an assistant scoutmaster did not force that organization "to communicate any message that its does not wish to endorse."[69] Since the Boy Scouts organization claimed repeatedly and urgently during litigation that it did not wish to communicate the various messages that might be thought implicit in keeping a homosexual in a position of leadership,[70] Stevens' claim to the contrary is rather bold. Examining its rules and pronouncements prior to litigation, Stevens in effect presumed to know what the Boy Scouts intended to say better than the Boy Scouts organization itself.

Given the sympathetic treatment Stevens gave the right to be left alone in *Hill*, it is striking that in *Dale* he went to such lengths to decide whether association with an avowed homosexual conflicted with the Boy Scouts' message. Indeed, it is peculiar that Stevens should have conceptualized the main issue as involving "speaking" at all. It was of no concern in *Hill* whether the would-be patient was "saying" anything in declining the importuning of the protestors; the relevant interest was that the patients did not want to associate with the protestors, not whether listening to the protestors would actually contradict any message the patient intended to convey. Even in the cases where under Stevens' analysis a privacy interest did not prevail, he at least formally recognized the existence of that interest independently of the content of any message communicated. For instance, a homeowner's decision to close the door in the face of a solicitor protects the legitimate interest in the privacy of the home without any inquiry into whether associating with the solicitor would actually conflict with anything the homeowner stood for or wanted to say. The patient and the homeowner can both cut off continued association because otherwise they might be subject to unwanted feelings of vulnerability, embarrassment, or exposure, not because of any message they might want to convey.

It might seem perverse for me to compare, as I just did, the Boy Scout organization with patients on the way to an abortion clinic and a would-be Scout leader with those persistent, importuning anti-

69. *Id.* at 665.
70. *Id.* at 651–52.

abortion protestors. But the simple fact is that the Boy Scout organization wished to cut off an uncomfortable association while Dale insisted on continuing that association. Whether the comparison is strong depends in part on the nature of the privacy interest, if any, that the Boy Scouts were seeking to protect.[71] Just as a walk across a public sidewalk can involve strong privacy interests if the objective of the walk is an intimate medical consultation, participation in a highly public organization might well involve strong privacy interests depending on the objectives pursued. Those objectives certainly include character development and moral instruction for boys at a highly sensitive stage of development.[72] Such objectives are pursued through relationships with adults, including the personal example they can provide. They are pursued in public settings but also in highly personal settings that involve activities like camping and individual conversations. That the members of the Boy Scouts organization might feel—and might be entitled to feel—an acute sense of unease in the presence of an unwanted, persistent participant in this set of relationships is at least plausible.

I am not suggesting that Justice Stevens' reasoning in *Hill* required any particular result in *Dale*. But Stevens' failure to recognize even dimly the existence of parallel interests and issues is troubling.[73] Indeed, the benignly tolerant practicality that made Stevens' opinion in *Hill* a potentially attractive reflection of wider cultural mores is entirely missing in his dissent in *Dale*. In place of an empathetic account of the Boy Scouts' associational interests, he characterizes their decision as part of "the cancer of unlawful discrimination," and he compares their unease with "atavistic opinions about certain racial groups."[74] These condemnations are so severe and yet uttered with such self-assurance that it is difficult to put them in perspective. It might help to try to turn things around and imagine a judicial opinion

71. It might be thought that the Boy Scouts, as a national organization, cannot credibly assert a privacy interest since personal communication and contact take place only at the local level between individuals. This, however, means only that the organization is seeking to construct and define certain private relationships among its members, not that privacy interests are absent.

72. *Id.* at 649.

73. His dissent does include a discussion of cases involving the right to associate, but he makes no effort to apply his thinking in *Hill* to those cases. *See id.* at 677–85. Indeed, under his analysis of the right to associate, the question comes down to whether the inclusion of homosexuals would "impose any serious burden" on the basic goals of the Boy Scouts. *Id.* at 683. Since his analysis of this issue focuses on the Boy Scouts' official statements, Stevens' discussion of the right to associate turns into another discussion of their speech interests.

74. *Id.* at 699.

that invalidated the Colorado bubble law on analogous grounds. Suppose the Court were to assert that a patient who did not want to hear the protestors' arguments was reflecting, not a sensibility that (whether right or wrong) deserved to be understood and honored, but an ugly prejudice against the scientific understanding that human life begins at conception.

