I did not even dream of life as an academic during law school," said Lillian BeVier. There were no female professors to serve as role models during BeVier's student years at Stanford Law School. "There were but five women in my law school class. I think each of us was convinced that she could do anything she wanted in the profession if she worked hard enough—anything, that is, except teach."

Nevertheless, when, after a few years in practice, BeVier sought career advice from one of her former professors, he suggested she consider teaching. She took the advice and embarked on a career that soon led her to the University of Virginia, where she became a prolific and original First Amendment scholar.
BeVier's talent for staking out and defending unorthodox positions was evident from the first article she wrote as a member of the Virginia faculty, "The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle," 30 Stanford Law Review 299 (1978). The article responded to a critical conundrum in First Amendment theory. The dominant view, under which "speech" is broadly defined, recognizes that First Amendment protection cannot be absolute and requires constant assessment of the strength of the governmental interest in restricting certain forms of speech. The most well-known contrary view, associated with Robert Bork, is that only "political" speech is protected. Political speech, in this view, is limited to speech that participates in the process of representative democracy. Thus advocacy of the forcible overthrow of the government, for example, falls outside the protected sphere by definition. This approach makes it possible to extend almost complete protection, but to a narrow category of expression.

BeVier took a novel approach. She argued that restriction of the First Amendment to political speech was correct as a matter of principle, but rejected the conclusion that any judicial scrutiny of restrictions on non-political speech is therefore illegitimate. Instead, introducing a theme to which her scholarship has often returned, she contended that pragmatic and institutional considerations play a role in crafting appropriate rules of decision. The difficulty judges and juries would have, for example, in determining when speech strongly critical of the government is an attempt to participate in representative democracy or overthrow it, together with the institutional need for clear guidance, argue for rules that protect beyond the narrow field of political speech. Thus BeVier advocated a change in the normal default rule of First Amendment analysis of non-political speech—rather than asking whether a restriction could be justified by government necessity, courts should ask whether the need for a workable rule justified broadening coverage beyond political speech.

In subsequent articles, BeVier engaged many of the thorniest issues in First Amendment theory. She wrote on press access to criminal trials ("Like Mackerel in the Moonlight: Some Reflections on Richmond Newspapers," 10 Hofstra Law Review 311 (1982)), indirect burdens on religious practice ("The Free Exercise Clause: A View from the Public Forum," 27 William & Mary Law Review 963 (1986), and the public forum doctrine ("Rehabilitating Public Forum Doctrine: In Defense of Categories," 1992 Supreme Court Review 79). She has returned frequently to the regulation of campaign financing, becoming one of the country's foremost advocates of the view that such regulation is generally inconsistent with the First Amendment (more on page 9).

Recently, BeVier was invited to give a lecture to the Supreme Court Historical Society on "Free Expression in the Warren and Burger Courts" (excerpt follows, on page 11). Apart from the considerable scholarly distinction it conveys, the invitation presented BeVier with an opportunity that scholars prize—the chance to reflect broadly on the changes in her chosen field over roughly the last half century. BeVier found that stepping back and surveying the whole of First Amendment doctrine as it evolved over that period provided many surprises, even to a teacher and scholar daily steeped in the nuances of speech and press clause jurisprudence.

BeVier's speech begins by noting the dramatic expansion in First Amendment doctrine from 1953 to the present—a growth all the more remarkable because the incremental style of the changes made it easy to miss the fact that a revolution of sorts was taking place. As BeVier puts it, when Chief Justice Warren took office in 1953, the First Amendment was a flimsy set of restrictions on government regulation of speech, a "98-pound weakling" that, by the time of Chief Justice Burger's retirement in 1986, had grown into "the Jesse Ventura of constitutional amendments."

Two features of First Amendment jurisprudence, BeVier notes, typified its relative toothlessness in 1953. When confronted with a regulation of speech, the Supreme Court's dominant methodology was to balance the governmental interest served by the regulation with the challenger's expressive interests. The latter, moreover, was limited to the interest of the individual defendant, not expanded to embrace a public interest in free expression. Put that way, the government's more far-ranging purposes tended easily to prevail. A second feature was a tacit understanding that certain types of speech—"fighting words," obscenity, libel, commercial speech, and so on—were wholly outside the protective cloak of the First Amendment.
By 1986, the landscape had changed beyond recognition. The Court developed a “strict scrutiny” test that requires the government to demonstrate it has chosen the least restrictive means to further its purposes. Ancillary rules, such as the vagueness and overbreadth doctrines, aim to assure that regulations prove minimally restrictive in practice by disallowing laws that may deter protected speech, even though not expressly prohibiting it. The Court, moreover, has extended First Amendment protection to commercial speech, as well as some speech that is libelous, insulting, or lewd.

BeVier offers insight into the forces that caused the shift. One is the lack of a stable political or academic constituency arguing in favor of limiting the First Amendment’s reach. By contrast, the academic world is filled with theorists vying to champion the most capacious right of free speech. In the political realm, the most visible player in the First Amendment scene—the press—has an obvious incentive to advocate the enlargement of First Amendment rights, while the ACLU, another repeat player, is a longtime champion of free speech.

