PROPOSED QUESTIONS FOR JUDGE BREYER

(1) QUESTION: "When your nomination was announced, you stated that your aspiration was to make the law work for 'ordinary people'. By that, did you mean, simply, that the law should serve the interests of the majority of the people? Or do you mean, also, that it should enhance their opportunity and capacity to participate actively in our democratic political life?"

Comment: For two reasons, all of the proposed questions get at matters of general attitude, not specific cases. First, nominees have learned to avoid specific questions. And, second, matters of attitude matter, and questions about attitude may actually stick with the nominee after confirmation. This first question -- again like the others -- is written so as to make it very likely that the nominee will hear himself making the desired answer. In this instance, the answer sets up the most fundamental problem of law in the late twentieth century: Do we want -- and can we have -- government for the people without government of and by the people?

(2) QUESTION: "The constitutional provision whose interpretation has most to do with the participation of ordinary people in our democracy is the Free Speech clause. Do you agree with Justice Brennan's reading of that clause that speech should be 'free, robust and wide open'? And, if so, what does that mean, in particular, for the opportunity and capacity for ordinary people to speak effectively?"

Comment: Justice Brennan offered this famous formula -- of great symbolic importance to constitutional lawyers -- in United States v. Robel, 389 U.S. 258 (1967). It represents one magnetic pole of free speech argument. Yet no lawyer will reject it.

(3) QUESTION: "Do you, then, agree that free speech protection should not be limited to the most politely 'reasonable' 'exposition of ideas' -- that it should extend to modes of expression most characteristic of ordinary people?"

Comment: The question invites the nominee to forswear the other magnetic pole of free speech argument. For decades, conservatives have used this formula to bias constitutional protection against ordinary people.

(4) QUESTION: "Do you agree, also, that the First Amendment demands more than a right of ordinary people to read or hear speech -- that it demands that they be empowered to participate, effectively, in speech themselves?"

Comment: In recent years, many conservatives have tried to collapse the right to produce speech into a

right to consume the speech of others. This, obviously, favors the powerful and well-to-do at the expense of ordinary people who do not own a broadcast license or other medium for promulgating their views?

(5) QUESTION: "Do you, then, agree with Justices White and Powell that the Amendment is concerned, importantly, with the distribution of effective opportunities to speak? That the very well-to-do or corporations should not be protected in 'drowning out' the speech of ordinary people? Or do you take the view that this concern is 'foreign' to the First Amendment?"

Comment: This gets to the crux. The pernicious idea that distributional concerns are "foreign" to the Amendment was famously stated in Buckley v. Valeo, 424 U.S. 1 (1976). Justice White's counter-view was stated not only in his Buckley opinion, but most notably in his majority opinion in Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969). Justice Powell's recognition of a "drown-out" concern came in First National Bank v. Bellotti, 435 U.S. 765 (1978).

(6) QUESTION: "Very often, the opportunity of ordinary people to speak effectively depends on access to forums for speech controlled and used by the well-to-do corporations. In recent years, some have interpreted the First Amendment to deny them this opportunity. Some have said that 'property' rights override free speech rights or that access would impermissably 'coerce' the rich to join in the speech of ordinary people, or that access must be denied to ordinary people because, otherwise, the rich supposedly would stop speaking themselves. What do you think of this idea that the rights of the well-to-do to speak 'trump' the rights of the majority of people?"

Comment: Now, we're in territory worrying to any nominee. But it poses one of the most vital problems of free speech law -- a problem which the Burger and Rehnquist Courts have often resolved in favor of the rich and corporations. Examples are Pacific Gas & Electric Co. v. Public Utilities Commission, 475 U.S. 1 (1986) and Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974). The great Warren Court opinion (by Justice Marshall) taking the other view was Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968) (now overruled). In 1980, the Court at least allowed States, if they so choose, to compel access to some such forums in Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

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