

SECOND THOUGHTS ABOUT THE FIRST AMENDMENT

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Working Draft (April 14, 2014)*

The U.S. Supreme Court has shown a notable willingness to reconsider—and depart from—its First Amendment precedents. In recent years the Court has overruled its past decisions on corporate electioneering. It has marginalized its prior statements regarding the constitutional value of false speech. It has even revamped its process for identifying categorical exceptions to First Amendment protection.

In the ordinary course of adjudication, dubious precedents enjoy a presumption of validity through the doctrine of stare decisis. This Article contends that within the First Amendment context, there is no such presumption. When the Court concludes that a given precedent reflects a cramped vision of expressive liberty, adherence to the past quickly gives way. Unfettered expression, not legal continuity, is the touchstone.

The explanation for this phenomenon is the perceived role of free speech in the constitutional order. The modern Court's tendency is to view affronts to expressive liberty as dangerous steps toward governmental repression and distortion. From this perspective, it is little wonder that the Court eschews continuity with the past. Legal stability may be significant, but official orthodoxy seems like an excessive price to pay.

Yet the Court's practice raises serious questions. Departures from precedent can carry substantial costs, especially when departures become so commonplace as to threaten the notion of constitutional law as enduring and impersonal. For those who ascribe significant value to doctrinal stability and the rule of law, there is a strong argument that the virtuous desire to protect expressive liberty must yield, at least occasionally, to the need for keeping faith with the past.

The Article concludes by looking to the future of First Amendment jurisprudence. Several pockets of law, ranging from broadcast regulation to commercial advertising to campaign finance (and beyond), are primed for reassessment in the coming years. Without a meaningful doctrine of stare decisis, the precedents in those areas are only as firm as their reasoning is persuasive.

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INTRODUCTION

Consider the following principles of First Amendment jurisprudence:

- False statements of fact have intrinsic constitutional value.¹
- Any categorical exceptions to First Amendment protection must be based on historical practice rather than analysis of costs and benefits.²
- Corporations have an unfettered right to spend money in support of political candidates.³
- Requiring public employees to “opt out” of paying fees to a labor union violates the First Amendment under certain circumstances.⁴
- Governments may not limit the aggregate amount of campaign contributions made by donors.⁵

The common thread uniting these principles is that not one was established as recently as five years ago. Indeed, all of them were contradicted by the U.S. Supreme Court’s prior caselaw. Yet the Court chose to revise each of these important areas of First Amendment doctrine.

There is another striking aspect to these new rules of expressive liberty. In the opinions that announced them, the Supreme Court ascribed little import to the doctrine of stare decisis, which generally requires the retention of precedent absent an exceptional basis for overruling.⁶ In some of the cases, the Court said nothing at all about stare decisis. In others, the Court acknowledged fidelity to precedent as an abstract principle but concluded that stare decisis should not stand in the way of correcting perceived constitutional mistakes. Back in 2007, Justice Scalia noted that “[t]his Court has not hesitated to

¹ See *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

² See *United States v. Stevens*, 130 S. Ct. 1577 (2010).

³ See *Citizens United v. FEC*, 558 U.S. 310 (2010).

⁴ See *Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277 (2012).

⁵ See *McCutcheon v. FEC*, 572 U.S. __ (2014).

⁶ See, e.g., *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1996) (“[E]ven in constitutional cases, the doctrine [of stare decisis] carries such persuasive force that we have always required a departure from precedent to be supported by some ‘special justification.’”) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (Souter, J., concurring) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984))).

overrule decisions offensive to the First Amendment.”⁷ That observation has become all the more resonant as the Court has deviated from precedent in order to expand expressive freedom.

There are two ways to understand this phenomenon. The first is that *stare decisis* is, generally speaking, an exercise in empty rhetoric. On this account, invocations of precedent are purely semantic devices. *Stare decisis* never leads the Court to issue a ruling it would otherwise reject, so it should come as little surprise when the Court brushes aside disfavored precedents.⁸ Yet this explanation is problematic, in part because it refutes the Court’s own descriptions of its attitude toward precedent. The Court has emphasized that deference to precedent is the rule rather than the exception. And in some cases, the Court has opted to retain a rule despite acknowledging concerns about its soundness.⁹ Precedent thus plays a role beyond rhetorical flourish.

The second way to understand the recent First Amendment innovations operates on the assumption that the Court is serious about its expressed fidelity to precedent. The puzzle becomes why that posture toward precedent is continually overcome in the First Amendment context. The answer, this Article contends, is that the Court has been applying a specialized and diluted version of *stare decisis* in First Amendment cases. First Amendment *stare decisis* does not share the conventional presumption that past decisions must be upheld absent an exceptional reason for departure. To the contrary, the Court has embraced a presumption that underrecognition of First Amendment rights should be rectified even at the expense of legal stability. In the battle between speech and stability, speech usually wins out.

This is not the same as saying there is a specialized version of *stare decisis* for *all* First Amendment cases. Only a subset of those cases is at issue: Cases in which the Court previously erred by failing to recognize an expressive liberty that should (in the estimation of today’s justices) have been protected. Where the dynamic is reversed—where, that is, the Court concludes that it improperly recognized an expressive liberty that turns out not to have a

⁷ *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in the judgment).

⁸ This position is often bolstered by appeals to social science literature. See Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1111 (2008) (discussing the “injection of acidly skeptical writing—much of it by political scientists—questioning whether *stare decisis* actually matters in Supreme Court decisionmaking”).

⁹ See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3030–31 (2010); *Dickerson v. United States*, 530 U.S. 428, 443 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 861 (1992); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 571 (2001).

constitutional basis—there is every reason to believe that the standard, deferential posture toward precedent remains in place.

Focusing on the operation of *stare decisis* within the First Amendment context helps to explain the Court’s recent decisions expanding the freedom of speech. It also offers lessons for the future. There are simmering debates in a number of areas ranging from television and radio broadcasting to commercial advertising to campaign contributions.¹⁰ If recent practice holds, we can expect that *stare decisis* will have little or no role to play in dissuading the Court from expanding First Amendment rights. Instead, the law will become whatever a majority of justices believes the Constitution to demand.

In one sense, it is difficult to find anything objectionable about such an approach. After all, depriving a speaker of her constitutionally guaranteed liberty seems like a high price to pay for allowing the law to remain undisturbed. And as Chief Justice Burger once observed, freedom of speech “is an area in which there are few eternal verities,” which may imply the need for doctrinal updating.¹¹ Still, the value of legal continuity cannot so easily be dismissed. If the doctrine of *stare decisis* is to achieve its aspiration of imbuing the law with a sense of stability, predictability, and impersonality, it must occasionally demand allegiance even when the stakes are high.

This Article begins in Part I by describing the Court’s recent First Amendment innovations, which have yielded a jurisprudence that looks substantially different from the one that existed just a few years ago. The Part pays particular attention to the Court’s discussions of precedent, which are notable for their lack of concern about factors such as continuity and stability that play a prominent role in other contexts. In Part II, the Article distills the Court’s innovations into a specialized precedent rule for situations in which expressive liberties have previously been constrained. Part III evaluates the attractiveness of this specialized doctrine of First Amendment *stare decisis*. The Part suggests that notwithstanding its benefits for robust expression, the diluted version of *stare decisis* creates a meaningful threat of jeopardizing the impersonality and stability of the law of free speech. Finally, Part IV projects the analysis forward by examining the implications of diluted *stare decisis* for ongoing debates over the contours of First Amendment protection.

I. THE FIRST AMENDMENT IN FLUX

As a doctrinal matter, the freedom of speech looks markedly different today than it did a decade ago. Some of the changes have taken the form of outright overrulings. Other changes have occurred more obliquely. This Part

¹⁰ See *infra* Part ____.

¹¹ *Miller v. California*, 413 U.S. 14, 22–23 (1973).

describes the Supreme Court’s recent innovations in expressive liberty, each of which represents a break from preexisting caselaw.

A. False Speech

Even when it is controversial or incendiary, truthful speech generally receives First Amendment protection. The underlying principle is that truthful speech enriches the marketplace of ideas to the benefit of society at large.¹²

For much of the past century, the Supreme Court recognized no comparable value in factual statements that are *false*. False statements occasionally received constitutional protection, as in the famous “actual malice” test articulated in *New York Times Co. v. Sullivan*.¹³ In *Sullivan*, the Court held that in defamation suits involving public figures and matters of public concern, it is not enough for a plaintiff to show that the defamatory speech was false.¹⁴ Rather, the defendant must have disseminated the offending statements with a mens rea of actual malice, defined as knowledge of the statements’ falsity or reckless disregard for their accuracy.¹⁵ The practical takeaway from *Sullivan* was that publishers would be insulated from liability so long as their misstatements were neither intentional nor reckless.

As for why speakers should ever receive protection for spreading falsehoods, *Sullivan* was not entirely clear. Some of the Court’s language depicted the protection of falsehood as prophylactic. Robust debate would “inevitab[ly]” lead to the dissemination of some falsehoods and the chilling effects would be too great if every utterance carried with it the prospect of liability.¹⁶ What is needed is “breathing space” around the false speech to enable the true speech to flourish.¹⁷ But the Court also indicated—following Mill and Milton—that false speech may carry its own, independent value by serving as a foil for truth.¹⁸ The Court suggested that the marketplace of ideas

¹² See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing “that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out”).

¹³ 376 U.S. 254 (1964).

¹⁴ See *id.* at 279 (“[W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.”).

¹⁵ See *id.* at 279–80.

¹⁶ *Id.* at 271.

¹⁷ *Id.* at 272 (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“[P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.”).

¹⁸ See *Sullivan*, 376 U.S. at 279 n.19 (“Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier

operates more effectively with falsity in the mix, because the juxtaposition of falsehood leads to a “clearer impression and livelier impression of truth.”¹⁹

In the ensuing years, the Court focused on the prophylactic justification for *Sullivan*’s rule and distanced itself from the idea that falsity is protected for its own sake.²⁰ Within the defamation context, the Court underscored that “there is no constitutional value in false statements of fact.”²¹ Dubious *opinions* receive the First Amendment’s full protection, but inaccurate *facts* do not.²² The Court reiterated the same principle in other cases, noting in a discussion of commercial regulation that “[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake.”²³ And in what is perhaps the most emphatic example, involving a claim for intentional infliction of emotional distress, the Court described false statements as “particularly valueless.”²⁴ Falsity, the Court explained, actually “interfere[s] with the truth-seeking function of the marketplace of ideas.”²⁵ On that account, the dissemination of falsehood subverts a central objective of First Amendment protection.

The value of false speech came to the forefront again in 2010 as the Court considered *United States v. Alvarez*.²⁶ That case dealt with the Stolen Valor Act, which criminalized false claims of military commendation.²⁷ *Alvarez* did not involve any defamation or fraud, but that fact would be irrelevant if false speech was, as the government asserted, utterly lacking in First Amendment value.²⁸ Writing for a plurality, Justice Kennedy recharacterized the Court’s previous descriptions of false speech. According to the plurality, although there was language in prior decisions suggesting that false statements are valueless, that language must be understood in context. Rather than

impression of truth, produced by its collision with error.”) (quoting J.S. MILL, ON LIBERTY 15 (Oxford: Blackwell, 1947), and citing J. MILTON, AREOPAGITICA, in *Prose Works* (Yale, 1959), Vol. II, at 561)).

¹⁹ *Id.* (quoting J.S. MILL, ON LIBERTY 15 (Oxford: Blackwell, 1947)).

²⁰ See David S. Han, *Autobiographical Lies and the First Amendment’s Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 76–77 (2012) (noting that in *Gertz*, the Supreme Court “apparently rejected the notion that false factual speech could have any independent constitutional value”).

²¹ *Gertz*, 418 U.S. at 340; see also *id.* (“Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

²² See *id.* at 339–40.

²³ *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

²⁴ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988).

²⁵ *Id.*

²⁶ 132 S. Ct. 2537 (2012).

²⁷ See *id.* at 2542–43.

