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THE SECOND-BEST FIRST AMENDMENT

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"If men were angels," James Madison wrote in *Federalist* 51, "no government would be necessary."[1] So too with the first amendment. If those in power were angels, or if their power represented more of an opportunity than a threat, the first amendment would also be unnecessary. True, the first amendment's protection of freedom of speech and press is commonly idealized, whether in newspaper editorials, in Fourth of July orations, or in law reviews. Freedom of speech, it is said, is basic, and the freedom to speak and to write is precisely what separates democracy from totalitarianism, liberty from restraint, and freedom from bondage. The first amendment, it follows, is the bedrock of all that we are and all that we wish to be.

Yet the claim underlying the slogans glorifying the first amendment is ambiguous, for most common versions of the claim confuse speaking freely, or even freedom to speak, with a *principle* or *rule* that categorially protects a wide range of communicative acts. Were we to focus on the rule-like nature of the first amendment, we would see that the first amendment's foundations lie not with

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1. THE FEDERALIST No. 51, at 160 (J. Madison) (Fairfield 2d ed. 1981).

ideal aspirations, but instead with the kind of arguably necessary pessimism that Madison's famous line captures. Not only the first amendment, but also the very idea of a principle of freedom of speech, is an embodiment of a risk-averse distrust of decisionmakers. Once we understand this, we are able to understand as well that the first amendment is not the reflection of a society's highest aspirations, but rather of its fears, being simultaneously the pessimistic and necessary manifestation of the fact that, in practice, neither a population nor its authoritative decisionmakers can even approach their society's most ideal theoretical aspirations. Or so I will attempt to show here.

I

I start with the premise, which I hope by now is commonplace, that the first amendment's protection of freedom of speech and press is interesting and important because, and only because, it immunizes from governmental control certain acts that would not be so immune were their regulation measured merely against a rational basis standard. Under the rational basis baseline for assessing the constitutional permissibility of government regulation, including prohibitory regulation of individual behavior, virtually any nonlaughable (and an occasional laughable) justification for governmental regulation is constitutionally sufficient.[2]

Were we to apply this prevailing standard of "nonlaughability" to recent successful first amendment challenges to government regulation, we would discover that all of the asserted but ultimately unavailing justifications for the challenged restrictions on communicative activity would have satisfied the rational basis baseline. Whether it be promoting newspapers and some types of

2. *See, e.g.*, City of Dallas v. Stanglin, 109 S. Ct. 1591, 1597 (1989) (equal protection; limiting admission of teenagers to certain dance halls but not to comparatively similar skating rinks is rational because "skating involves less physical contact than dancing"); City of New Orleans v. Dukes, 427 U.S. 297, 305 (1976) (equal protection; allowing otherwise prohibited pushcart vendors to operate in the Vieux Carre if they have operated for the previous eight years is rational because, *inter alia*, such long term vendors would likely operate their businesses in a manner more consistent with the traditions of the area); Williamson v. Lee Optical, 348 U.S. 483, 491 (1955) (due process and equal protection; prohibiting opticians from placing patients' old lenses in new frames unless they are given a prescription from an optometrist or ophthalmologist is rational because it furthers the objective of raising "treatment of the human eye to a strictly professional level").

magazines,[3] maintaining the integrity of political parties,[4] preventing the annoyance of travelers in airports,[5] preserving the peace and quiet of residential neighborhoods,[6] maintaining the appearance of dignity in the legal profession,[7] protecting women against the effects of material glorifying sexual violence,[8] controlling factually false public ridicule,[9] or protecting Holocaust victims from emotional distress,[10] the courts routinely reject as constitutionally insufficient under the first amendment various rationales for controlling the behavior of the citizenry that would be constitutionally sufficient were mere rational basis the standard of measurement. The first amendment, therefore, does not invalidate irrational restrictions of speech; it invalidates numerous restrictions of speech *in spite of their rationality.*

Once we understand the way in which the bite of the first amendment lies in its prohibition of otherwise rational controls, we are drawn to search for reasons for treating a class of governmental actions in that way. Although I have views about the validity or invalidity of various background justifications for the first amendment,[11] my agenda here is not to return to that territory. Rather, for my purposes now, we need only find *some* background reason for having the freedom of speech and, consequently, the first amendment.[12]

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3. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987).

4. Eu v. San Francisco County Democratic Cent. Comm., 109 S. Ct. 1013 (1989).

5. Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987).

6. Frisby v. Schultz, 108 S. Ct. 2495 (1988).

7. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

8. American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

9. Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

10. Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

11. *See* F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982); Schauer, *Must Speech Be Special?*, 78 NW. U.L. REV. 1284 (1983).

12. The existence of a reason for protecting freedom of speech presupposes an instrumental account of free speech that could be otherwise. Perhaps the value of speech is itself foundational, as is pleasure for the hedonist utilitarian, or certain other primary goods for the ideal-consequentialist, or dignity or equal concern and respect for various nonconsequentialist theorists. Thus, speaking or communicating, or something of that order, could possibly be a fundamental, foundational, irreducible good. Under this account, an account whose implausibility is indicated albeit not proved by the empty set of its proponents, the very idea of a theory about *why* we protect speech collapses because maximizing speech for speech's sake is all the theory we need.