Another factor is an internal, methodological shift in the Supreme Court’s approach. Early in the Warren years, the Court, led by Justices Brennan and Harlan, began to analyze the First Amendment’s prohibitions not merely in terms of the constraints they put on government, but in terms of the incentives they provide for citizens to engage in expressive activity. By considering not only the formal prohibitions a challenged regulation embodies, but also its potential to deter non-prohibited speech, the Court set the stage for the First Amendment’s expansion. Today, less than a half century later, the First Amendment occupies a place of primacy among the civil liberties enshrined in the Constitution, even though that status was far from inevitable viewed prospectively.

Although the First Amendment has been the mainstay of BeVier’s scholarship, her writings also draw on her experience as an intellectual property teacher. She has produced an incisive article on false advertising suits under federal law, “Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception,” 78 Virginia Law Review 1 (1992). BeVier notes that while such suits are described as involving “deceptive” or “fraudulent” advertising, the facts of reported cases inevitably involve garden-variety negligence. Thus, she argues, these suits are unlikely to produce sufficient benefits to consumers to outweigh the associated enforcement costs.

As BeVier describes it, her work in intellectual property has helped her to see First Amendment issues from a fresh
perspective. Teaching and writing about false advertising led her to think about the First Amendment's commercial speech doctrine in the context of the substantive law of advertising. As a consequence, she has come to question the rationale for the starkly different First Amendment treatment of false or misleading commercial advertising, on the one hand, and false or misleading political speech, on the other.

BeVier expands on this theme in a chapter she is preparing for a book of essays on the First Amendment at the end of the twentieth century. Her chapter, “The Invisible Hand of the Marketplace of Ideas,” considers the market metaphor so common in First Amendment discourse. On the surface, it is quite surprising that commercial advertisers and newspapers, who provide information to educate the public about products and political issues, respectively, operate under wildly different liability regimes. If market forces cannot be trusted to keep advertisers honest, and their falsehoods impose considerable harm on consumers that must be corrected by stringent liability rules, why wouldn’t the same analysis support similarly stringent liability for the press’s misstatements? A reporter might argue that she is acting disinterestedly for the public’s good, in contrast to a profit-making business. To accept that argument, however, is to ignore what we know about human nature. If there is a justification, BeVier argues, it must lie elsewhere.

Instead of arguing for a sharp difference between the two contexts, BeVier contends that the marketplace of political ideas functions more effectively than we recognize. There are many decentralized and informal correctives for misleading political information, making stringent regulation through liability rules unnecessary for the purpose of protecting the public’s interest in accuracy. These arguments elegantly echo those she made against expansive liability rules for advertisers.

Even as she reflects on the state of free speech at the end of the century, BeVier is also analyzing the impact of new technologies on the conflict between the privacy of individual communications and the needs of law enforcement. In “The Communications Assistance for Law Enforcement Act of 1994: A Surprising Sequel to the Break Up of AT&T,” 51 Stanford Law Review 1049 (1999), she examined a statute requiring telecommunications carriers to use equipment that facilitates interception of communica-

tions by law enforcement agencies. Congress and the FBI described the act as a return to the pre-telecommunications revolution status quo that would enable law enforcement to keep pace with technological change. BeVier points out, however, that “in terms of the extent to which it purports to coerce private sector solutions to public sector problems, and in terms of the foothold it gives government to control the design of telecommunications networks, the act is a paradigm shift.” She locates the reasons for that shift within interest group conflict among law enforcement, the telecommunications industry, and advocacy groups.

It is this determination to see the intersection of government policy and communication as a broad set of interrelated problems, rather than a group of stand-alone issues under headings like “speech,” “copyright,” “broadcast regulation,” and so on, that keeps BeVier’s scholarship timely and original. The combination of intellectual property, telecommunications policy, campaign finance reform, and standard free speech controversies will continue to provide ample raw material for her inclusive approach to the regulation of expression.
Lillian BeVier entered the field of constitutional scholarship with considerable trepidation. "The field has always seemed to attract more than its fair share of scholarly giants, even when their theoretical ambitions were, by today's standards, relatively constrained," she said. But enter it she did, and she's never turned back.

Over the years, most of BeVier's scholarship has focused on the First Amendment. Never tiring of her topic, BeVier's interest in the First Amendment has been sustained for a number of reasons. Like most of her colleagues, BeVier enjoys the challenge of achieving a sense of doctrinal and theoretical mastery. In addition, "The First Amendment now covers much more territory than it did when I started to study it, so both doctrinal and theoretical changes are constantly presenting themselves," she says, "and they cry out to be accounted for somehow." She also has found over the years that the other courses she teaches provide her the opportunity to see the First Amendment from a variety of fresh perspectives.
A fourth reason may, according to BeVier, seem somewhat perverse, since “it has to do with the fact that, quite without intending to, I have turned out to be rather a contrarian, not so much in my attitude to what the Court has done, but rather with respect to my perspective on doctrinal developments in comparison to many in the legal academy.” Perhaps the most prominent example of this has been her attitude toward campaign finance regulations.