²⁸ See Brief for the United States 18 (No. 11-210) (Dec. 1, 2011).

demonstrating “that false statements, as a general rule, are beyond constitutional protection,” the Court’s prior pronouncements related only to issues of “defamation, fraud, or some other legally cognizable harm associated with a false statement.”²⁹ While falsity “was not irrelevant” to the Court’s prior decisions, “neither was it determinative.”³⁰ The *Alvarez* plurality thus disputed the existence of any “categorical rule” that “false statements receive no First Amendment protection.”³¹

In a dissent joined by Justices Scalia and Thomas, Justice Alito criticized the plurality’s treatment of precedent. He noted that “[t]ime and again, the Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value.”³² The plurality’s contrary conclusion “represents a dramatic—and entirely unjustified—departure from the sound approach taken in past cases.”³³ In Justice Alito’s view, the only valid basis for protecting false speech had been, and should remain, prophylaxis: “The lies covered by the Stolen Valor Act have no intrinsic value and thus merit no First Amendment protection unless their prohibition would chill other expression that falls within the Amendment’s scope.”³⁴

What is most noteworthy about *Alvarez* is how easily the plurality overcame the pull of precedent. As the plurality conceded, over the years the Court had stated several times that false speech has no inherent First Amendment value. The plurality’s decision to cabin that rule to the contexts of “defamation, fraud, or some other legally cognizable harm associated with a false statement” may or may not have been justifiable, but it certainly represented a deviation from the Court’s prior explanations of its rationale.³⁵ In such situations, the customary response is to apply the doctrine of stare decisis, which is a well-established framework for assessing whether adjudicative changes are warranted. Yet the *Alvarez* plurality did no such thing.

²⁹ *Alvarez*, 132 S. Ct. at 2544–45 (plurality op.).

³⁰ *Id.* at 2445.

³¹ *Id.*

³² *Id.* at 2560 (Alito, J., dissenting).

³³ *Id.* at 2562 n.14.

³⁴ *Id.* at 2563.

³⁵ *Alvarez*, 132 S. Ct. at 2545 (plurality op.); see also, e.g., Brief of Professors Eugene Volokh and James Weinstein as *Amici Curiae* in Support of Petitioner at 1–2, in *U.S. v. Alvarez*, No. 11-210 (Dec. 6, 2011) (“Consistent with this Court’s repeated observation that ‘there is no constitutional value in false statements of fact,’ various state and federal laws restrict a wide range of knowingly false statements, and not just the familiar categories of defamation, fraudulent solicitation of money, and perjury. Most of these laws are broadly accepted as constitutional”) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)).

One might respond that the Court’s prior pronouncements about the worthlessness of false statements were undeserving of deference because they took the form of dispensable dicta rather than binding holdings. But that response is unsatisfying, for the Court commonly defines the scope of its precedents in capacious terms.³⁶ Though its practice is not entirely consistent, the Court has left behind the notion that only the narrow holdings of its decisions are binding in future cases. To the contrary, the Court has indicated that deference attaches to a “well-established rationale upon which the Court based the results of its earlier decisions.”³⁷ That is, “the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.”³⁸ The justices have also treated the durability of a decision as depending upon the continued vitality of its underlying rationale, further cementing the understanding of precedential effect as extending to rules and reasons alike.³⁹

Why, then, was the *Alvarez* plurality so willing to marginalize and dismiss its past pronouncements that false speech has no inherent value? I submit that the answer relates to the substantive liberty at issue. Underlying the plurality’s analysis in *Alvarez* was an abiding commitment to expressive liberty, coupled with an abiding distrust of governmental efforts at suppression. The plurality held up the case—a case involving blatant lies about one’s military record—as “illustrat[ing], in a fundamental way, the reasons for the Law’s distrust of content-based speech prohibitions.”⁴⁰ For the plurality, it was but a short step from the Stolen Valor Act to “Oceania’s Ministry of Truth.”⁴¹ At issue was nothing less than the government’s “broad censorial power” over its citizens.⁴² The plurality’s departure from precedent was its way of staving off governmental repression.

³⁶ See Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. __, __ (forthcoming 2014).

³⁷ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66–67 (1996).

³⁸ *Id.* at 67 (quoting *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part)); see also *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 490 (1986) (O’Connor, J., concurring in part and dissenting in part) (“Although technically dicta, the discussion [of a relevant statute in a previous decision] was an important part of the Court’s rationale for the result it reached, and accordingly is entitled to greater weight than the Court gives it today.”).

³⁹ See *Citizens United v. FEC*, 558 U.S. 310, 363 (2010) (“When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished.”); *id.* at 384 (Roberts, C.J., concurring) (“There is . . . no basis for the Court to give precedential sway to reasoning that it has never accepted, simply because that reasoning happens to support a conclusion reached on different grounds that have since been abandoned or discredited.”).

⁴⁰ *Alvarez*, 132 S. Ct. at 2547 (plurality op.).

⁴¹ *Id.* at 2547; see also *id.* (“Were this law to be sustained, there could be an endless list of subjects the National Government or the States could single out.”).

⁴² *Id.* at 2547–48.

B. Categorical Exceptions to Protection

Not all speech is entitled to full First Amendment protection. There are certain categories of speech whose restriction does not offend the Constitution. Obscenity,⁴³ threats,⁴⁴ and incitement⁴⁵ are among the familiar examples. Governments have considerable discretion to restrict such speech as they see fit.⁴⁶ That discretion is particularly significant for content-based regulations that would otherwise face the daunting task of surviving strict scrutiny.⁴⁷

Since at least the middle of the twentieth century, it appeared that one way to identify categorical exceptions to First Amendment protection was through a comparative analysis of costs and benefits. In *Chaplinsky v. New Hampshire*, the Court made clear that “fighting words,” which “by their very utterance inflict injury or tend to incite an immediate breach of the peace,” can be punished without raising First Amendment concerns.⁴⁸ In explaining its decision, the Court noted that “such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”⁴⁹

⁴³ See, e.g., *Miller v. California*, 413 U.S. 15, 19–20 (1973) (“[W]e are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing on the First Amendment as applicable to the States through the Fourteenth Amendment.”).

⁴⁴ See, e.g., *Virginia v. Black*, 538 U.S. 343, (2003) (“[T]he First Amendment . . . permits a State to ban a ‘true threat.’”) (quoting *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam)).

⁴⁵ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

⁴⁶ There is a limited exception for situations in which the government seeks to enact content-based distinctions within a given category of unprotected speech. See *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 384 (1992) (“[T]he government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.”).

⁴⁷ See, e.g., *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729, 2738 (2011) (“Because the [relevant statute] imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest.”).

⁴⁸ 315 U.S. 568, 572 (1942).

⁴⁹ *Id.*; cf. ZECARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 150 (1941) (“The true explanation is that profanity and indecent talk and pictures, which do not form an essential part of any exposition of ideas, have a very slight social value as a step toward truth, which is clearly outweighed by the social interests in order, morality, the training of the young, and the peace of mind of those who hear and see.”) (cited in *Chaplinsky*).

Chaplinsky's broader lesson appeared to be that "there are some categories that are not covered by the First Amendment" for the simple reason that the relevant "speech . . . is not worth it."⁵⁰ Put differently, it seemed that if a particular category of speech causes great harm but produces only meager benefits, cost-benefit analysis might justify treating the speech as subject to restriction based on its content. As the Court noted in *New York v. Ferber*, a subsequent case dealing with the restriction of child pornography:

[I]t is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.⁵¹

The Court reiterated these sentiments ten years later in *R.A.V. v. City of St. Paul*. In that case, the Court returned to *Chaplinsky* and explained that the First Amendment "has permitted restrictions upon the content of speech in a few limited areas" involving speech whose harms clearly outweigh its virtues.⁵² The Court followed suit in 2007, noting that "speech that is obscene or defamatory can be constitutionally proscribed because the social interest in order and morality outweighs the negligible contribution of those categories of speech to the marketplace of ideas."⁵³

This understanding changed dramatically in 2010, when the Court decided *United States v. Stevens*.⁵⁴ *Stevens* involved a federal statute directed at depictions of animal cruelty.⁵⁵ One of the government's arguments in defending the statute was that depictions of animal cruelty should be denied protection based "upon a categorical balancing of the value of the speech against its societal costs."⁵⁶ But despite the endorsements of cost-benefit analysis in prior cases, the *Stevens* Court dismissed the government's contention. The Court acknowledged that it had often "*described* historically unprotected categories of speech" as carrying high costs and meager

⁵⁰ Mark Tushnet, *The First Amendment and Political Risk*, 4 JOURNAL OF LEGAL ANALYSIS 103, 113 (2012) (quoting *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2012)).

⁵¹ 458 U.S. 747, 763–64 (1982); see also *id.* at 764 ("When a definable class of material . . . bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.").

⁵² 505 U.S. 377, 382–83 (1992) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

⁵³ *Davenport v. Washington Education Ass'n*, 551 U.S. 177, 188 (2007).

⁵⁴ 130 S. Ct. 1577.

⁵⁵ See *id.* at 1582–83.

⁵⁶ *Id.* at 1585 (quoting Brief for the United States 18 (No. 08-769) (June 8, 2009)).

benefits.⁵⁷ Nevertheless, such descriptions “do not set forth a test that may be applied as a general matter.”⁵⁸ Rather, the proper question is whether a category of speech has been “*historically* unprotected.”⁵⁹ Without a basis in history, no amount of cost-benefit analysis can deny full protection to a category of speech.⁶⁰

As in *Alvarez*, the Court in *Stevens* offered little discussion of the value of continuity. Instead, the Court brushed aside its acceptance of cost-benefit analysis as inconsequential window-dressing.⁶¹ Yet the Court’s distinction between the *articulation* of rules and the *description* of those rules is unsatisfying. As noted above, the Court commonly characterizes its underlying rationales as entitled to deference in future cases.⁶² The question is why the Court was so willing to break from the past in *Stevens*.

Once again, the key is the nature of the right being protected. To the *Stevens* Court, the previous approach to speech restrictions was insufficiently protective of speakers’ rights. In the words of *Stevens*, the application of cost-benefit analysis is not just incorrect, it is “startling and dangerous.”⁶³ Such an approach contravenes the balance struck by the First Amendment itself, which “reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.”⁶⁴ Only by limiting First Amendment exceptions to “long-established categor[ies]” could the Court quell the threat posed by cost-benefit analysis and “highly manipulable balancing test[s].”⁶⁵

C. Corporate Electioneering

⁵⁷ *Id.*

⁵⁸ *Id.* at 1586.

⁵⁹ *Id.* (emphasis added); see also Tushnet, *First Amendment and Political Risk*, *supra* note __, at 113 (“To the extent that the Court offered a defense of choosing the historical rather than the functional interpretation of *Chaplinsky*, it relied on a common but misleading trope in recent decisions.”).

⁶⁰ Subsequent cases have followed suit. See *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729, 2734 (2011) (“[I]n *Stevens*, we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated.”); *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (plurality op.).

⁶¹ See *supra* Part __.

⁶² See *supra* Part __; see also Kozel, *Scope of Precedent*, *supra* note __, at 32–36.

⁶³ *Stevens*, 130 S. Ct. at 1585.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1586; but cf. Tushnet, *First Amendment and Political Risk*, *supra* note __, at 118 (noting, though expressing skepticism about, the argument that “understanding themselves to have the power to create categories of uncovered expression, legislators will be tempted to respond to constituents’ concerns about forms of expression the constituents find particularly distasteful by seeking to regulate the utterances without seriously considering whether the harms caused by the utterances truly outweigh the social benefits of their dissemination”).

The previous two Sections dealt with cases in which the Supreme Court departed from the *language* of its past decisions. In both cases, the Court denied that it was overturning a previous *holding*. As a result, the Court saw no need to invoke the doctrine of stare decisis.

In another recent case, however, the Court unequivocally disagreed with the holding of a past decision. The doctrine of stare decisis was put in play, though it would not prevent the Court from breaking new ground.

The case in question is *Citizens United v. Federal Election Commission*,⁶⁶ one of the most heavily (and Presidentially) criticized decisions in modern memory.⁶⁷ At issue was the right of corporations and labor unions to endorse or criticize candidates for federal office. That right was constrained by provisions of federal law that barred corporations and unions “from using their general treasury funds for express advocacy or electioneering communications.”⁶⁸

From one perspective, *Citizens United* presented a fact-intensive challenge regarding the application of electioneering restrictions to a documentary about then-Senator and presumptive presidential candidate Hillary Clinton.⁶⁹ The documentary, entitled *Hillary: The Movie*, was to be released to cable television subscribers via a video-on-demand service.⁷⁰ The film’s creator, Citizens United, straddled the line between different types of organizational speakers: it was a nonprofit corporation that received most of its funding from individual donors, but it “accept[ed] a small portion of its funds from for-profit corporations.”⁷¹

The case was initially shaped by these distinctive facts. Among the arguments that Citizens United advanced was that the rationale for restricting corporate expenditures could not extend to “feature-length movies distributed through Video on Demand,” because such movies are “far less likely than broadcast advertisements to reach and persuade undecided voters.”⁷² Citizens United also relied on its funding model, asserting that “any anti-corruption

⁶⁶ 558 U.S. 310 (2010).

⁶⁷ See Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 414 (2013) (calling *Citizens United* “one of the most reviled decisions of the Supreme Court in recent years”); Barack H. Obama, President of the United States, *Remarks by the President in the State of the Union Address* (Jan. 27, 2010) (criticizing the *Citizens United* decision as having “reversed a century of law” and “open[ing] the floodgates for special interests—including foreign corporations—to spend without limit in our elections”).