The protection of freedom of speech can be seen instrumentally as furthering some background justification, or rationale, or goal. For example, it might further the goal of facilitating popular decisionmaking,[13] or the goal of providing criticism of or a check on institutional government,[14] or the goal of fostering the search for and the identification of truth or error,[15] or the goal of inculcating attitudes of tolerance,[16] or the goal of permitting individual autonomy in decisionmaking,[17] or the goal of promoting variously described components of personal liberty and self-realization,[18] or some number of other less well-established goals.[19] Whatever the

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13. *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 16-17 (1948); BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 304-22 (1978); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20-35 (1971); Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255-57.

14. *See* H. KALVEN, A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 69-70 (1988); Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 529-44; Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 205.

15. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); J.S. Mill, *On Liberty*, in SELECTED WRITINGS OF JOHN STUART MILL 121, 134-71 (M. Cowling ed. 1968); Milton, *Areopagetica*, in COMPLETE POETRY AND SELECTED PROSE OF JOHN MILTON 677, 710-24 (Mod. Lib. ed. 1950); K. POPPER, 2 THE OPEN SOCIETY AND ITS ENEMIES 42-43 (5th ed. 1966); Duval, *Free Communication of Ideas and the Quest for Truth: Towards a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161, 188-94 (1972).

16. *See* L. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 175-212 (1986).

17. *See* Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 216 (1972); Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1121-25 (1979).

18. *See* M. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 47-48 (1984); Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293, 331-37 (1981); Baker, *The Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990-1109 (1978); Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 5-9 (1976); Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 622-29 (1982); Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678, 679-85 (1982); Richards, *Free Speech and Obscenity Law: Towards a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 83-90 (1974). Because all of these arguments see the value of speech in terms of what it does or what it promotes rather than what it *is*, they are, for my purposes, consequentialist, see *supra* note 12, even though the arguments are components of a larger vision that is not itself consequentialist.

19. For excellent analytical surveys of background first amendment theories, see Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. CIN. L. REV. 1317 (1988); Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First*

goal may be, however, the point is only that the special protection for speech fosters *something*, *some* justification.

Importantly, all of these background justifications are defined in terms that do not themselves refer to speech or communication. Indeed, that is what makes them justifications *of* freedom of speech, rather than merely question-begging restatements of the principle of free speech. One can explain autonomous decisionmaking, or popular sovereignty, or the identification of truth, or limiting the excesses of government officials, or even self-realization without incorporating speech into the description, and thus all of these goals, or theories, of what free speech does or promotes are logically antecedent to a theory of free speech. A theory of free speech is thus a theory that posits a rationale, or justification, or goal, in terms other than free speaking, and then maintains that freedom to speak, or write, or communicate, will promote that posited rationale, justification, or goal.

II

Freedom of speech is thus ordinarily seen instrumentally, as the vehicle for promoting some supposed primary, or at least more fundamental, value. But that leads naturally to the question of why we have or need free speech, or theories of free speech, at all. Would it not be possible merely to protect the primary or fundamental values against restriction?

Assume that we are dealing with a search for truth justification. Why could there not be simply a prohibition on governmental controls that interfere with the search for truth? "Congress shall make no law abridging the search for truth." If some putative restriction on behavior interfered with the search for truth, that restriction would be impermissible, and whether the restriction was or was not a restriction of speech would make no difference.[20] Many of these impermissible restrictions would indeed be restrictions on

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Amendment Theory, 34 UCLA L. REV. 1405 (1987); Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

20. The analysis here proceeds for the moment at the level of pre-constitutional political theory. To say that an action is "impermissible" at this level is not to say necessarily that a court would strike it down pursuant to judicial review under a written constitution. The action may be subject to criticism alone, but at this level that would still be sufficient to characterize the action as "impermissible" under the pertinent theory.

speech, but many would not. For example, were a "search for truth" justification to be applied directly to various government restrictions, we might find that many restrictions on experimentation, travel, and other noncommunicative experiences would be impermissible. Conversely, were we again to apply the "search for truth" justification directly to particular cases, it might be that various forms of now-protected speech would not be protected. For example, consider an intentional factual falsehood, but one not directed at individuals and, thus, presumably protected under current understandings of *New York Times Co. v. Sullivan*.[21] It would certainly be possible to make an "all things considered" judgment *in a particular case* that such an action hindered rather than fostered the search for truth (even given the empirical assumptions of the "marketplace of ideas" theory),[22] and thus would not be protected by direct application of the "search for truth" justification to that particular case.

We can identify the same phenomenon with respect to any number of other free speech justifications. Were we to apply a "popular sovereignty" justification directly to particular cases, some number of restrictions on voting, not involving communication, might be judged impermissible, and some number of currently impermissible restrictions on communication might no longer be thought troublesome. For example, restrictions on misleading campaign promises or claims, now impermissible unless the constraints of *New York Times* are satisfied,[23] might be permitted, as would restrictions on now-unrestrictable market-distorting spending or other power disparities.[24]

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21. 376 U.S. 254 (1964). Interestingly, no Supreme Court case appears to establish the well-accepted proposition that intentional factual falsehoods, in domains otherwise within the coverage of the first amendment, are protected. Brown v. Hartlage, 456 U.S. 45, 60-63 (1982), lends some support to the proposition in the text, as does Pestrak v. Ohio Elections Comm'n, 670 F. Supp. 1368, 1374-78 (S.D. Ohio 1987), *clarified*, 677 F. Supp. 534 (S.D. Ohio 1988). The contrary view, however, gets some support from *In re* Grand Jury Matter, Gronowicz, 764 F.2d 983, 986-89 (3d Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986).