When BeVier began to study the First Amendment implications of campaign finance regulations, she had no idea what she would end up concluding. She had only one reason for deciding to write about the issue, and it was not to defend a preconceived position. Instead, it was the result of her efforts to achieve a deeper understanding of the campaign finance cases she was teaching in her First Amendment course. BeVier did a lot of reading, studying, and thinking about the issue before she reached any conclusions, but what she concluded was that the First Amendment’s protection of political freedom embraced the freedom to make political contributions and expenditures.

At first BeVier had found herself attracted by the arguments made by the campaign finance reformers who said that giving and spending money on political campaigns is “action” and not “speech,” and, as she explains, “I was intuitively slightly repelled by the notion that political giving and spending ought to be protected as speech for the crude reason that ‘money talks.’” However, she soon became convinced that contributing and spending money to support political candidates and political causes is core First Amendment activity, because the political communication that is purchased with expenditures and the support that is communicated with contributions are vital to democratic self-government, “and that is principally what the First Amendment is about.”

In addition, BeVier has argued that the Court should scrutinize strictly legislative efforts to “reform” the political process, not only because most campaign finance reforms turn out to be strongly incumbent protective, but also because legislators are at their least reliable as guardians of the broad public interest when they are attempting to redistribute political power. “I do not find the current political scene to be without flaws,” BeVier says, “but much of my support of the First Amendment with respect to campaign finance regulation stems from a conviction that any legislative cure is likely to be worse than the disease.”

The position BeVier has staked out has placed her outside the main body of campaign finance regulation scholarship. “I found myself swimming against the academic tide because I have defended the position that the First Amendment is and ought to be a powerful barrier to most of the reforms that have been on the legislative agenda since Buckley v. Valeo (424 U.S. 1 (1976)) was decided.”

Several scholars have begun to embrace views similar to her own. While she enjoys the company, BeVier has never shied away from championing unorthodox positions, and as she continues to tackle some of the First Amendment’s thorniest issues, she is sure to find herself on the outside again—or perhaps she is simply leading the way.
Free Expression in the Warren and Burger Courts

by Lillian R. BeVier

Despite seeds of doctrinal growth, the overall picture of pre-Warren Court First Amendment doctrine is of rules and methodologies that offered fragile and undependable protection to a far-from-inclusive set of expressive activities. Sensitive though the Court claimed to be, and occasionally was, in weighing conflicting interests, its decisional tools lacked analytical subtlety, rested on a narrow view of what the stakes were in free speech cases, and avoided having to confront difficult theoretical issues by unquestioningly embracing the apparently conventional wisdom embodied in the categorical exclusions.
Contrast this with the First Amendment in 1986, when Chief Justice Burger retired. A transformation had occurred. The 98-pound weakening of 1953 had become the Jesse Ventura of constitutional amendments. Look at just four examples of where the First Amendment had got to.

First, the Court no longer engaged in ad hoc balancing in First Amendment cases. Instead, when a challenger was able to persuade the Court that legislation burdened First Amendment rights, the Court engaged in strict scrutiny, requiring the government to defend the law by demonstrating that it served a compelling state interest by the least restrictive means. Second, in place of an implicit conception of law as a “transparently ideal set of commands or regulations” that constitutional doctrine could assume operated within a frictionless and error-free world, the Court had adopted an approach that impelled it to try to craft rules explicitly to accommodate and correct for law’s opacity, officials’ temerity, and citizens’ failures of nerve. For example, it had firmly and self-consciously put in place techniques of adjudication and substantive doctrines, such as vagueness and overbreadth, that attempted to avert the danger “of tolerating, in the area of [delicate, vulnerable and precious] First Amendment freedoms, the existence of ... penal statute[s] susceptible to sweeping and improper application, to prevent substantive First Amendment violations by erecting procedural barriers to speech regulation, and to craft rules that, by giving freedom of expression “breathing space,” would foster “uninhibited, robust, and wide-open public debate.” Moreover, the Court had begun to link its results directly to rationales that took account of the foibles of both private and legal actors and that tried to implement a disparate array of instrumental First Amendment theories. Third, the shifting, open-ended, unpredictable and unreliably protective clear-and-present danger test had given way to a considerably harder and faster Brandenburg rule that “the constitutional
The Court had "carefully limited" the permissible substantive scope of regulation under the obscenity rubric to "works which depict or describe sexual conduct [that is] specifically defined by the applicable state law." Indeed, it had even concluded that nude dancing was "not without its First Amendment protections."

Excerpted from "Free Expression in the Warren and Burger Courts," forthcoming in the Journal of Supreme Court History.
Publications of Lillian R. BeVier


Campaign Finance “Reform” Proposals: A First Amendment Analysis (CATO Institute, 1997).