In short, while Stevens' dissent in *Dale* does, like many of his other opinions, move away from doctrinalism toward a more accessible political discourse, it draws on a harshly judgmental and intolerant strain in American political life. More generally, his inattention to the privacy interests implicated in the case suggests that in place of the superficial rigor of doctrinalism, Stevens is proposing nothing more than the ad hoc imposition of personal moral preferences.

E. Santa Fe Independent School District v. Doe[75]

Although in a range of cases, then, Justice Stevens seems rather unreceptive toward the interests of the unwilling listener, in at least one decision besides *Hill* he firmly vindicated that interest in at least one respect. In *Santa Fe Independent School District v. Doe*, issued at almost the same time as *Hill*, he considered the position of a student who, while attending a high school football game, did not want to hear a fellow student read a prayer over the loudspeaker.[76] Attending a football game may not evoke all the intimate considerations that a walk to a reproductive health center does, but Justice Stevens once again is warmly empathetic. He notes that students "feel immense social pressure . . . to be involved in the extracurricular event that is American high school football. . . ."[77] He asserts that students attending games will feel specific pressure to pray, and, indeed, that they will be "coerc[ed] . . . to participate in an act of religious worship."[78] Even more ominously, school sponsorship of the student-led prayer "sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community. . . .'" [79]

75. 530 U.S. 290 (2000).

76. *Id.* at 294.

77. *Id.* at 311.

78. *Id.* at 312.

79. *Id.* at 309 (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

Apart from this highly sympathetic depiction of the interest of the unwilling listener, Justice Stevens' opinion in *Santa Fe* is quite different from his opinion in *Hill* both substantively and methodologically. In *Hill*, the abortion-specific history of the bubble law is treated as irrelevant and, as I have said, Stevens defers to legislative judgments about drafting and other matters. In *Santa Fe*, he goes to considerable lengths to argue that the decision-making history behind the school's apparently neutral policy demonstrates an illicit motive to favor prayer; in fact, far from deferring to local authorities, Stevens argues that the history of prayer endorsement imposes an obligation on the authorities not merely to be neutral but to disassociate themselves from prayer.[80] The result is a series of small but striking inconsistencies. For example, in *Hill*, Stevens insisted on reading words like "education" and "protests" abstractly, so that the bubble law might have applied, he claimed, "to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries."[81] In *Santa Fe*, Stevens insists on reading the word "solemnize" in the historical context of the school's support for prayer, so that it implied endorsement only of prayer.[82]

More broadly, in *Hill*, the state is permitted to protect the interests of the unwilling listener under circumstances where protests can certainly proceed. In *Santa Fe*, the state is required to protect the interests of the unwilling listener under circumstances where any message except a religious message can be broadcast over the loudspeaker. In short, in *Santa Fe*, the interest of the unwilling listener justifies—requires—significant censorship.[83] Indeed, students who want to hear a religious message might be made into unwilling listeners themselves, since they must endure whatever uplifting secular message the school allows to be conveyed. The discomfort created by this form of officially endorsed secularism might seem relatively trivial,[84] although it is not clear why it could not be as

80. *Id.* at 312–17.

81. Hill v. Colorado, 530 U.S. 703, 723 (2000).

82. *Santa Fe*, 530 U.S. at 315.

83. A school district could respond to *Santa Fe* by allowing only secular messages or, if concerned about the resulting discrimination against religious messages, it could prohibit all messages.

84. There is, of course, no reason to assume that a religious student would have any specific objection to the content of whatever secular messages end up being broadcast. Indeed, he might approve of those messages, except in the sense that he would prefer a religious message and resent hearing only secular communications. This resentment is, under Stevens' reasoning, significant because it can make some members of the political community feel that their central beliefs are banished, at least from public school programs.

psychologically significant as the discomfort felt by someone objecting to public prayer.[85] Indeed, Stevens' own observations imply that the religious student's discomfort at secularized messages could be significant, since the wholesale exclusion of religious messages ordered by the United States Supreme Court and implemented by local authorities would surely cause some to feel "that they are outsiders, not full members of the political community. . . ."[86] Even when Stevens' concern for the unwilling listener reemerges, then, it reemerges selectively. The conclusion seems inescapable that Stevens' moral imagination—not to mention the details of his analysis—is shaped and limited by an explicitly stated fear of sectarian conflict. In this Justice Stevens claims to be drawing on the lessons of American constitutional history, but he may also be drawing on—and giving voice to—the dark fears and suppressive urges that lie very near the surface of modern political life.[87]