22. *See generally* Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1.

23. *Brown*, 456 U.S. at 60-61.

24. *See* Federal Election Comm'n v. Massachusetts Citizens For Life, Inc., 479 U.S. 238, 251-52 (1986); Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 497-98 (1985); Buckley v. Valeo, 424 U.S. 1, 18-20 (1976); *see also* Miami

Similarly, if we were to apply a "self-realization" justification directly to particular cases, some currently unprotected noncommunicative acts of self-realization might be protected,[25] while some communicative (speech) but nonself-realizing acts might not. Again, no point is served by quibbling about individual cases. The claim is only that were we to think in terms of justifications for free speech as applied to particular cases, as opposed to "freedom of speech" being applied to particular cases, the results would be at least slightly different. From this perspective, "freedom of speech" is necessarily both underinclusive and overinclusive with respect to its background justification, whatever that background justification might be.

III

The activity of speaking is thus underinclusive and overinclusive with respect to any background justification for protecting it. One should note that this is *not* a function of the crudeness of "speech" as compared to more justification-tailored subsets of speech.[26] For example, even if we were considering "political speech" under a democratic theory rationale, or "ideological" or "scientific" speech under a rationale making that *kind* of speech worthy of special protection, there would still be cases in which a particular instance of that kind of speech would not serve its background justification, and others in which an instance of something outside of the definition of the "kind" would serve that justification. Only by defining the kind *in terms of its background justification* will this possibility be avoided; but by doing so, we have just decided to apply that background justification directly to particular cases. If, however,

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Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256-57 (1974) (statute requiring Florida newspapers to print replies is a cost to newspapers that violates the first amendment).

25. Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990-1009 (1978), urges this result. Different conceptions of substantive due process would of course come to the same conclusion, but what makes Baker's position distinctive is his use of the first amendment to reach that result.

26. For a discussion of how any conception of the speech protected by the freedom of speech is but a subset of speech *simpliciter*, see Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 NW. U.L. REV. 1081 (1983); Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645; Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981); Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979).

we do not do this, and define the coverage of freedom of speech in terms that are not coincident with the terms used to define free speech's background justification, then the existence of an area of underinclusiveness and overinclusiveness for free speech vis-a-vis its background justification is inevitable.[27]

Note that even my use of "background justification" is a simplifying but unnecessary assumption. The justification for freedom of speech is ordinarily part of a larger array of justifications, or is merely the instrumental manifestation of an even deeper justification, such as the promotion of human dignity, the maximization of happiness, the promotion of public welfare, or whatever. In that respect even a justification *for* freedom of speech may itself be underinclusive or overinclusive with respect to *its* background justification, or with respect to the array of justifications of which this is but one component. Suppose, for example, that free speech is perceived as a way of promoting popular decisionmaking, but that popular decisionmaking, at the next remove, is perceived as a way of embodying equality among all persons. We may then discover that some forms of popular decisionmaking do not promote equality, and that equality is promoted by forms of decisionmaking that are not popular. With respect to such cases, popular decisionmaking appears to be both underinclusive and overinclusive with respect to its background justification.

If we were to assemble all of the justifications that go as deeply as it is possible to go within a given perspective on justification, we could then say that, with respect to every event or every set of facts, there is some best "all things considered" result that is the product of applying those deepest justifications (or that one deepest justification) directly to that event. Whether we get there directly or indirectly through several levels of intermediate justifica-

27. I deal with justifications singularly only for ease of exposition. The same point would hold, obviously, were the justification for free speech some combination of these various justifications. In order to avoid complications unnecessary to my argument, I also simplify the justifications themselves. Thus, for example, the justification for protecting speech may be that speech is thought to promote self-realization *and* that speech is less harmful than other forms of conduct, a position espoused by Professor Redish, *supra* note 18. But even with this more complex justification, my point about underinclusiveness and overinclusiveness still holds, for the resultant free speech rule protects some conduct, such as harmful self-realizing speech, that direct application of the background justification would not.

tion, we will discover that freedom of *speech* is underinclusive and overinclusive with respect to direct application of the "all things considered" array of justifications to particular cases.

IV

Why, then, at the level of political theory, do we not just forget about "freedom of speech" and apply its background justifications directly to particular cases? And why, at the level of constitution-*making*, does the Constitution refer to "the freedom of speech" rather than to those background principles that for its drafters explained the importance of protecting freedom of speech in the first place? Why do we accept the necessary imperfection that comes from the underinclusiveness and overinclusiveness that is built into defining the right to free speech (or any other right) in a description that is extensionally divergent from the description of its background justification?

This question appears to have a two-part answer. First, we commonly believe that *in most cases* the coverage (or extension) of the right as defined will track rather than diverge from the coverage of its background justification. When we instantiate a justification, whether with a rule or with a right,[28] we believe that the instantiation will indicate, at least probabilistically, the results that direct application of the background justification would generate. The relationship is one of *tendency* rather than inexorability or inevitability. Thus, when we instruct police officers *always* to give a *Miranda* warning before interrogating a suspect, we do not believe that giving such a warning will serve the purposes behind *Miranda v. Arizona*[29] in *every* case. Rather, we think that giving the warning will serve those purposes in *most* cases. Behind any nonfrivolously constructed rule (or right) is a statistical presupposition—that the presence of the triggering facts identified in the rule indicates, at the very least, the applicability of the rule's justifica-

28. I take a right, in its structural operation, to be importantly similar to or a species of rule. *See* Schauer, *Rights as Rules*, 6 LAW AND PHILOSOPHY 115, 116-19 (1987). This view does not apply to those rights that under a rights-based moral or political theory are ultimate, or foundational. It does apply, however, to any right that in some moral or political theory is seen to serve or to instantiate some even deeper principle.