⁶⁸ *Citizens United*, 558 U.S. at 321.

⁶⁹ See *id.* at 319–20.

⁷⁰ See *id.* at 320.

⁷¹ *Id.* at 319.

⁷² Brief of Appellant 13 (No. 08-205) (Jan. 8, 2009).

interest that the government might have . . . would not reach movies that, like *Hillary*, are funded primarily through individual donations.”⁷³ And it disputed that its documentary constituted advocacy against Senator Clinton’s presidential aspirations.⁷⁴

Following oral argument, the Supreme Court ordered additional briefing and argument on the status of two precedents.⁷⁵ The first, *Austin v. Michigan Chamber of Commerce*, had upheld a restriction on the use of corporate treasury funds to advocate for or against political candidates.⁷⁶ That decision was effectively reaffirmed in *McConnell v. Federal Election Commission*, with the Court recognizing “Congress’ power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates.”⁷⁷

During its second round of briefing and argument, the *Citizens United* Court considered the fate of these precedents. Ultimately, a five-justice majority squarely rejected *Austin* and the relevant portion of *McConnell*. Unlike its recent engagements with false speech and categorical exceptions to protection, the Court’s opinion in *Citizens United* explicitly acknowledged that it was overruling the holdings of applicable precedents. The Court dutifully stated its obligation to respect precedent “unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.”⁷⁸ Still, it renounced the rule of *Austin* and *McConnell* and concluded that independent campaign expenditures by corporations do not lead to corruption or its appearance, leaving no valid basis for governmental restriction.⁷⁹

The Court’s willingness to overrule cohered with its depiction of the constitutional stakes. In the view of the *Citizens United* majority, by treating corporations differently from other speakers, the *Austin* rule reflected a profoundly dangerous principle. The rule allowed the government to use its coercive powers to “command where a person may get his or her information

⁷³ *Id.*

⁷⁴ See *id.* at 14.

⁷⁵ See U.S. Supreme Court Order Directing Supplemental Briefing (No. 07-2240) (June 29, 2009) (“For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C § 441b?”).

⁷⁶ See 494 U.S. 652, 668–69 (1990).

⁷⁷ 540 U.S. 93, 203 (2003). *McConnell* extended this principle beyond express advocacy to all “electioneering communications.” See *id.* at 204; *id.* at 189–90 (discussing the statutory definition of “electioneering communication”).

⁷⁸ *Citizens United*, 558 U.S. at 362.

⁷⁹ *Id.* at 357 (“[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”).

or what distrusted source he or she may not hear.”⁸⁰ In so doing, *Austin* allowed the government to “use[] censorship to control thought.”⁸¹ Chief Justice Roberts echoed the point in his concurrence, arguing that *Austin*’s “logic threatens our First Amendment jurisprudence and the nature of public discourse more broadly.”⁸² *Austin*, in other words, was nothing short of disastrous, a wrench in the works of public discourse and a facilitator of thought control. The decision was (in the eyes of the majority) incorrect and deeply harmful, so it simply had to be overruled, irrespective of any general principle of stare decisis.

II. EXPRESSIVE LIBERTY AND THE (ALMOST) IRRELEVANCE OF PRECEDENT

The Supreme Court’s willingness to break from First Amendment precedent is reason for reevaluating the doctrine of stare decisis as it applies to the freedom of speech. This Part begins with a brief overview of the Court’s customary approach to precedent before arguing that the operation of stare decisis in First Amendment cases represents an inversion of the doctrine as conventionally depicted.

A. Ordinary Stare Decisis

The Supreme Court’s stare decisis jurisprudence continues to reflect Justice Brandeis’ famous dichotomy between the value of the law’s being “settled” and the value of its being “right.”⁸³ The Court’s attempts at weighing the value of settlement against the value of interpretive accuracy have yielded a “series of prudential and pragmatic considerations” that bear on “the respective costs of reaffirming and overruling a prior case.”⁸⁴ This

⁸⁰ *Citizens United*, 558 U.S. at 356; cf. Kurt T. Lash, *The Cost of Judicial Error: Stare Decisis and the Role of Normative Theory*, 89 NOTRE DAME L. REV. ___, ___ (forthcoming 2014) (“Unlike an ordinary non-intervention case, which allows for potential political ratification, *Citizens United* involved a precedent which potentially undermined the proper functioning of the political process.”).

⁸¹ *Citizens United*, 558 U.S. at 356; see also *id.* at 372 (“Governments are often hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime. Yet this is the statute’s purpose and design.”).

⁸² *Id.* at 382 (Roberts, C.J., concurring); see also *id.* at 381 (“The First Amendment theory underlying *Austin*’s holding is extraordinarily broad. *Austin*’s logic would authorize government prohibition of political speech by a category of speakers in the name of equality.”).

⁸³ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting); see also *Citizens United v. FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) (“When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*.”).

⁸⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992); see also, e.g., Jill Fisch, *The Implications of Transition Theory for Stare Decisis*, 13 J. OF CONTEMP. LEGAL ISSUES 93, 105 (2003) (“The Court has identified a variety of factors that, combined with legal error,

understanding of stare decisis as a flexible policy rather than an “inexorable command”⁸⁵ does not mean precedent is immaterial.⁸⁶ It does, however, make clear that the presumption of fidelity to precedent “is capable of being overridden” by countervailing factors.⁸⁷

Among the relevant considerations in assessing a rule’s continued vitality are:

- “whether the rule has proven to be intolerable simply in defying practical workability;”
- “whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation;”
- “whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine;” and
- “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.”⁸⁸

Another salient consideration is the reasoning of the precedent in question. The Court has suggested that a precedent is more vulnerable if it was not “well reasoned”⁸⁹ and, in particular, if it “has been proved manifestly erroneous.”⁹⁰ The operation of stare decisis accordingly is tethered to the

justify overruling, including a conflict with other precedents, the presence of an unworkable legal test, changed circumstances or intervening developments.”); see also *id.* at 106 (“In economic terms, we might view the Court as seeking to determine the net social value of overruling by comparing the benefits obtained through the adoption of the new legal rule with the costs imposed by overruling.”).

⁸⁵ *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

⁸⁶ See Richard H. Fallon, *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 581 (2001).

⁸⁷ *Id.*; see also *id.* at 581–82 (“That a principle is not absolute, or that a principle reflects judgments that include concerns of policy, does not entail that it lacks constitutional authorization.”).

⁸⁸ *Id.* at 854–55 (citations omitted).

⁸⁹ *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009).

⁹⁰ *United States v. Gaudin*, 515 U.S. 506, 521 (1995); cf. Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001) (“In both the written law . . . and the unwritten law . . . , Americans viewed stare decisis as a way to restrain the ‘arbitrary discretion’ of courts. But this sort of discretion was thought to exist only within a certain space, created by the indeterminacy of the external sources of law that courts were supposed to apply.”); Fallon, *Stare Decisis and the Constitution*, *supra* note __, at 585 (arguing that,

soundness—or, more accurately, the degree of *unsoundness*—of the rationale on which a previous case was resolved.

These are not the only factors relevant to the stare decisis calculus. Others that crop up from time to time include the precedent’s age,⁹¹ the number of justices who voted in its favor,⁹² and whether it deals with “procedural and evidentiary rules” as opposed to “property and contract rights,” the latter of which create greater concerns about disruption.⁹³ By applying this litany of factors, the Court determines whether to reaffirm or overrule a precedent that is dubious on the merits.

Understanding the doctrine of stare decisis requires accounting for these enumerated factors as well as the general principles that frame them. The overarching enterprise is to assess specific matters such as workability and reliance while remaining cognizant of the fundamental tension between the value of a stable, continuous vision of law and the importance of accurate legal interpretation.

B. First Amendment Stare Decisis

The doctrine of stare decisis plays a diminished role within the Supreme Court’s recent First Amendment jurisprudence. Time and again, the Court has treated the virtues of doctrinal continuity as subordinate to the imperative of protecting expressive liberty.

Implicit in the classic description of the tension between the law’s being settled and the law’s being right is a comparative assessment of normative values. Holding all else constant, the greater the importance that one ascribes to interpreting the law accurately, the greater the chances that one will decide to overrule a dubious precedent.⁹⁴ The correlation is critical to free speech jurisprudence, for the Court has made unmistakable its view that interpretations of the First Amendment are of the utmost significance. Recall the plurality opinion in *Alvarez*, which describes lies about one’s military

despite the benefits of stare decisis as a general rule, “decisions that are severely misguided or dysfunctional surely should be overruled”).

⁹¹ See, e.g., *Montejo*, 556 U.S. at 793 (noting that the relevant “opinion is only two decades old, and eliminating it would not upset expectations”).

⁹² *Payne v. Tennessee*, 501 U.S. 808, 829 (1991).

⁹³ *Id.* For a lengthier discussion of the factors that are relevant to the stare decisis calculus, see Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 416–48 (2010).

⁹⁴ See Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1846 (2013) (“Before determining whether to retain or reject a flawed precedent, there must . . . be an inquiry into the importance of getting the law *right*—in other words, of replacing one constitutional rule with another.”).

record—hardly speech at the core of self-government or the societal quest for truth—as implicating concerns about the roving censorial power of government.⁹⁵ Recall, too the Court’s opinion in *Stevens*, which describes the application of cost-benefit analysis as “startling and dangerous” to expressive liberty.⁹⁶ Finally, recall *Citizens United* and its linking of a ban on corporate political expenditures to governmental efforts to “control thought.”⁹⁷

When the costs inflicted by an erroneous decision are framed in such daunting terms, it becomes exceedingly difficult to strike the balance in favor of the countervailing interest in allowing the law to remain settled.⁹⁸ We are not likely to see a Supreme Court opinion that contains the line, “Though this precedent authorizes the government to control thought, we uphold it on grounds of stare decisis.” So long as the Court is inclined to describe restrictions on First Amendment liberties—from prohibitions on lying to prohibitions on corporate electioneering—as existential threats to liberty, the value of leaving matters settled will forever find itself in (a distant) second place. The conventional doctrine of stare decisis, which reflects a presumptive elevation of stability and continuity over substantive correctness, is turned on its head.⁹⁹

Of course, it is understandable for the Court to treat the vindication of certain rights and interests as more important than others. Such prioritization is theoretically compatible with the doctrine of stare decisis. It takes a bit more analytical work to square the Court’s readiness to overrule First Amendment precedents with its demand for a “special justification” above and beyond a precedent’s wrongness to justify a break with the past.¹⁰⁰ But that apparent inconsistency can be reconciled through the argument that a precedent’s extraordinary harmfulness is itself a special justification for reconsidering the precedent.¹⁰¹

⁹⁵ See *United States v. Alvarez*, 132 S. Ct. 2537, 2547–48 (2012) (plurality op.); see also *supra* Part ____.

⁹⁶ *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010); see also *supra* Part ____.

⁹⁷ *Citizens United v. FEC*, 558 U.S. 310, 356 (2010); see also *supra* Part ____.

⁹⁸ Cf. Kozel, *Settled Versus Right*, *supra* note __, at 1870 (“[W]hatever the precedent under review, the perceived value of accuracy will vary, often substantially, from one interpretive method to another.”).

⁹⁹ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864 (1992) (“[T]he Court could not pretend to be reexamining prior law with any justification beyond a present doctrinal disposition to come out differently To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.”).

¹⁰⁰ See, e.g., *Alleyne v. United States*, 133 S. Ct. 2151, 2164 (2013).

¹⁰¹ Cf. *Rangel-Reyes v. United States*, 547 U.S. 1200 (2006) (Stevens, J., respecting the denial of certiorari) (suggesting a potential link between the degree of deprivation of rights and the presence of a “special justification for overruling” precedent).

Still, even if the Court’s approach to First Amendment precedent is superficially compatible with its articulated doctrine of stare decisis, tension remains beneath the surface. The express objective of the Supreme Court’s doctrine of stare decisis is to instill a presumption of deference to past decisions; “adhering to our prior case law” must “be the norm.”¹⁰² Yet the Court’s practice demonstrates a rejection of that principle when it comes to First Amendment liberties. The modern caselaw is much more supportive of a presumption in favor of *overruling* constrained interpretations of First Amendment rights than of *sustaining* those interpretations.¹⁰³ The consequence is to place First Amendment jurisprudence in a state of flux. If a deprivation of expressive liberty will invariably outweigh the countervailing value of fidelity to the past, stare decisis loses its force.