CONCLUSION

Justice Stevens' somewhat promising opinion in *Hill* turns out not to signal the development of an attractive alternative to formulaic free speech law. Looking at other opinions where analogous interests are involved, we find that his moral sensibilities lack imaginative breadth and consequently appear parochial if not narrowly ideological. His empathetic exploration of the interests of the unwilling listener at times is reduced to a rather chilly and formal acknowledgment, and at times to complete nonrecognition. We find that he relies uncritically on conventional doctrines and assumptions some of the time, that his respect for political decision making comes and goes,

85. I recognize that it is possible to take the position that offense generated by public prayer is not comparable to offense created by other types of messages because the Constitution specifically prohibits government endorsement of religion. Whether or not this distinction is available to others, it is not available to Justice Stevens because, as his opinion in *Hill* demonstrates, he believes that the unwilling listener's right "to be let alone" is important; indeed, "the right most valued by civilized men." 530 U.S. at 716–17.

86. *Santa Fe*, 530 U.S. at 309 (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

87. That is to say, Stevens appears to be hostile to religious belief. If the opinion in *Santa Fe* is not a sufficient indication, it should be noted that in considering the constitutionality of a voucher system, Justice Stevens refers four times in his very brief dissenting opinion to education within religious schools as "indoctrination." Zelman v. Simmons-Harris, 536 U.S. 639, 684–86 (Stevens, J., dissenting) (2002); *see also*, Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917, 1917 (2001) (referring to Stevens' dissent in Boy Scouts as "stunningly bigoted . . . one of the most intolerant-of-religion opinions ever to appear in the U.S. Reports.").

and that, in short, his intellectual daring is erratic and apparently strategic. Perhaps most disappointing is Stevens' failure to extend the effort, which is visible in *Hill*, to draw on the strain of generous and tolerant pragmatism in American political life. Instead of expanding on the effort to allow the political system to find evenhanded and respectful ways to accommodate bitterly divided groups, in important instances Stevens himself imposes a form of severe and suppressive judgmentalism.

In a broader sense, these failures call to mind some of the more extreme critiques of public discourse in modern America. Justice Stevens' blatant inconsistencies, both with respect to specific positions and to his more general stance on doctrinalism, seem to reflect the opportunistic, manipulative strain so prevalent among interest groups and politicians. His shifting sensibility on the nature and importance of privacy interests suggests the melodramatic, highly personalized moralism that dominates popular culture and influences political debate as well. His outbursts of self-righteousness are of a piece with the angry intolerance that drives the culture wars from both sides. In short, although Justice Stevens appears to be moving towards a constitutional discourse that is more directly grounded in the general political culture, he does not appear to be elevating the resources available in that culture.

It is too much to say that the opinions discussed here are so thin and unappealing as to justify the conclusion that Justice Stevens' project is especially dangerous. Even accepting the worst characterization of his emerging jurisprudence—that it amounts to the overconfident imposition of highly debatable personal preferences—I myself am not at all sure that would be clearly worse than the alternatives. Much the same can be said and has been said of other, more conventional forms of constitutional interpretations. In my view, the ambitious pursuit of progress through the heavy hand of formalism or through the deceptiveness of doctrinal rigor is also dangerous. Stevens' opinions at least have the advantage of relative transparency. Being more direct and less arcane, they display some of what is admirable, as well as some of what is regrettable, about our culture's moral and rhetorical resources. The problem may lie, not so much in the quality of those resources or in Justice Stevens' relatively unvarnished use of them, but in the underlying endeavor itself. Even discursive resources more deeply grounded and persuasive than ours might not be adequate to justify the imposition of a particular moral

vision on a people who are both deeply divided and fully entitled to be deeply divided. Or, to turn back to the relatively attractive aspects of the opinion in *Hill*, the moral vocabulary available today—with all its limitations—might be adequate, but only if used by the Court to explain how Americans, operating through accountable institutions, are free to work out decent accommodations for even their most bitter disputes.