29. 384 U.S. 436 (1966).

tion to a greater extent than would be indicated by purely random application. Thus, the existence of a triggering set of facts—interrogation of a suspect by a police officer—indicates a greater likelihood of the applicability of the justifications behind *Miranda* than would be indicated by random identification of police behavior.

Normally, of course, the correlation between rule and justification, the degree of indication provided by the rule, will be substantially higher than this minimal statistical threshold, even as it falls short of the perfect indication provided when all cases of the applicability of the rule are cases of the applicability of its background justification. Ordinarily, rules are designed in such a way that the applicability of the rule at least *usually* indicates the applicability of its justification.[30]

This probabilistic analysis of the relationship between a rule and its justification applies to the relationship between freedom of speech and its justifications. Immunizing political speech from regulation under a popular sovereignty justification, for example, is premised on the belief that immunizing political speech from governmental regulation will usually serve the goals of promoting popular sovereignty. Similarly, we might believe that protecting individual statements of opinion from restriction will usually promote self-realization, or that disabling government from restricting speech on account of its supposed falsity will usually advance the search for truth, and so on. The instantiation of the background justification in terms of a right to "speech"[31] is premised on the presupposition that "speaking" will ordinarily, or usually, or almost always, serve the goals embodied in the background justification itself.

The presence of this probabilistic relationship, of at least a tendency,[32] is not sufficient, of course, to establish the existence of a

30. Obviously, a close parallel exists between what I say here and a common form of thinking about "fit" for equal protection purposes. The classic is Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). An important recent analysis is Simons, *Overinclusion and Underinclusion: A New Model*, 36 UCLA L. REV. 447 (1989).

31. On the reason for the scare quotes, see *supra* text accompanying note 26 and *infra* text accompanying notes 36-44.

32. On the use of the word "tendency" to mark this relationship, see A. QUINTON, UTILITARIAN ETHICS 47-48 (1973); Urmson, *The Interpretation of the Moral Philosophy of J.S. Mill*, 3 PHIL. Q. 3, 37 (1953).

rule because we could be dealing not with a "real" rule at all, but only with a rule of thumb, one that provides no decisionmaking guidance *qua* rule, and which therefore furnishes no reason for following it in cases in which its background justification is inapplicable.[33] Where rules are but rules of thumb, the decisionmaker does not follow the rule in its area of underinclusiveness or overinclusiveness. If the decisionmaker has reason to believe that the result indicated by the rule of thumb is not that which would be indicated by direct application of the rule of thumb's background justification, she is free to ignore the prescriptions of the rule of thumb. Consequently, rules of thumb, however heuristically useful they may be, are decisionally superfluous, for the results under a rule of thumb decision procedure are those that would be generated by direct application of the rule's background justification.

More substantial rules exist, therefore, when, and only when, the probabilistic relationship I have just described is converted into a universal one. That is, rules operate *as rules*, in the sense I am now describing,[34] only when the fact that an event falls within the coverage of the rule provides a reason for deciding in that way, even when the event would not fall within the rule's justification.[35]

Thus, the important features of rules are: (1) the existence of a probabilistic relationship between the rule and its background justification; and (2) a decisionmaking procedure pursuant to which the inclusion of an event within the rule is itself a reason for treat-

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33. *See* R. HARE, MORAL THINKING: ITS LEVELS, METHOD AND POINT 37-38 (1981); Smart, *Extreme and Restricted Utilitarianism*, 6 PHIL. Q. 344, 344 (1956); Urmson, *supra* note 32, at 36.

34. I do not claim that there is anything "false" about using the word "rule" to refer to a rule of thumb. Still, given that "rule" can be used to refer both to a form of decisionmaking (rule of thumb) in which the rule is completely transparent to its justification, and to a form of decisionmaking in which rules are at least partially opaque to those justifications, I believe that the latter has a somewhat closer affinity to the ordinary use of "rule." Nothing in my argument, however, turns on this question of meaning. My only point is to separate two importantly distinct forms of decisionmaking.

35. For a discussion of the linguistic assumptions that undergird the claim that a rule can have an extension different from its background justification, see Schauer, *Formalism*, 97 YALE L.J. 509, 532-35 (1988). Note also that the reason provided by the rule *qua* rule need not be absolute, nor conclusive. As long as the rule *qua* rule provides some reason, even only a presumptive one, it still functions as something more than a mere rule of thumb. *See* Schauer, *The Jurisprudence of Reasons* (Book Review), 85 MICH. L. REV. 847 (1987). Thus, to say that a rule is of universal application is not to say that its mandates are conclusive. It is to say only that the rule provides a reason for decision in every case within its extension.

ing the event in the way indicated by the rule, even in those cases in which the event falls outside of the applicability of the rule's background justification. And as should be apparent, all of this is directly relevant to thinking about the relationship between freedom of speech (the rule) and any one or more of its background justifications.