The role of stare decisis is an issue of enormous significance and abiding disagreement. For some, meaningful deference to precedent is consistent with a dedication to the rule of law and the systemic stability of the legal order.¹⁰⁴ Others are more skeptical of the tug of precedent, for reasons including its status as a potential impediment to judicial innovation¹⁰⁵ and, conversely, its claimed incompatibility with faithful adherence to the Constitution’s original meaning.¹⁰⁶ I will address these issues below,¹⁰⁷ but for now I simply note that the Supreme Court appears—by its repeated and unequivocal statements—to have resolved them in favor of a strong presumption of deference. Indeed, the Court has gone so far as to emphasize that “the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”¹⁰⁸ The principle that emerges from the Court’s rhetoric is that stare decisis must remain the norm. But the reality of First Amendment jurisprudence is different. The virtues of

¹⁰² *Randall v. Sorrell*, 548 U.S. 230, 243 (2006) (Breyer, J.).

¹⁰³ See *supra* Part ____.

¹⁰⁴ I have attempted to sketch such a view in Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 65 *VANDERBILT L. REV.* ____ (forthcoming 2015).

¹⁰⁵ See Justin Driver, *The Significance of the Frontier in American Constitutional Law*, 2011 *SUP. CT. REV.* 345, 351 (2012) (“[W]hile judges cannot do anything they wish regarding constitutional law, they do possess greater flexibility to reject outmoded precedents than the dominant understanding of living constitutionalism allows.”).

¹⁰⁶ See Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 *CONST. COMMENT.* 289, 289 (2005) (“[S]tare decisis, understood as a theory of adhering to prior judicial precedents that are contrary to the original public meaning, is completely irreconcilable with originalism.”).

¹⁰⁷ See *infra* Part ____.

¹⁰⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992); see also *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) (describing stare decisis as “the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion”); *Citizens United*, 558 U.S. at 362 (“Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.”); *id.* at 377 (Roberts, C.J., concurring) (“Fidelity to precedent—the policy of *stare decisis*—is vital to the proper exercise of the judicial function.”).

fidelity to precedent have regularly proved insufficient to preserve what a majority of justices views as a deprivation of expressive liberty.

III. ASSESSING THE FIRST AMENDMENT IN FLUX

The Supreme Court's First Amendment jurisprudence has undergone several meaningful revisions in the past decade. This Part turns to the normative question of whether the Court's willingness to reconsider its First Amendment precedents is salutary or problematic.

A. The Case for Trumping Precedent with Speech

The clearest argument in support of the Court's recent practice is that improper truncation of expressive liberty is greatly damaging. It is damaging to the individual, who is obstructed from speaking her mind in the way she sees fit.¹⁰⁹ It is damaging to the speaker's intended listeners, who are denied the benefits of hearing and evaluating her positions.¹¹⁰ And it is damaging to the constitutional order, which depends on governmental authority being kept at bay by a vigorous and open public discourse.¹¹¹ It is bad enough, one might contend, when the Supreme Court fails to vindicate expressive liberties that the Constitution rightfully protects. It is all the worse when the Court, having recognized the error of its ways, nevertheless perpetuates its error merely "in

¹⁰⁹ See, e.g., Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (arguing that "the constitutional guarantee of free speech ultimately serves" the value of "individual self-realization," which may refer to the "development of the individual's powers and abilities" or "the individual's control of his or her own destiny through making life-affecting decisions"); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963) ("[E]xpression is an integral part of the development of ideas, of mental exploration and of the affirmation of self. The power to realize his potentiality as a human being begins at this point and must extend at least this far if the whole nature of man is not to be thwarted.").

¹¹⁰ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 341 (2010) ("[I]t is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.").

¹¹¹ See, e.g., *Citizens United*, 558 U.S. at 340 ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints."); PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 262 (2013) ("In many respects, distrust of government explains First Amendment doctrine better than the other standard justifications of free speech."); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (arguing that "First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives"); Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 49 (1992) ("All too often the desire of political figures to suppress speech has to be understood as a crude effort to suppress criticism of public actors, which could lead to their *deserved* political embarrassment, removal from office, or electoral defeat. Thus the social good of free speech is found in the fundamental check it exerts on how government officials behave.").

the interest of stability.”¹¹² There may be some areas of the law in which it really is best to leave matters settled. But the freedom of speech (so the argument goes) is not one of them. If freedom of speech implicates something as essential as the “democratic culture” that “allows ordinary people to participate freely in the spread of ideas and in the creation of meanings that, in turn, help constitute them as persons,” perpetuating a constrained view of liberty in the name of stare decisis is difficult to justify.¹¹³ Free speech, after all, lays claim to being the bulwark against oppressive government, the facilitator of free thought, and the antidote to governmental determinations of “what shall be orthodox.”¹¹⁴

Another justification for the Court’s readiness to reconsider First Amendment precedent draws on the nature of stare decisis. The Court invariably describes stare decisis as a “principle of policy” rather than an “inexorable command.”¹¹⁵ While deference to precedent is valuable, it not a mandate to suffer indefinitely the Court’s most grievous constitutional mistakes.¹¹⁶ There must be flexibility to revise dubious precedents. A practice of unblinking fidelity to judicial errors could undermine the very rule-of-law benefits that the doctrine of stare decisis is designed to produce, both by “stifling the practical effectiveness of reasoned argumentation” and by authorizing too many departures from a court’s best reading of the Constitution.¹¹⁷

In sum, the doctrine of stare decisis is essentially and undeniably flexible. At the same time, the freedom of speech is profoundly important to American politics, society, and culture. Taken in combination, the argument goes, these factors point to a world in which stare decisis must yield to expressive liberty.

B. The Dangers of Diluted Stare Decisis

¹¹² ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 139 (1997) (“The whole function of the doctrine [of stare decisis] is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability.”).

¹¹³ Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 NYU L. REV. 1, 3–4 (2004).

¹¹⁴ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

¹¹⁵ *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

¹¹⁶ See *Citizens United v. FEC*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring) (noting that if stare decisis were an absolute command, “segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants”).

¹¹⁷ Randy J. Kozel, *The Rule of Law and the Perils of Precedent*, 111 MICH. L. REV. FIRST IMPRESSIONS 37, 40 (2013); cf. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 144 (2008) (Ginsburg, J., dissenting) (“It damages the coherence of the law if we cling to outworn precedent at odds with later, more enlightened decisions.”).

Notwithstanding these arguments for withholding deference from flawed First Amendment precedents, the practice carries serious costs that must be acknowledged.

Even overrulings that enhance expressive freedom can be disruptive. *Citizens United* is a paradigmatic example.¹¹⁸ Despite acknowledging that its prior decisions had informed legislative and regulatory efforts at regulating campaign finance, the Court dismissed those efforts out of hand. It explained that legislative reliance “is not a compelling interest for stare decisis.”¹¹⁹ This conclusion is perplexing if one takes a comprehensive and systemic view of legal disruption—a view the Court has endorsed on other occasions.¹²⁰ The better way to understand *Citizens United* is as a product of the Court’s deep regard for expressive liberties; in light of the perceived harms flowing from the denial of First Amendment rights to corporate speakers, there was little point in poring over the disruptive effects of overruling settled law, for such effects would never be able to tip the balance toward preserving the status quo. Regardless of whether *Citizens United* struck the correct balance, the case illustrates the disruption costs that can accompany the overruling of First Amendment precedents.¹²¹

The diluted nature of First Amendment stare decisis also raises a more foundational concern. The Court’s practice threatens to bring about precisely what the doctrine of stare decisis is designed to resist: a situation in which a judge’s subjective intuitions are effectively unchecked by fidelity to a preexisting, overarching legal norm established by her predecessors.¹²² As Justice Frankfurter wrote in dissent in *West Virginia State Board of Education*

¹¹⁸ *Citizens United v. FEC*, 558 U.S. 310 (2010).

¹¹⁹ *Id.* at 365.

¹²⁰ See *Harris v. United States*, 536 U.S. 545, 567–68 (2002) (plurality op.) (“Legislatures and their constituents have relied upon [the relevant precedent] to exercise control over sentencing through dozens of statutes like the one the Court approved We see no reason to overturn those statutes or cast uncertainty upon the sentences imposed under them.”); cf. *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (op. of Breyer, J.) (“*Buckley* has promoted considerable reliance. Congress and state legislatures have used *Buckley* when drafting campaign finance laws.”); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 925 (2007) (Breyer, J., dissenting) (citing reliance by parties including Congress and the Executive Branch).

¹²¹ For a broader account of the role of disruption in the stare decisis analysis, see generally Kozel, *Precedent and Reliance*, supra note ____.

¹²² See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (“[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”); *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986) (“[The doctrine of stare decisis] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.”).

v. Barnette—a case that unequivocally broke from precedent by forbidding schools from compelling their students to salute and pledge allegiance to the American flag¹²³—the role of the judge is to “take a view of longer range than the period of responsibility entrusted to Congress and legislatures.”¹²⁴ He continued:

That which three years ago had seemed to five successive Courts to lie within permissible areas of legislation is now outlawed by the deciding shift of opinion of two Justices. What reason is there to believe that they or their successors may not have another view a few years hence? Is that which was deemed to be of so fundamental a nature as to be written into the Constitution to endure for all times to be the sport of shifting winds of doctrine?¹²⁵

Justice Frankfurter’s argument emphasizes the role of stare decisis in promoting the impersonality of law. That value has long been a central plank of the case for deferring to precedent. The objective, the Court has explained, is to ensure that “bedrock principles are founded in the law rather than in the proclivities of individuals.”¹²⁶ Whether it was Benjamin Cardozo warning against allowing “the weekly changes in the composition of the court” to generate “changes in its rulings,”¹²⁷ or Lewis Powell describing the Constitution’s aspiration to be something more than “what five Justices say it is,”¹²⁸ the connection between precedent and impersonality is a familiar feature of American legal thought.¹²⁹

The norm of judicial impersonality stands in tension with a practice of unconstrained (or weakly constrained) overruling. In the absence of a

¹²³ 319 U.S. 624, 642 (1943) (“We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control. The decision of this Court in *Minersville School District v. Gobitis* and the holdings of those few per curiam decisions which preceded and foreshadowed it are overruled.”).

¹²⁴ *Id.* at 665 (Frankfurter, J., dissenting).

¹²⁵ *Id.*; see also Brad Snyder, *Frankfurter and Popular Constitutionalism*, 47 U.C. DAVIS L. REV. 343, 378 (2013) (arguing that “[w]hat rankled Frankfurter most was that *Barnette* reflected merely the Court’s shifting political preferences and changing personnel”).

¹²⁶ *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

¹²⁷ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 146 (1921).

¹²⁸ Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 288 (1990).

¹²⁹ For a more recent example to similar effect, see *Alleyne v. United States*, 133 S. Ct. 2151 (2013) (Alito, J., dissenting) (“[O]ther than the fact that there are currently five Justices willing to vote to overruling [one precedent], and not five Justices to overrule [a different precedent], there is no compelling reason why the Court overrules the former rather than the latter.”).

meaningful doctrine of stare decisis, determining whether a case like *Citizens United v. FEC* will overrule *Austin v. Michigan Chamber of Commerce* becomes the simple product of asking whether there are five justices who disagree with the latter. And whether *Citizens United* itself will carry forward depends entirely on whether the four dissenters will add, through the process of presidential appointment, another like-minded justice to their ranks.¹³⁰ When Supreme Court decisions ebb and flow in this manner, they lose any claim to being the product of an integrated court acting in a collaborative manner across space and time.¹³¹ Instead, they become the fluctuating outputs of shifts in the Court's balance of power. A legal system can remain compatible with the rule of law even when—indeed, especially when¹³²—it makes room for the occasional departure from precedent.¹³³ But the *tendency* must be toward stability and continuity notwithstanding the countervailing benefits of accurate constitutional interpretation.¹³⁴

This requirement is all the more resonant because disputes over the contours of First Amendment protection are so salient and, often, controversial. In general, a vacillating body of First Amendment jurisprudence does not carry the same prospect of disrupting economic rights as does a vacillating body of contract or property jurisprudence.¹³⁵ But due to the widespread interest in matters of free speech, fluctuations may exacerbate the perception of the Court's decisions as the product of whichever group of

¹³⁰ See *Am. Tradition Partnership, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (Breyer, J., dissenting) (stating, in an opinion joined by Justices Ginsburg, Sotomayor, and Kagan, that “I disagree with the Court’s holding” in *Citizens United*); see also *id.* (“Were the matter up to me, I would vote to grant the petition for certiorari in order to reconsider *Citizens United* or, at least, its application in this case.”).

¹³¹ Cf. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 569 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (noting the argument that stare decisis promotes “[t]he desirability, from the point of view of fairness to the litigants, of securing a reasonable uniformity of decision throughout the judicial system, both at any given time and from one time to another”).

¹³² See Kozel, *Rule of Law and the Perils of Precedent*, *supra* note ___, at 40–41 (discussing some rule-of-law concerns with excessive deference to precedent).