V

Once we understand how rules operate in relation to their background justifications, we can see that free speech decisionmaking operates in just this way, and that "free speech" is the rule instantiating its background justification. On numerous occasions, the presence of an event within the coverage of some notion of "speech" is sufficient to trigger application of the "more than rational basis" protection of the first amendment, even though the event does not fall within the coverage of its justification, or would not be decided in the same way were we to apply the best "all things considered" judgment of the society's prevailing political theory. In this regard consider not only the cases that invalidate democracy-promoting restrictions on political speech,[36] but also those that protect racial epithets and other racist speech,[37] subordinate women,[38] intend to cause injury to others,[39] involve false speech,[40] and so on. Again, I am sure that readers will quarrel with this or that example, but my point is only that these are examples, to me, of cases in which direct application of the reasons behind the protection of freedom of speech could well have yielded the opposite result. Others may find different examples of the same phenomenon, but only the phenomenon and not the examples is important here. From the perspective informed by identification of this phenomenon, these appear to be cases in which free-

36. *See supra* notes 23-24.

37. Brandenberg v. Ohio, 395 U.S. 444 (1969) (per curiam); *see* Near v. Minnesota, 283 U.S. 697 (1931).

38. American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

39. Hustler Magazine v. Falwell, 485 U.S. 46 (1988); Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

40. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); *see* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

dom of *speech* is operating in rule-like fashion. If something is speech in the relevant sense, and that relevant sense is some number of further rules still not coextensive with free speech's background justification, then there is at least presumptive protection, even if the background justification would not be served, and even if an "all things considered" judgment about this particular case might have come out the other way.

Let me reemphasize that my point is *not* that free speech rules, such as the ones that generated each of the foregoing results, rules like those set forth in *Brandenberg v. Ohio*,[41] *New York Times Co. v. Sullivan*,[42] *Miller v. California*,[43] and *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[44] are crude implements. Rather, my point is that the very idea of free speech is a crude implement, to the core, protecting acts that its background justifications would not protect, and failing to protect acts that its background justifications would protect. Were we to eliminate this crudeness, and tailor free speech decisionmaking precisely to its background justifications, we would discover that free speech had become superfluous, because we would be applying the nonspeech-defined background justifications directly to particular cases. Were this the case, quite a bit of speech would still be protected, and quite a bit of freedom to speak would still exist. But this protection of speech would be merely incidental to protecting democratic decisionmaking, or activities searching for truth, or self-realizing behavior, or conduct checking the abuses of governmental officials, and so on. The fact of an event being an instance of *speech* would mean nothing if that event were not also an instance of the background justification, and the fact of an event not being an instance of *speech* would also mean nothing if that event *were* an instance of the background justification. Consequently, all of the normative work would be done by the background justification, and the fact of an event being an instance of speech would be decisionally irrelevant.

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41. 395 U.S. 444 (1969) (per curiam).
42. 376 U.S. 254 (1964).
43. 413 U.S. 15 (1973).
44. 447 U.S. 557 (1980).

We can now see why there is nothing *ideal* about the protection of freedom of speech as we know it. Were we searching for the ideal, we would apply background justifications directly, or make particularistic "all things considered" judgments about individual cases, applying the best political theory directly to particular cases as best we could.[45] Even if "speech" is qualified by numerous rules giving it a highly technical meaning, the very fact that the generalization "speech" makes a difference indicates a decision to avoid the ideal, to protect speech in some number of cases in which ideally it ought not to be protected. It is not that the free speech rules we have are less than ideal. It is that free speech itself is a willingness to settle for less than the ideal.

VI

Having seen that the very idea of free *speech* is a nonideal approach to serving free speech's background justifications, and having discovered that this is a function of the way in which the distinct principle of freedom of speech is a species of rule, we can now understand that explaining why we have a principle of free speech involves looking to why we have rules at all. There are, of course, numerous reasons for having rules, but many of them are not relevant in this context. Traditional justifications for rules in terms of predictability, reliance, and certainty do not seem particularly germane. But rules serve other purposes as well, and one of those, the disabling of certain classes of decisionmakers from making certain kinds of decisions, does appear especially pertinent to thinking about freedom of speech as a rule.[46]

At this point we must be more precise about the decisionmakers to whom we are referring. First, therefore, let us think about freedom of speech in terms of a mandate to primary (nonjudicial) gov-

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45. On particularistic legal decisionmaking, see generally Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); Farber & Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615 (1987); Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

46. Although in the context of free speech I focus on decisionmaker distrust and decisionmaker disability, the larger theme is that rules are devices for the allocation of power, with the disabling of certain decisionmakers because we distrust their decisionmaking abilities being merely a subset of that larger function.

ernmental officials. From this perspective, we can see the first amendment as a rule directed to those officials, saying, in essence, "Make no law (or take no action) abridging the freedom of speech." As we have seen, "abridging the freedom of speech," "the freedom of speech," "freedom of speech," and "speech" are all theory-soaked and doctrinally-encumbered terms of art.[47] But that is not relevant to the matter at issue, as long as we acknowledge that the sum total of all of the theory-ladenness and all of the doctrine is still to leave some space between the sum total and what the justification or justifications for freedom of speech would do if applied directly. That is, all of first amendment doctrine taken together remains extensionally divergent from the unmediated application of "promote the search for truth," or "foster self-realization," or "establish popular sovereignty," or whatever. Consequently, my references to instructing officials to "make no law abridging freedom of speech" can be taken as a stylistically convenient metaphor for this extensionally divergent array of first amendment doctrines.

If, therefore, we were establishing instructions for governmental officials, why would we not simply instruct them in accordance with the background justifications, not telling them to "make no law abridging the freedom of speech," but instead telling them to "make no law interfering with the search for truth," and so on? When put this way, the question seems almost to answer itself. For if we think of the full range of governmental officials, including members of a town council deciding whether certain bookstores should be restricted, police officers deciding whether to arrest someone whose criticism of government policy includes strong language, a city clerk deciding whether to issue a parade or rally permit to members of a local communist organization, and members of the Chicago Police Department deciding whether to remove an offensive painting of a popular former mayor from the walls of the School of the Art Institute, we wonder about entrusting to this array of officials the responsibility for making particularistic, case-

47. In addition to authorities cited *supra* note 26, see A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 18-19 (1948); M. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 2.01 (1984); Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107, 148-50 (1982).

sensitive determinations regarding what forms of activity will promote the search for truth and what forms will not, what conduct is consistent with democratic theory and what is not, and which acts are self-realizing and which acts are not.

Wary, therefore, of the mistakes that might be made in direct application of these background justifications, the "make no law abridging the freedom of speech" instruction substitutes the built-in errors of underinclusion and overinclusion for the errors thought to be empirically, although not logically, attendant to a more maximally precise particularistic evaluation. This strategy recognizes that the simplified "free speech" instruction is nonideal, prohibiting the official from taking certain actions that would not jeopardize the background justification and allowing some number of actions that would. Still, the choice in the instruction for the instantiation rather than the justification is based on the empirical supposition that these errors are likely to be less in frequency and smaller in magnitude than the errors that might be expected were the background justification alone used as the instruction to these primary officials.[48]

It is important to appreciate the empirical underpinnings of a decision to instruct an official in terms of a rule, such as freedom of speech, rather than in terms of its background justification, such as promoting the search for truth. If we were confident of that official's ability to determine which conduct would promote the search for truth and which would not, we would be reluctant to instruct that official in terms of a cruder rule, one with errors built into even its faithful application. To choose the rule, the instantiation of the background justification, is therefore to make an assessment that the relevant addressee of the rule, here an official or class of officials, is not to be trusted to make that case-sensitive evaluation.

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48. It seems, then, that with regard to any rule which is *generally* useful, we may assert that it ought *always* to be observed, not on the ground that in *every* particular case it will be useful, but on the ground that in *any* particular case the probability of its being so is greater than that of our being likely to decide rightly that we have before us an instance of its disutility. In short, though we may be sure that there are cases where the rule should be broken, we can never know which those cases are, and ought, therefore, never to break it.

G.E. MOORE, PRINCIPIA ETHICA 162-63 (1903); *see* Urmson, *Moore's Utilitarianism*, in G.E. MOORE: ESSAYS IN RETROSPECT 343, 343-49 (A. Ambrose & M. Lazerowitz eds. 1970).

The empirical assumption is that those who crafted the rule will get it closer to right than will the official trying to apply the background justification directly without the benefit of the rule.[49] In so proceeding, however, we accept the benefits of comparative closeness of getting it right in exchange for the aspirations of getting it right all the time (from the perspective of a given background justification or set of justifications), for that aspiration can be served only by avoiding the rule and applying the background justification directly to the diversity of experience.

VII

Let me focus now on the first amendment not as a mandate to *primary officials*, but as a mandate to *judges* who determine the constitutionality of the primary officials' conduct. Again, we must distinguish prescriptions to judges that would have them apply the justifications for freedom of speech directly to particular cases from prescriptions that would have them apply the necessarily underinclusive and overinclusive notion of freedom of speech itself to those cases.

We could think about this choice purely as a question of constitutional interpretive theory. The first amendment, after all, refers not to searching for truth, or to self-realization, or to popular sovereignty, but to "the freedom of speech." Whatever indeterminacy that phrase contains, and however much it needs to be filled out by theory-informed subrules and doctrines, that language itself would stand as a barrier to viewing the notion of "the freedom of speech" as totally transparent to its background justifications were we to view the text of the Constitution as itself a rule. Under such an approach, one for which I have some sympathy,[50] the phrase "the freedom of speech" would provide some decisional input, some reason for protection, even in those cases in which the phrase's back-

49. This may explain why it is perhaps appropriate to view the first amendment not as theoretically coherent, but rather in terms of a specific response to specific kinds of proclivities towards error during specific historical periods. *See* Alexander & Horton, *The Impossibility of a Free Speech Principle*, 78 NW. U.L. REV. 1319 (1983).

50. *See* Schauer, *Rules, the Rule of Law, and the Constitution*, 6 CONST. COMM. 69 (1989); Schauer, *The Constitution as Text and Rule*, 29 WM. & MARY L. REV. 41 (1987); Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985); Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797 (1982).

ground justifications were not served, and the phrase would also provide some decisional barrier to applying the background justification to cases not encompassed by the phrase.[51] Exactly how this works, and exactly how the competing concerns of fidelity to text and the recognition of the technical nature of the terms involved are to be accommodated, is not something I can take up here. The point is only that *if* we were to adopt a rule-based view of constitutional language, then a view about the status of "the freedom of speech" as a rule would flow from that, at least somewhat independent of views about the substance of free speech decisionmaking in particular.