¹³³ See Michael C. Dorf, *Prediction and the Rule of Law*, 42 *UCLA L. REV.* 651, 683 (1995) (“While stare decisis does not preclude the occasional overruling of cases, the fact that a court’s personnel have changed and the new judges have a different view of the law from that of their predecessors is not, by itself, a sufficient basis for overruling.”).

¹³⁴ *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (Breyer, J.) (“[T]he rule of law demands that adhering to our prior case law be the norm. Departure from precedent is exceptional, and requires ‘special justification.’”) (citation omitted); see also Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 *MICH. L. REV.* 1, 26 (2012) (“[I]n no context does the rule of law dictate immutability. But the rule of law does counsel against too-frequent changes in the law, and this applies as much to precedent as to other sources of law.”).

¹³⁵ Cf. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved.”).

justices happens to control the levers of constitutional meaning. It is difficult to fathom a starker contrast with the ideal of impersonal, stable law that the Court's doctrine of stare decisis is overtly designed to foster.¹³⁶ Stare decisis reflects "a conception of a court continuing over time."¹³⁷ Take away that conception, and what remains is adjudication based on individual judgment by individual judges.¹³⁸

"[A]bridging the freedom of speech" can be a difficult phrase to interpret. Textually, the phrase leaves much to be worked out, including what "the freedom of speech" is and how the notion of "abridg[ement]" should be understood. The Constitution's historical context may shed some additional light, but it often falls short of fully illuminating the First Amendment's words.¹³⁹ When neither the First Amendment's text nor its historical context provides clear guidance, jurists must consult other indicia of constitutional meaning. Moreover, some constitutional lawyers view considerations such as original meaning as nondispositive even when they are clear. The situation that emerges is one in which judges must occasionally operate without clear constitutional constraints.¹⁴⁰

Stare decisis is a potential response to this state of affairs. As commentators such as David Strauss have emphasized, precedent may provide a salutary check against vacillation by instituting a system of respect for one's judicial predecessors.¹⁴¹ By contrast, diluting stare decisis leaves the justices

¹³⁶ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 408 (2010) (Stevens, J., concurring in part and dissenting in part) (arguing that if the principle of stare decisis "is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine"); HART & SACKS, *supra* note __, at 569 (noting among the bases of stare decisis "[t]he desirability of promoting genuine impersonality of decision by minimizing the elements of personal discretion, and of facilitating the operation of the check of professional criticism").

¹³⁷ Dorf, *Prediction and the Rule of Law*, *supra* note __, at 683.

¹³⁸ See, e.g., Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J. L. & PUB. POL'Y 67, 70 (1988) (arguing that fidelity to precedent "moderates ideological swings and thus preserves both the appearance and the reality of the Court as a legal rather than a purely political institution"); cf. Waldron, *Stare Decisis and the Rule of Law*, *supra* note __, at 21 (explaining that a subsequent judge "should think of himself not as an individual charged with deciding cases but as a member of a court").

¹³⁹ Cf. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 97–100 (2010) (discussing sources of constitutional indeterminacy).

¹⁴⁰ Cf. *Holland v. Florida*, 560 U.S. 631, 671 (2010) (Scalia, J., dissenting) ("[T]he Constitution does not empower federal courts to rewrite, in the name of equity, rules that Congress has made. Endowing unelected judges with that power is irreconcilable with our system The danger is doubled when we disregard our own precedent, leaving only our own consciences to constrain our discretion.").

¹⁴¹ See David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299, 300 (2005) ("[M]any constitutional principles that are morally appealing are simply off limits, because of precedent.").

to rely on their moral and pragmatic intuitions and their “private sentiments,”¹⁴² at least when constitutional text and history are either uncertain in their implications or nondispositive based on one’s interpretive philosophy. What results is the same concern about “arbitrary discretion” that led Hamilton to emphasize the importance of precedent in his discussions of the proposed Constitution.¹⁴³

C. Counterpoints

Part I discussed several instances in which the Supreme Court has broken from precedent to afford greater protection to expressive liberty. There are, however, two counterpoints to this trend in the recent caselaw: the treatment of broadcast regulation, in which the Court has cast considerable doubt upon its First Amendment precedents while nevertheless (so far) allowing them to linger; and the treatment of campaign contributions, in which the Court has (so far) resisted calls to review *contribution* limits using the same exacting scrutiny that is applied to restrictions on independent *expenditures*.

1. Broadcast Regulation

In 1978, the Supreme Court ruled in *FCC v. Pacifica Foundation* that broadcasters are subject to punishment based on their dissemination of indecent, but non-obscene, speech.¹⁴⁴ The decision to single out broadcasters for unfavorable treatment has faced increasing pressure in recent years, including direct criticism from some appellate judges¹⁴⁵ and Supreme Court justices.¹⁴⁶ *Pacifica*’s critics claim that there was never a convincing basis for treating broadcasters differently from other speakers, and that the differential treatment has become increasingly problematic as technological developments

¹⁴² 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (1765).

¹⁴³ THE FEDERALIST NO. 70 (A. Hamilton).

¹⁴⁴ 438 U.S. 726, 749–51 (1978); see also Jack M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1133 (1996) (noting that the concept of indecency “includes sexually explicit speech that could not be regulated as obscene” and is “a much larger category than many people imagine”).

¹⁴⁵ See *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 325–27 (2nd Cir. 2010) (criticizing elements of the *Pacifica* rationale but concluding that “we are bound by Supreme Court precedent, regardless of whether it reflects today’s realities”); *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 465 (2nd Cir. 2007) (following *Pacifica* but noting that “we would be remiss not to observe that it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television”).

¹⁴⁶ See *FCC v. Fox Television Stations, Inc.* 132 S. Ct. 2307, 2321 (2012) (Ginsburg, J., concurring); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 530 (2009) (Thomas, J., concurring).

have eroded the distinctions between broadcasting and other sources of media.¹⁴⁷

Yet the Supreme Court has preserved the *Pacifica* approach despite offering little response to the mounting criticism.¹⁴⁸ The Court has not gone so far as to expressly reaffirm *Pacifica* on grounds of stare decisis. Instead, the Court has deemed it either unnecessary or premature to address *Pacifica* itself. By resolving cases on alternative grounds such as administrative procedure and due process, the Court has managed to avoid a head-on confrontation with *Pacifica*. It has defended its approach based on principles of judicial constraint, constitutional avoidance, and the need for preliminary consideration in the lower courts.¹⁴⁹

The Court's reluctance to challenge *Pacifica* arguably reflects some institutional dedication to doctrinal stability at the expense of expressive liberty.¹⁵⁰ *Pacifica* appears to be serving a “braking” function by encouraging a slow, incremental approach to legal change rather than an abrupt reversal-of-course.¹⁵¹ This does not mean that *Pacifica* will hang on indefinitely, but it does suggest that precedent is lending a degree of stability to the law of free speech by affecting the manner in which doctrines evolve.

2. Campaign Contributions

The crucial distinction in assessing the constitutionality of campaign-finance regulation is between (a) monetary contributions to political campaigns, and (b) independent expenditures made to support or criticize political candidates. Ever since *Buckley v. Valeo*, it has been clear that expenditure limits can only persist if they survive “the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.”¹⁵² This standard is tantamount to strict scrutiny, which requires

¹⁴⁷ See *Fox Television Stations*, 556 U.S. at 530–34 (Thomas, J., dissenting).

¹⁴⁸ See *Fox*, 132 S. Ct. at 2320; *Fox*, 556 U.S. at 529.

¹⁴⁹ See *Fox*, 132 S. Ct. at 2320 (“[B]ecause this Court resolves these cases on fair notice grounds under the Due Process Clause, it need not address the First Amendment implications of the Commission’s indecency policy.”); *Fox*, 556 U.S. at 529 (declining to address *Pacifica* given that the “Second Circuit did not definitively rule on the constitutionality of the Commission’s orders”).

¹⁵⁰ The desirability of allowing change to occur organically rather than through judicial decree was one of the themes during the Court’s most recent reconsideration of *Pacifica*. Consider the statements of Justice Alito at oral argument: “It’s not going to be long before [broadcast television] goes the way of vinyl records and eight-track tapes. . . . [W]hy not just let this die a natural death? Why do you want us to intervene[?]” *FCC v. Fox Television Stations, Inc.*, No. 10-1293, Argument Transcript at 33–34 (Jan. 10, 2012).

¹⁵¹ See Kozel, *Settled Versus Right*, supra note ___, at 1851–53 (discussing the braking function of precedent).

¹⁵² 424 U.S. 1, 44–45 (1976) (per curiam).

the government to cite a compelling interest and to pursue that interest by the least restrictive means possible.¹⁵³ By comparison, governments have a freer hand to regulate campaign contributions. Contribution limits are permissible so long as the government “demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.”¹⁵⁴

As discussed above with respect to corporate electioneering, the Court has been vigilant about protecting the rights of individuals and organizations to make unfettered expenditures.¹⁵⁵ At the same time, it has preserved the pivotal distinction between expenditures and contributions. Most recently, in *McCutcheon v. FEC* the Court invalidated the *aggregate* limits on campaign contributions that were set forth in the Bipartisan Campaign Reform Act of 2002.¹⁵⁶ Aggregate limits “restrict[] how much money a donor may contribute in total to all candidates or committees” during a two-year election cycle.¹⁵⁷ The *McCutcheon* plurality invalidated those limits, concluding that the “government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.”¹⁵⁸

The *McCutcheon* plurality’s reasoning deviated from the standard set forth in *Buckley*, in which the Court had upheld aggregate limits.¹⁵⁹ In this respect *McCutcheon* furnishes further evidence of the Court’s willingness to sacrifice doctrinal continuity to expressive liberty.¹⁶⁰ Yet *McCutcheon* is more notable for what it did *not* do. The *Buckley* distinction between expenditures and contributions has always been controversial, and some justices have called it into serious question.¹⁶¹ In *McCutcheon*, “[t]he parties and *amici curiae*

¹⁵³ See *Citizens United v. FEC*, 558 U.S. 310, 340 (2010); EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* 460 (5th ed. 2014).

¹⁵⁴ *Buckley*, 424 U.S. at 25.

¹⁵⁵ See *supra* Part __.

¹⁵⁶ 572 U.S. __ (2014).

¹⁵⁷ *Id.* at __, slip op. at 3.

¹⁵⁸ *Id.* at __, slip op. at 15.

¹⁵⁹ See *Buckley*, 424 U.S. at 38 (“The limited, additional restriction on associational freedom imposed by the overall ceiling is . . . no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.”).

¹⁶⁰ See *McCutcheon*, 572 U.S. at __, slip op. at 1 (Breyer, J., dissenting) (“The *Buckley* Court focused upon the same problem that concerns the Court today. . . . Today a majority of the Court overrules [*Buckley*’s] holding.”)

¹⁶¹ See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 409 (2000) (Kennedy, J., dissenting) (“I would overrule *Buckley* and then free Congress or state legislatures to attempt some new reform, if, based upon their own considered view of the First Amendment, it is possible to do so.”); *id.* at 410 (Thomas, J., dissenting) (“I would subject campaign contribution limits to strict scrutiny.”); see also McConnell, *supra* note __, at 456 (arguing that “one wing of the Court (Scalia, Kennedy, and Thomas) would erase the distinction by extending constitutional protection to contributions, and the other (Ginsburg, Breyer, Sotomayor, and Kagan) would

spen[t] significant energy debating whether the line that *Buckley* drew . . . should remain the law.”¹⁶² For his part, Justice Thomas took the case as another opportunity to advance the view that contribution limits are every bit as suspect as expenditure limits.¹⁶³ But the plurality declined the invitation to reconsider the standard of review for contributions—and, by implication, the continued validity of *base* limits that restrict the amount of contributions to individual candidates or committees. The plurality reasoned that because the aggregate limits could not survive the standard set forth in *Buckley*, there was no need to “revisit *Buckley*’s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review.”¹⁶⁴

As a matter of Supreme Court practice and procedure, the plurality’s decision to retain the distinction between expenditures and contributions was surely defensible. Having concluded that the aggregate limits could not survive the relatively lenient standard of review set forth in *Buckley*, it was unnecessary for the plurality to consider whether a more demanding standard was appropriate. Even so, *McCutcheon* certainly gave the Court the option of erasing the line between contribution limits and expenditure limits if it wished to do so. In declining to renounce *Buckley*’s core distinction, the *McCutcheon* plurality provided another indication of fidelity to precedent serving a braking function on the evolution of constitutional law.

3. Synthesis

The examples of broadcast regulation and campaign contributions suggest that principles of *stare decisis* continue to have some purchase in the realm of First Amendment adjudication. Given the Court’s robust protection of expressive liberty in recent years, one might expect outright renunciation of the idea that government regulators possess authority to punish broadcasters for indecent speech. One might likewise expect rejection of the view that base limits on campaign contributions should receive anything less than the strictest form of First Amendment scrutiny. The Court has not gone so far, despite having opportunities to do so.

erase the distinction by stripping constitutional protection from independent expenditures”) (footnotes omitted).