Nothing in the Constitution, however, dictates that its language be interpreted in such rule-like fashion. Nor does anything in the Constitution prohibit such an approach. The "ruleness" of prescriptive language is not determined by the language itself.[52] It is determined instead by the norms of internalization of those to whom the language is directed. In other words, were the norms of judicial interpretive behavior such that the prescriptions in the Constitution were to be treated only as transparent rules of thumb, the Constitution itself would not be "violated." The question of how to interpret the Constitution, therefore, is a question of political and legal theory, a question that might be answered in favor of a rule-based approach to constitutional language, but might also be answered in favor of a rule of thumb approach.

Under the latter approach, one that allows constitutional interpreters such as judges to view the constitutional text as transparent, and allows constitutional interpreters to identify background justifications and apply them directly to particular cases, we cannot avoid thinking directly about the substance of free speech, and about the same kinds of questions of decisionmaker competence that I discussed in terms of nonjudicial officials. Now the question is whether judges should be empowered to determine whether a

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51. Without delving into the question, let me note the possibility of an asymmetry here. Perhaps extending the protections of the Constitution to events not within its textual contours is somehow less unfaithful to one conception of constitutionalism than is failing to extend the protections of the Constitution to events that are within its textual contours. But perhaps not.

52. *See* Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 186-90 (1986).

challenged governmental action did or did not conflict with the justifications lying behind "the freedom of speech." If there were such a conflict, the challenged action would be invalidated as unconstitutional, even if that action, though an instance of the background justification, was not an instance of "the freedom of speech." Conversely, if the action and the background justification did not conflict, the action would be upheld, even if it were an instance of "the freedom of speech."

As with other governmental officials, resolving this issue requires making assessments about the competence of those who would putatively be applying the background justifications directly to particular cases. If we believe that they would do so with sensitivity and wisdom, and get it right a high percentage of the time, then the rule-based approach ought to be rejected and judges told to determine in individual cases whether the values informing the principle of free speech were promoted by striking down a particular government action. Judges would then be in the business of applying not the principle of freedom of speech, but the background principles, whatever they were determined to be. Conversely, if we believe that judges would, for various reasons, err with some frequency in applying the background justifications directly to particular cases, then we might prefer the rule-based approach, one whose underinclusiveness and overinclusiveness prevents judges from reaching the optimal result in every case, but whose probabilistic simplification may also be optimal over the aggregate of cases by preventing the even larger number of errors that might be the product of a particularistic approach.

Nothing says that these determinations must be constant across the judiciary. One plausible approach might be to say that the Supreme Court should be particularistic, applying the deepest level of background theory directly to the facts of particular cases,[53] but

53. My references to case-direct application of background justifications need to be qualified in an important way. I have been working with a distinction that contrasts the result indicated by a rule with the result indicated by direct application of the justification lying behind it. But that distinction turns on a seemingly questionable assumption about the kinds of justifications that undergird a rule. More specifically, I have thus far failed to distinguish two types of justification. One, which I will call a *substantive justification*, establishes the background rationales behind the rule. This is the type of justification I have been considering, and thus justifications such as promoting the search for truth, fostering self-

that other judges should have a much more rule-based approach to

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realization, and establishing popular sovereignty are all substantive justifications. By contrast, another type of justification, one I will call a *rule-generating justification*, provides the rationale for specifying the substantive justification *in the form of a rule*. Rules do not emerge from nowhere. Rather, they are created as an alternative to a direct and uninstantiated statement of the rule's substantive justification in prescriptive form, leaving the justification to do its own normative work. But when this alternative is not selected, and the substantive justification is instead instantiated in the form of a rule, that decision to instantiate or specify the substantive justification must itself be justified, and this latter justification, the justification for having a *rule*, is what I call the rule-generating justification.

If we acknowledge the existence of rule-generating justifications as part of the array of justifications lying behind a rule, a judge or other decisionmaker consulting this expanded array of justifications would then be entitled in some cases to conclude that obedience to the rule itself was required even though the rule indicated a different result from that indicated by the rule's substantive justifications taken alone. This possibility, that in some cases a particularistic decisionmaker might still conclude that the rule should be followed despite divergence between rule and substantive justification, threatens my claims about extensional divergence, because it now appears that the outcome produced by direct application of *all* of a rule's justifications will match the outcome produced by the rule in every case except those in which the reason for having a rule at all is insufficient to overwhelm the force of the rule's substantive justifications. This decision procedure appears to be one in which the formal values of "ruleness" are recognized, but which also takes into account all relevant features in every particular case. This procedure, which we can designate as *rule-sensitive particularism*, is one in which the rules are rules of thumb in the sense of being transparent to their substantive justifications, but in which their very existence and effect *as* rules of thumb became a factor to be considered in determining whether the rules should be set aside when the results they indicated diverged from the results indicated by direct application of their substantive justifications. For suggestions about this type of decision procedure, see G. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 410-11, 446-48 (1986). Similar themes can be found in M. DETMOLD, THE UNITY OF LAW AND MORALITY (1984); Gans, *Mandatory Rules and Exclusionary Reasons*, 15 PHILOSOPHIA 373 (1986).