¹⁶² *McCutcheon*, 572 U.S. at ___, slip op. at 10.

¹⁶³ *Id.* at ___, slip op. at 5 (Thomas, J., concurring in the judgment) (“This case represents yet another missed opportunity to right the course of our campaign finance jurisprudence by restoring a standard that is faithful to the First Amendment.”).

¹⁶⁴ *Id.* at ___, slip op. at 10 (plurality op.); see also *id.* at ___, slip op. at 3 (“This case does not involve any challenge to the base limits, which we have previously upheld as serving the permissible objective of combatting corruption.”).

While deference to speech-restrictive precedents is infrequent and sporadic, the practice does appear to exert some influence on the Court's decisionmaking by delaying reconsideration of certain controversial precedents. The resulting braking effect can promote the ideal of law as drawing from a collective repository of wisdom and judgment.¹⁶⁵ Still, while the benefits of an incremental approach are meaningful, they would be amplified if there were a greater possibility that today's judges would retain—not just temporarily, but indefinitely—a precedent despite reservations about its rule of decision. In its fullest form, *stare decisis* means that some prior decisions must live on, not just die slowly.

D. Speech and Stare Decisis in the Final Analysis

For those who view deference to precedent as a valuable feature of American law, a great deal would be accomplished by the Court's choice to retain a dubious precedent on grounds of *stare decisis* despite arguments that the precedent was unduly restrictive of expressive liberty. Such a decision would ascribe paramount importance to the values of stability, consistency, and continuity. It would also give tangible import to the Court's frequent statements that constitutional law is the province of overarching rules whose operation transcends the proclivities of particular justices.¹⁶⁶ Abiding by a dubious precedent is making good on the promise of law as something more than the sum of jurists who come and go from the bench.¹⁶⁷

The converse is also true. Even if one sincerely believes that the importance of speech is of surpassing importance, constantly allowing speech to trump *stare decisis* threatens to undermine the impersonality of constitutional law. Whether the Court will adhere to its past decisions on issues such as the value of false speech, the treatment of corporate electioneering, and the process of identifying exclusions to First Amendment protection comes to depend entirely on how five contemporary justices interpret the Constitution. Even if “what's past is prologue,” writing the epilogue becomes the exclusive prerogative of the justices of the moment.¹⁶⁸ Such an approach is a far cry from the conventional depiction of *stare decisis*.

¹⁶⁵ Cf. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 41 (2010) (“It is a bad idea to try to resolve a problem on your own, without referring to the collective wisdom of other people who have tried to solve the same problem.”).

¹⁶⁶ See Kozel, *Settled Versus Right*, *supra* note ___, at 1853 (juxtaposing precedent's braking function against its self-constraining function).

¹⁶⁷ See, e.g., STEPHEN G. BREYER, *MAKING OUR DEMOCRACY WORK* 150 (2010) (“[A] Court that overturns too many earlier decisions encourages the public to believe that personalities or politics, not law, determine the outcome of Court cases.”).

¹⁶⁸ Cf. WILLIAM SHAKESPEARE, *THE TEMPEST*, act 2, scene 1.

The deeper question is whether the Court’s doctrine of First Amendment stare decisis is normatively attractive. The answer depends on one’s underlying theoretical and interpretive premises. If one believes, as the Court has suggested, that infringements of expressive liberty are too dangerous and harmful to tolerate at nearly any price, then the heavily diluted version of stare decisis makes sense. If, on the other hand, one concludes that constitutional law should presumptively aspire to stability and impersonality, then many of the Court’s recent First Amendment innovations may do more harm than good. That latter view finds support in the Court’s broad pronouncements linking stare decisis with the rule of law.¹⁶⁹ Though the harms of perpetuating a First Amendment infringement are glaring, the rule-of-law effects of undermining stare decisis might well present the greater threat to the project of constitutional law.

There is no way to eliminate this tension between fostering expressive liberty and promoting the impersonal, stable operation of law. There will always be disagreements over the harmfulness of a particular infringement of speech. Likewise, there will be disagreements at the threshold level of determining which harms are legally salient.¹⁷⁰ The Supreme Court is a multi-member institution, and the justices embrace varying normative commitments and philosophical dispositions. During the past decade, several justices have coalesced around the view that expressive liberty is, in most cases, more important than doctrinal stability. But there is no guarantee that future justices will be as speech-protective as the contemporary majority. The inevitable result is vacillation: The freedom of speech will undergo periods of intense protection from governmental restriction, followed by periods of greater leeway for governments to enact regulations aimed at speech-related harms.

The doctrine of stare decisis is a means of moderating those swings.¹⁷¹ The justice who is fiercely protective of speech can choose to abide by precedent even in cases that she would have resolved differently as an initial matter. The justice who is less protective of speech can adopt the same approach. Through this process of precedent-minded compromise, justices can preserve the essential stability of constitutional law. They can also provide support for the idea that constitutional law really is something more than whatever five justices say it is.

¹⁶⁹ See supra Part ____.

¹⁷⁰ See Kozel, *Settled Versus Right*, supra note ___, at 1863–75.

¹⁷¹ Cf. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1722 (2013) (“In hot-button cases where differences in constitutional philosophy are in the foreground, the preference for continuity disciplines jurisprudential disagreement. Absent a presumption in favor of keeping precedent, and absent the system of written opinions on which stare decisis depends, new majorities could brush away a prior decision without explanation.”).

Yet it is not enough for the justices to agree on the abstract notion that fidelity to precedent is a beneficial aspiration. With its focus on evaluating “prudential and pragmatic considerations”¹⁷² and gauging the relative importance of legal stability and legal correctness, the doctrine of *stare decisis* is inextricably linked to a judge’s underlying normative suppositions.¹⁷³ The value of correct constitutional interpretation, both in absolute terms and in relation to the countervailing value of legal stability, is a product of interpretive philosophy as well as the normative underpinnings that lead a judge to select one methodology instead of another.

Consider, for example, an adherent to the common-law constitutionalist school of interpretation. Common-law constitutionalism focuses on moving constitutional law toward just and sound results, but it also emphasizes the role of precedent in constraining judges and limiting the incidence of dramatic change.¹⁷⁴ For a common-law constitutionalist, considerations such as morality and public policy will play a significant role in interpreting the First Amendment.¹⁷⁵ At the same time, those considerations will color the extent to which an erroneous constitutional interpretation is viewed as too harmful to tolerate.¹⁷⁶

Adherents of other schools of interpretation will focus on different considerations in gauging the harmfulness of constitutional mistakes. For example, to some originalists, a precedent’s effect on popular sovereignty is a pivotal factor. Precedents that interfere with the people’s ability to govern themselves are acutely troubling and carry the strongest presumption of overruling, while other constitutional mistakes are easier to tolerate.¹⁷⁷ From that perspective, the net benefit of overruling a speech-restrictive precedent would depend on matters of democratic government and popular sovereignty.

And the list goes on. Every interpretive philosophy carries its own metric for assessing the magnitude of constitutional mistakes. Moreover, even within a given interpretive school, different normative baselines and emphases will

¹⁷² *Planned Parenthood of Se. Pa. v Casey*, 505 U.S. 833, 854 (1992).

¹⁷³ See Kozel, *Settled Versus Right*, supra note __, at 1847 (“The perceived benefit of deviating from precedent is always derivative of one’s interpretive method and normative priors.”).

¹⁷⁴ See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

¹⁷⁵ See STRAUSS, *LIVING CONSTITUTION*, supra note __, at 45 (“The common law approach explicitly envisions that judges will be influenced by their own views about fairness and social policy.”).

¹⁷⁶ See Kozel, *Settled Versus Right*, supra note __, at 1863–70.

¹⁷⁷ See Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, supra note __, at 1442 (“The cost of judicial error increases with the severity of the intrusion into the democratic process, and this accordingly increases the need for strong pragmatic justifications if precedent is to control.”).

lead to different views regarding the value of interpreting the Constitution correctly.¹⁷⁸ Whether the doctrine of stare decisis counsels the retention of precedent will depend on the underlying methodology through which a judge determines the importance of accurate interpretation.

The upshot is that for the doctrine of stare decisis to have practical effect, there must be shared dedication not only to the general *process* of weighing the costs and benefits of deviating from precedent, but also to the idea that the virtues of stability and impersonality should sometimes achieve the *outcome* of allowing precedent to carry the day. The modern Supreme Court has taken numerous stands for First Amendment liberties. If the Court wishes to preserve the vitality of stare decisis and the virtues of continuity, it eventually must interrupt that trend, at least briefly, to issue a reminder that the value of precedent is something more than rhetoric invariably recited but just as invariably overborne. Notwithstanding the diversity of interpretive philosophies and normative commitments, there must be shared dedication to the idea that the value of precedent is sometimes worth preserving.

To be sure, there still may be some First Amendment infringements that are too damaging to perpetuate; an “absolute” doctrine of stare decisis has no currency at the Court.¹⁷⁹ But if precedent is not absolute, neither can the First Amendment be, at least if the doctrine of stare decisis is to retain potency in matters of expressive liberty. The Court’s past decisions must occasionally win out precisely because they are the Court’s past decisions, and despite the fact that they may be less (or more) protective of speech than the modern majority would prefer. The invocation of stare decisis en route to a surefire overruling is deference in name alone.

As we have seen, there are some instances in which the Court has retained questionable precedents and thereby avoided, or at least delayed, the disruption that would attend an overruling. The Court’s approach in the areas of campaign contributions and broadcast regulation suggest some continued vitality for stare decisis in the First Amendment sphere.¹⁸⁰ If such precedents were to fall, it would become even more difficult to make the case that precedent has any power other than staving off the inevitable. In the meantime, there remain some pockets of stare decisis amidst the drive toward greater First Amendment protection.

E. Postscript: Diluted Stare Decisis Beyond the Freedom of Speech

¹⁷⁸ For additional examples, see Kozel, *Settled Versus Right*, supra note __, at 1870–75.

¹⁷⁹ See *Citizens United v. FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) (“[N]one of us has viewed *stare decisis* in such absolute terms.”).

¹⁸⁰ See supra Part __.

The Supreme Court’s willingness to reconsider First Amendment precedents raises a broader question that transcends substantive boundaries: Should individual liberties *other than* the freedom of speech enjoy the same privileged status in overcoming restrictive precedents?

A negative answer would imply that the freedom of speech is more significant than other constitutional rights. And, indeed, there is some evidence in the caselaw to support this understanding. As noted above, Justice Scalia wrote in 2007 that “[t]his Court has not hesitated to overrule decisions offensive to the First Amendment,” which is “a ‘fixed star in our constitutional constellation,’ if there is one.”¹⁸¹ The context was the Court’s reconsideration of *McConnell v. FEC*, which (among other things) followed the lead of *Austin v. Michigan Chamber of Commerce* by sustaining section 203(a) of the Bipartisan Campaign Reform Act against a facial challenge.¹⁸² Though section 203(a) prohibited corporations and unions from using “their general treasury funds to finance electioneering communications,” the Court found no violation of the First Amendment.¹⁸³

Justice Scalia dissented from *McConnell* in relevant part.¹⁸⁴ When the issue reemerged four years later in *FEC v. Wisconsin Right to Life*, he held to his view notwithstanding the pull of stare decisis.¹⁸⁵ Justice Scalia described *McConnell* as “unworkable” and inconsistent with cases that came before it, and he argued that neither “reliance interests” nor “cultural impact” provided sufficient reason for reaffirming the decision.¹⁸⁶ The most notable aspect of his opinion was his emphasis on the unique salience of free speech: “It is perhaps our most important constitutional task to ensure freedom of political speech.”¹⁸⁷

Justice Scalia’s approach, and particularly his description of protecting political speech as “perhaps our most important constitutional task,” warrants close attention. Justice Thomas has expressed a similar position by describing political speech as “the primary object of First Amendment protection.”¹⁸⁸

¹⁸¹ *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in the judgment) (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

¹⁸² 540 U.S. 93 (2003).

¹⁸³ *Id.* at 204–07.

¹⁸⁴ See *id.* at 248 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹⁸⁵ See *Wisconsin Right to Life*, 551 U.S. at 504 (Scalia, J., concurring in part and concurring in the judgment) (“I would overrule that part of the Court’s decision in *McConnell* upholding § 203(a) of the BCRA.”).

¹⁸⁶ *Id.* at 501–03.

¹⁸⁷ *Id.* at 503.

¹⁸⁸ *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 410–11 (2000) (Thomas, J., dissenting).

Likewise, Justice Kennedy has written that the Court’s rulings “must never be viewed with more caution than when they provide immunity from their own correction in the political process in the forum of unrestrained speech.”¹⁸⁹ Justice Kennedy’s rationale was that limitations on political speech are uniquely self-insulating, because they stifle efforts to generate democratic opposition. Due to the dangers of electoral manipulation, the Court’s “obligation to examine the operation of the law is all the more urgent when the new evil is itself a distortion of speech.”¹⁹⁰

The Court reiterated these sentiments in 2012 by underscoring “the close connection between our Nation’s commitment to self-government and the rights protected by the First Amendment.”¹⁹¹ And in 2014, a plurality announced unequivocally that “[t]here is no right more basic in our democracy than the right to participate in electing our political leaders.”¹⁹² Statements like these suggest that the freedom of speech, or at least the freedom of political speech that constitutes “public discourse,”¹⁹³ is simply more important than other constitutional liberties.¹⁹⁴

In other cases, however, the justices have described rights beyond expressive liberty as too precious to compromise for the sake of stare decisis. In *Arizona v. Gant*, the Court considered the authority of police to search an automobile after arresting its occupant.¹⁹⁵ The Court ruled that no warrantless searches are permitted “after the arrestee has been secured and cannot access the interior of the vehicle.”¹⁹⁶ There was some debate over whether this holding was consistent with the Court’s previous decision in *New York v. Belton*,¹⁹⁷ but the *Gant* majority found no tension between the two cases. In response to the argument that many stakeholders had understood *Belton* as articulating a general rule that authorized the search of automobiles incident to

¹⁸⁹ Id. at 407 (Kennedy, J., dissenting).

¹⁹⁰ Id. at 408.

¹⁹¹ *Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012).

¹⁹² *McCutcheon v. FEC*, 572 U.S. ___, ___ (2014) (plurality op.).

¹⁹³ Cf. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 4 (2000) (arguing that “core First Amendment protections extend to those forms of communications that are deemed necessary to ensure that a democratic state remains responsive to the views of its citizens”).

¹⁹⁴ Cf. Jack M. Balkin, *The Roots of the Living Constitution*, 92 B.U. L. REV. 1129, 1142 (2012) (“The New Deal transformation forged modern American liberalism, which merged Progressive ideas about regulation of the economy with classical liberal ideas about the protection of non-economic rights. . . . Among these non-economic liberties, the First Amendment’s guarantees of freedom of speech, press, and religion were seen as paradigmatic.”).

¹⁹⁵ 556 U.S. 332, 335 (2009).

¹⁹⁶ Id.

¹⁹⁷ 453 U.S. 454 (1981).

an occupant's arrest, the *Gant* majority stated that “[w]e have never relied on *stare decisis* to justify the continuance of an unconstitutional police practice.”¹⁹⁸

Writing in dissent, Justice Alito took issue with the majority's characterization of *Belton*. He also rejected the majority's suggestion that *stare decisis* considerations are immaterial in cases involving unlawful police procedures: “[T]he Court cites no authority for the proposition that *stare decisis* may be disregarded or provides lesser protection when the precedent that is challenged is one that sustained the constitutionality of a law enforcement practice.”¹⁹⁹ Unlike the majority, Justice Alito was unwilling to elevate freedom from unlawful searches above considerations of *stare decisis*.

The Court shed additional light on the relationship between *stare decisis* and individual liberties in a recent case involving criminal sentencing. *Alleyne v. United States* dealt with the allocation of factfinding responsibility between judges and juries.²⁰⁰ The Court deviated from precedent by interpreting the Sixth Amendment to require any fact that increases a mandatory minimum sentence to be determined by a jury beyond a reasonable doubt.²⁰¹ The Court addressed the issue of *stare decisis* in a footnote, stating that “[t]he force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections.”²⁰² This formulation departed from the more common rule, recited in Justice Sotomayor's concurrence, that “when procedural rules are at issue that do not govern primary conduct and do not implicate the reliance interests of private parties, the force of *stare decisis* is reduced.”²⁰³ Justice Sotomayor's position aligns with the Court's prior observations that because private individuals ordinarily do not *rely* on procedural and evidentiary rules, changing those rules tends to create less of a concern.²⁰⁴ But the *Alleyne* majority provided a different emphasis in speaking of procedural rules “that implicate fundamental constitutional protections.” On the *Alleyne* formulation, it is not the lack of reliance, but rather the deprivation

¹⁹⁸ *Gant*, 556 U.S. at 348; cf. *id.* at 353 (Scalia, J., concurring) (“Justice Alito insists that the Court must demand a good reason for abandoning prior precedent. That is true enough, but it seems to me ample reason that the precedent was badly reasoned and produces erroneous (in this case unconstitutional) results.”).

¹⁹⁹ *Id.* at 360 (Alito, J., dissenting).

²⁰⁰ 133 S. Ct. 2151 (2013).

²⁰¹ See *id.* at 2163.

²⁰² *Id.* at 2163 n.5.

²⁰³ *Id.* at 2164 (Sotomayor, J., concurring).

²⁰⁴ See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . . ; the opposite is true in cases . . . involving procedural and evidentiary rules.”).

of “fundamental constitutional protections,” that dilutes the force of stare decisis.

Alleyne and *Gant* hint at the broader principle that individual rights beyond the freedom of speech may customarily trump stare decisis. Nevertheless, the Court has sometimes clung to precedent on grounds of stare decisis even when the result would be to perpetuate a potential deprivation of individual liberty. For example, the Court has grandfathered exceptions to the Bill of Rights’ application to state and local action for the grand jury right and the civil jury right.²⁰⁵ Further, justices occasionally write separately in describing their adherence to precedent notwithstanding a countervailing personal liberty interest.²⁰⁶ Finally, the fact that the Court has chosen to reconsider several important doctrines of free speech in the past decade suggests a particular sensitivity among the justices to restrictions on expressive liberty.²⁰⁷ Perhaps a day will come in which the Court exhibits a similar willingness to reconsider its precedents involving, for example, unreasonable searches and seizures. In the meantime, the freedom of speech occupies a unique place in the constitutional order as it pertains to the role of precedent in adjudication.

IV. THE FUTURE OF THE FIRST AMENDMENT

Part I of this Article discussed several recent Supreme Court decisions that deviate from prior First Amendment jurisprudence. In Part II, I claimed that the Court’s approach to First Amendment cases has inverted the

²⁰⁵ See *McDonald v. City of Chicago, Illinois*, 130 S. Ct. 3020, 3046 n.30 (2013); *id.* at 3046 (“Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States and thus *limits* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values.”) (footnote omitted). The Court also suggested that stare decisis may trump Second Amendment rights in *District of Columbia v. Heller*. In that case, the Court framed its question as “whether any of our precedents forecloses the conclusions we have reached about the meaning of the Second Amendment.” 554 U.S. 570, 619 (2008). Ultimately, however, the Court found “nothing in our precedents” to “foreclose[]” its interpretation of the Second Amendment based on its textual and contextual meaning. *Id.* at 625.

²⁰⁶ See, e.g., *Gant*, 556 U.S. at 358 (Alito, J., dissenting) (arguing that the factors relevant to the stare decisis inquiry “weigh in favor of retaining the rule established in *Belton*”); *District of Columbia v. Heller*, 554 U.S. 570, 639–40 (2008) (Stevens, J., dissenting) (citing fidelity to precedent as a reason for adopting an interpretation of the Second Amendment that did not “limit[] the authority of Congress to regulate the use or possession of firearms for purely civilian purposes”); *Crawford v. Marion County Election Bd.*, 535 U.S. 181, 207 (2008) (Scalia, J., concurring in the judgment) (“[W]eighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence.”).

²⁰⁷ See *supra* Part __.

conventional account of stare decisis in situations where the effect of precedent is to deprive a speaker of her expressive liberty.

That leaves the issue of what the Court’s willingness to overrule portends for the future of First Amendment jurisprudence. The following Sections discuss five areas in which the diluted doctrine of stare decisis places precedents in serious jeopardy.

A. Broadcasting

Even in this era of risqué offerings via cable and satellite transmissions, radio and television broadcasters are exposed to regulatory action if they allow indecency on the airwaves.²⁰⁸ As discussed above,²⁰⁹ this phenomenon owes in large part to the Supreme Court’s decision in *Federal Communications Commission v. Pacifica*, which affirmed the FCC’s power to penalize a radio station for broadcasting an expletive-laden monologue by the comedian George Carlin.²¹⁰ The Court explained that “of all the forms of communication, it is broadcasting that has received the most limited First Amendment protection.”²¹¹

Over the past decade, *Pacifica*’s vitality has been a salient issue. The FCC’s decision to treat “fleeting” expletives as worthy of sanction has sparked more fundamental challenges to the notion that broadcast broadcasters should receive different treatment than other speakers.²¹² On two occasions, those challenges have made their way to the Supreme Court. Both times, the Court disposed of the case without reaching the issue of *Pacifica*’s continued vitality.²¹³ Notwithstanding the Court’s approach, Justice Thomas and Justice Ginsburg penned separate opinions renouncing the *Pacifica* rule. Justice Ginsburg was brief in her remarks, noting that *Pacifica* was “wrong when it was issued” and had become even worse in light of factors including “technological advances.”²¹⁴ Justice Thomas offered more elaboration. He

²⁰⁸ See, e.g., *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2314–15 (2012) (describing several examples of broadcasts that drew regulatory attention).

²⁰⁹ See supra Part ____.

²¹⁰ *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

²¹¹ *Id.* at 748.

²¹² *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 505 (2009) (“This case concerns the adequacy of the Federal Communication Commission’s explanation of its decision that [federal law] sometimes forbids the broadcasting of indecent expletives even when the offensive words are not repeated.”).

²¹³ *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2320 (2012) (“In light of the Court’s holding that the Commission’s policy failed to provide fair notice it is unnecessary to reconsider *Pacifica* at this time.”); *Fox Television Stations*, 556 U.S. at 529 (“We decline to address the constitutional questions at this time.”).

²¹⁴ *Fox Television Stations*, 132 S. Ct. at 2321 (Ginsburg, J., concurring in the judgment).

described *Pacifica* and a predecessor case²¹⁵ as a “deep intrusion into the First Amendment rights of broadcasters.”²¹⁶ He also emphasized technological advances as having undermined the notion of broadcast media as “uniquely pervasive” and, thus, entitled to weaker constitutional protection.²¹⁷

Given the weakness of stare decisis in the First Amendment context, *Pacifica*’s durability is in serious doubt.²¹⁸ Even if the opinion’s factual premises had remained intact, its distinction between forms of media—which is to say, between different speakers—is uneasy in a post-*Citizens United* world.²¹⁹ There are also lingering questions about how the efficacy of a form of media furnishes added justification for governmental restriction.²²⁰ And the fact that broadcasting has become only one of many prevalent media sources exacerbates *Pacifica*’s vulnerability by undercutting the “unique[] pervasive[ness]” of the medium. The notion of broadcast media as unavoidably intrusive is also questionable, particularly in light of the proliferation of “video on demand, in which receiving content requires the type of affirmative steps sufficient to render indecency restrictions unconstitutional.”²²¹ The Court has made clear that factual changes provide a valid basis for reconsidering precedent, and *Pacifica* would seem to present a paradigm case.²²²

This is not to say that *Pacifica* is utterly hopeless. For example, it may be that the *Pacifica* rule can be reconceptualized as an instantiation of “government speech” doctrine,²²³ whereby the government receives greater

²¹⁵ Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

²¹⁶ Fox Television Stations, 556 U.S. at 530, 531 (Thomas, J., concurring).

²¹⁷ Id. at 533 (quoting *Pacifica*, 438 U.S. at 748).

²¹⁸ See, e.g., Christopher S. Yoo, *Technologies of Control and the Future of the First Amendment*, 53 WM. & MARY L. REV. 747, 774 (2011) (reiterating Justice Thomas’s observations and concluding that “[s]ignificant doubts exist as to whether *Pacifica* remains good law even with respect to broadcasting”).

²¹⁹ See *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (“Speech restrictions based on the identity of the speaker are all too often simply a means to control content.”).

²²⁰ See Balkin, *Foundations of Broadcast Regulation*, supra note __, at 1136 (“[T]he fact that a particular mode of communication is particularly powerful or ubiquitous is not necessarily a reason for regulating it.”).

²²¹ Yoo, *Technologies of Control*, supra note __, at 774.

²²² See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992) (noting the relevance of “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification”).

²²³ Cf. Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 708 (2011) (“Government speech is not, strictly speaking, a First Amendment ‘right’ of the government, but rather a doctrine that allows the government to justify what otherwise might be unconstitutional interference with private speakers.”) (footnote omitted); but see Lilli Levi, “*Smut and Nothing But*”: *The FCC, Indecency, and Regulatory Transformations in the Shadows*, 65 ADMIN. L. REV. 509, 571 n.234 (2013) (“The Court has not found broadcast

discretion to control the expressions of those to whom it issues licenses.²²⁴ Alternatively, perhaps there is an ongoing need for a “safe harbor” where media consumers can confidently avoid indecent material.²²⁵ Arguments like these seek to justify *Pacifica* on the merits. If those efforts fail, the Court’s willingness to revisit its First Amendment precedents bodes ill for *Pacifica*’s long-term durability.