The desirability, and even the plausibility, of rule-sensitive particularism, however, seems to be a function of thinking about the advantages of rules from the perspective of reliance, certainty, and predictability. If these were the only values that rules were designed to serve, if these were the normally applicable rule-generating justifications, much could be said for rule-sensitive particularism, because judges and other decisionmakers could determine in each case whether avoiding the harsh strictures of the rule in this case would excessively defeat those values that justified having the rule in the first instance. But the conclusion may be different if we see rules as serving not so much as implements for achieving predictability, but as devices for the allocation of power. If the virtues of "ruleness" are seen to reside primarily in decisionmaker disability, then the difference between rule-sensitive particularism and the stronger form of rule-based decisionmaking I have been using up to this point becomes enormously important. If we are guided by a concern that certain decisionmakers should not be making certain kinds of decisions, such as the decision that this instance of speech is not one that serves the purposes for having freedom of speech, then authorizing a decisionmaker to determine whether this is the kind of decision with respect to which she should not be trusted appears, although not logically inconceivable, nevertheless psychologically bizarre. Similarly, authorizing a decisionmaker to determine whether in

free speech questions.[54] I do not want to take a position on this here. One should note, however, that because the questions about the virtues of "ruleness" are essentially empirical ones about particular institutions and particular arrays of decisionmakers, there is every reason to suppose that relevant variations in competence and in role occur even among those who wear robes and call themselves judges.

Thus, the central question about freedom of speech is as applicable to judicial as to nonjudicial free speech decisionmaking. For example, when we think about the free speech particularism of Justice Stevens,[55] we are drawn (or ought to be drawn) to think about whether that particularism provides sufficient guidance for nonjudicial officials and for lower court judges, decisionmakers we may not trust to apply background justifications directly to particular cases. At the level of the Supreme Court, however, the questions are slightly different. We must ask whether we want the Court itself to operate in an optimizing mode, recognizing that while that mode may reflect our highest aspirations, it may, at the same time, entail the greatest risks. Or, do we want the Court, like other officials, to be less concerned with optimizing in the individual case and more concerned with the case-specific suboptimality that may, in some contexts, be the optimal decision procedure in the long run. Finally, we must consider whether the very idea of

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this case the virtues of not trusting her will be outweighed by other considerations seems inconsistent with *this* type of rule-generating justification. If we do not trust a decisionmaker to determine x, then we can hardly trust that decisionmaker to determine that this is a case in which the reasons for disabling that decisionmaker from determining x either do not apply or are outweighed.

54. This view may be especially appealing once we think about doctrinal rules made (and changeable) by the Supreme Court. Although I have been talking about free speech as itself a rule, the rules about free speech are also rules, and most of what I have said applies *mutatis mutandis* to these rules when they are applied by courts other than the Supreme Court.

55. *See, e.g.*, Frisby v. Schultz, 108 S. Ct. 2495, 2508 (1988) (Stevens, J., dissenting); Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 35 (1986) (Stevens, J., dissenting); Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 691 (1986) (Stevens, J., dissenting); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 80 (1983) (Stevens, J., concurring); New York v. Ferber, 458 U.S. 747, 777 (1982) (Stevens, J., concurring); Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 79 (1981) (Stevens, J., concurring); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 544 (1980) (Stevens, J., concurring); FCC v. Pacifica Found., 438 U.S. 726, 729 (1978); Young v. American Mini-Theatres, Inc., 427 U.S. 50, 52 (1976) (Stevens, J., plurality opinion).

free speech dictates the latter and not the former, because with maximal particularism the constraints of categories, including the category of speech, fall by the wayside.

VIII

We can see that thinking about the advantages of case-specific suboptimality, of necessarily crude and underinclusive and overinclusive rules, and of second-best solutions, is pertinent throughout the range of free speech issues. Case-specific suboptimality is relevant in determining what kinds of free speech rules are most appropriate as guidance for frontline governmental officials who, far more than judges, determine how much the first amendment means in this country. Case-specific suboptimality is relevant also in determining what kinds of free speech rules the courts themselves should be bound by, for judges and not only other officials are frequently the objects of our distrust.[56] Most importantly, though, case-specific suboptimality is relevant in thinking about the very idea of free speech itself, for the idea of free speech, as contrasted with the justifications it is thought to serve, is itself an exercise in distrust, in suboptimality, and in the recognition of the frequent virtues of second-best solutions.

My analysis remains incomplete in an important way. As I have suggested, the essence of the idea of free speech lies in the idea of a rule, but the "ruleness" of a rule, as I have argued elsewhere,[57] is closely tied to a formalistic understanding of a rule's prescriptions. When a rule is formulated in language capable of comparatively noncontroversial application according to existing linguistic understandings, this is relatively nonproblematic. But when, as with the first amendment, and as with the idea of free speech itself, the rule exists in open ended and theory-laden language, the likelihood of a rule simply collapsing into its justification is great. If a rule-based understanding of the idea of free speech captures our intuitions about what free speech and the first amendment are all about, we must think about how, if at all, rule formulations can be simulta-

56. For a particularly relevant discussion of thinking about first amendment rules and first amendment discourse in terms of preventing the worst case, see Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

57. Schauer, *Formalism*, 97 YALE L.J. 509, 532-35 (1988).

neously theory-laden and constraining, informed by background justifications but extensionally divergent from those justifications. That task, however, must wait for another day.