B. Campaign Finance

Part III described the Supreme Court’s recent decision in *McCutcheon v. FEC* as an example in which precedent served a braking function by discouraging sweeping change. While the Court invalidated aggregate limits on campaign contributions, a plurality resisted the invitation to hold that contribution limits should face the same demanding scrutiny that is applied to expenditure limits.²²⁶ The *McCutcheon* plurality also left intact the proposition that contribution limits can reduce political corruption or its appearance.²²⁷ Still, *McCutcheon* did not go so far as to extol the soundness of the Court’s historic treatment of contribution limits.²²⁸ It is natural to ask whether, notwithstanding the reprieve provided by *McCutcheon*, a broader revision to the Court’s campaign-finance jurisprudence is in the offing.

The Court’s solicitude for independent expenditures reached its crescendo in *Citizens United*, where limits on any entity’s expenditures were described as posing a grave threat to expressive liberty.²²⁹ The robust protection of independent expenditures arguably clashes with a more relaxed approach to contribution limits. While the *Citizens United* Court stated that its decision did not alter the treatment of campaign contributions,²³⁰ it is far from clear that the

licensees to be governmental actors, despite the discussion by some Justices in *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 114–21 (1973).”)

²²⁴ Cf. *Fox Television Stations*, 132 S. Ct. at 2320 (summarizing the federal government’s argument that “when it licenses a conventional broadcast spectrum, the public may assume that the Government has its own interest in setting certain standards”).

²²⁵ *FCC v. Fox Television Stations, Inc.*, No. 10-1293, Argument Transcript at 28 (Jan. 10, 2012).

²²⁶ See supra Part ____.

²²⁷ See *McCutcheon v. FEC*, 527 U.S. ___, ___, slip op. at 19 (2014) (plurality op.) (“In addition to ‘actual *quid pro quo* arrangements,’ Congress may permissibly limit ‘the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions’ to particular candidates.”) (quoting *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (per curiam)).

²²⁸ See Richard L. Hasen, “Die Another Day,” *Slate.com* (April 2, 2014) (“While [Chief Justice] Roberts goes out of his way to say that those base limits were not challenged [in *McCutcheon*], he does not do anything to affirm that those limits are safe.”).

²²⁹ See supra Part ____.

²³⁰ See *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (“*Citizens United* has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.”);

Court’s reasoning can be so contained. *McCutcheon*’s subsequent rejection of aggregate contribution limits adds fuel to the fire by highlighting the constitutional harms that result from stifling campaign contributions.²³¹

Criticism of the distinction between expenditures and contributions is nothing new.²³² The *Buckley* Court reasoned that “expenditure limitations ‘impose significantly more severe restrictions on protected freedoms of political expression and association than’ do contribution limitations.”²³³ The Court also validated the government’s interest in limiting contributions as a way to combat corruption and its appearance.²³⁴ But nearly four decades later, with the Court having concluded that independent expenditures cannot give rise to corruption or its appearance,²³⁵ there is reason to wonder whether the same treatment will extend to campaign contributions—at least where those contributions do not rise to the level of bribes, which can be regulated by criminal prohibitions outside the campaign-finance regime.²³⁶ This is not to imply that the Court is necessarily correct in its conclusion regarding independent expenditures; only that the rationale arguably applies with equal force to contributions and expenditures alike.²³⁷

There is also uncertainty about whether, in light of the Court’s emphasis on unfettered expression and the need for a wide-open democratic dialogue, the portrayal of contribution limits as “only a marginal restriction upon the

Hasen, *Citizens United and the Illusion of Coherence*, supra note __, at 616 (“The *Citizens United* majority went out of its way to state that its opinion did not have direct implications for the constitutionality of contribution limit laws.”).

²³¹ See supra Part __.

²³² 424 U.S. 1 (1976) (per curiam); see also Hasen, *Citizens United and the Illusion of Coherence*, supra note __, at 615 (“The tension between the Supreme Court’s treatments of contributions and expenditures is nothing new, but the *Citizens United* Court put serious pressure on the doctrinal edifice of campaign finance law.”).

²³³ *Randall v. Sorrell*, 548 U.S. 230, 241 (2006) (Breyer, J.) (quoting *Buckley*, 424 U.S. at 23).

²³⁴ See *Buckley*, 424 U.S. at 27 (“Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”).

²³⁵ See, e.g., *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826–27 (2011) (“The separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the sort of *quid pro quo* corruption with which our case law is concerned.”).

²³⁶ Cf. Hasen, *Citizens United and the Illusion of Coherence*, supra note __, at 616 (“If access and ingratiation are not corruption and corruption is really limited to *quid pro quo* corruption, then contribution limits would appear to be in serious danger of being struck down.”) (footnote omitted).

²³⁷ See, e.g., *McConnell*, supra note __, at 452 (“The district court in *McConnell* heard compelling testimony from participants in campaigns to the effect that independent expenditures are well known to the candidates and have much the same impact on them as direct contributions.”).

contributor’s ability to engage in free communication” continues to persuade a majority of justices.²³⁸ Some sitting justices have expressly challenged *Buckley*’s treatment of contributions.²³⁹ Others have endorsed powerful protections for independent expenditures that may, for the reasons I have discussed, logically extend to campaign contributions as well.²⁴⁰

Against this theoretical backdrop, we can consider concrete applications. One aspect of the law of campaign contributions is subject to alteration even without reconsideration of *Buckley*: bans on contributions by corporations.²⁴¹ Such bans seem precarious after *Citizens United*. The *Citizens United* Court railed against the notion of adjusting expressive liberties based on a speaker’s identity.²⁴² It also rejected the argument that adoption of the corporate form entails a sacrifice of expressive rights.²⁴³ The Court’s rationale casts doubt upon a constitutional regime in which one’s right to contribute to political candidates depends on whether one has joined with others to form a corporation.²⁴⁴

Beyond the issue of corporate contributions is the question whether *all* campaign contributions should be treated like independent expenditures—which is to say, free of any restriction unless the government can satisfy the rigors of exacting scrutiny.²⁴⁵ Assuming that a majority of justices view contribution limits as fully protected speech, conventional principles of stare decisis seem unlikely to stand in the way of doctrinal revision. The fact that legislatures have relied on the preexisting regime in structuring their systems of campaign-finance regulation is far less relevant in light of *Citizen United*, which held that legislative reliance “is not a compelling interest for *stare*

²³⁸ *Buckley*, 424 U.S. at 20; see also McConnell, *supra* note __, at 451 (“To say that contribution limits impose no significant restraint on speech is like saying that a fifteen-minute limitation on labor picketing would be fine, on the theory that once the picketer has engaged in the ‘symbolic act of picketing’ there is no point in keeping it up.”).

²³⁹ See *supra* Part __.

²⁴⁰ For example, Chief Justice Roberts and Justice Alito joined the majority opinion in *Citizens United*.

²⁴¹ *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (“*Citizens United* has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.”).

²⁴² See *id.* at 319.

²⁴³ See *id.* at 349.

²⁴⁴ See McConnell, *supra* note __, at 419 (reasoning that the *Citizens United* “majority’s broader holding prohibiting all speaker-based distinctions . . . would seem to portend invalidation of long-standing laws prohibiting corporate contributions to campaigns”).

²⁴⁵ See *Citizens United*, 558 U.S. at 340 (“[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’”) (quoting *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (opinion of Roberts, C.J.)).

decisis.²⁴⁶ With the reliance interests thus minimized, and drawing on the Court’s deep skepticism of governmental efforts to influence the marketplace of political ideas, the importance of removing *Buckley*’s barrier to unfettered contributions might well be treated as paramount.²⁴⁷ As the Court wrote in *McCutcheon*, “There is no right more basic in our democracy than the right to participate in electing our political leaders,” including by “contribut[ing] to a candidate’s campaign.”²⁴⁸

What, then, to make of the plurality’s restraint in *McCutcheon*, which invalidated aggregate contribution limits but allowed base limits to live for another day? There are three plausible explanations. First, perhaps some members of the plurality believe that *Buckley*’s more lenient treatment of contribution limits is justifiable on the merits. This conclusion is tenuous given the Court’s steady paring of the concept of political corruption that can support campaign-finance regulations.²⁴⁹ Second, perhaps some justices believe that although *Buckley* is incorrect, its treatment of contribution limits ought to be preserved—not just temporarily but indefinitely—for reasons of *stare decisis*. Considering the Court’s elevation of expressive liberty over *stare decisis* in other First Amendment disputes,²⁵⁰ that option seems unlikely as a descriptive matter.

Finally, perhaps some justices are fully intent on overruling *Buckley*’s treatment of contribution limits, but prefer to do so incrementally rather than abruptly. If this understanding of *McCutcheon* is the correct one, the Court’s approach is consistent with the braking function of *stare decisis*,²⁵¹ but it is

²⁴⁶ *Citizens United*, 558 U.S. at 365.

²⁴⁷ Cf. *id.* at 372 (noting with respect to independent expenditure restrictions that “[s]peech would be suppressed in the realm where its necessity is most evident: in the public dialogue preceding a real election. Governments are often hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime.”).

²⁴⁸ *McCutcheon v. FEC*, 572 U.S. ___, ___, slip op. at 1 (2014).

²⁴⁹ See, e.g., *McCutcheon v. FEC*, 572 U.S. ___, ___, slip op. at 19 (2014) (plurality op.) (“[W]hile preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption—‘*quid pro quo*’ corruption.”); *id.* at ___, slip op. at 19 (“[B]ecause the Government’s interest in preventing the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption, the Government may not seek to limit the appearance of mere influence or access.”); *id.* at ___, slip op. at 3 (“Campaign finance restrictions that pursue other objectives . . . impermissibly inject the Government ‘into the debate over who should govern.’”) (quoting *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011)). For recent commentary on the implications of the Court’s definition of corruption, see Richard L. Hasen, “Die Another Day,” *Slate.com* (April 2, 2014) (“By requiring that any campaign finance laws be deemed necessary to prevent *quid pro quo* corruption, akin to bribery, many more campaign laws could fall in the near future, including those base [contribution] limits.”).

²⁵⁰ See *supra* Part ___.

²⁵¹ See *supra* Part ___.

only a matter of time before we experience another reshuffling of important First Amendment rights.

C. Abortion Protesting

Another convergence of the Supreme Court’s First Amendment jurisprudence and its doctrine of stare decisis occurred in *McCullen v. Coakley*. At issue was a Massachusetts law that “creat[ed] a fixed thirty-five-foot buffer zone around the entrances, exits, and driveways of abortion clinics.”²⁵² Challengers to the law claimed that it subverted their efforts to counsel against abortions “through up-close, gentle conversations.”²⁵³ The First Circuit Court of Appeals rejected that argument, finding the law to be a “valid time-place-manner regulation” that left open “adequate communicative channels” for opponents of abortion.²⁵⁴

In reaching its decision, the First Circuit relied in part on the Supreme Court’s decision in *Hill v. Colorado*.²⁵⁵ In *Hill*, a divided Court upheld a Colorado statute that prohibited approaching “within eight feet of another person” in order to hand that person literature or “engag[e] in oral protest, education, or counseling.”²⁵⁶ The *Hill* majority treated the statute as a permissible, content-neutral restriction that was justified by “the State’s interest in protecting access and privacy, and providing the police with clear guidelines.”²⁵⁷ The dissenters viewed the statute as a serious imposition on ideological expression, with Justice Kennedy arguing that “[t]he Court’s holding contradicts more than a half century of well-established First Amendment principles.”²⁵⁸ From his perspective, the majority broke new and treacherous ground in “approv[ing] a law which bars a private citizen from passing a message, in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk.”²⁵⁹

McCullen put *Hill*’s validity back in front of the Court. The challengers to the Massachusetts law contended that if *Hill* stood in the way of striking the law down, the Court should take the opportunity to limit or overrule *Hill* itself.²⁶⁰ They reasoned that “*Hill* has proved to be badly reasoned, out of step

²⁵² *McCullen v. Coakley*, 708 F.3d 1, 3 (1st Cir. 2013).

²⁵³ *Id.* at 12.

²⁵⁴ *Id.* at 14.

²⁵⁵ 530 U.S. 703 (2000).

²⁵⁶ *Id.* at 707 (quoting Colo. Rev. Stat. § 18-9-122 (1999)).

²⁵⁷ *Id.* at 719–20.

²⁵⁸ *Id.* at 765 (Kennedy, J., dissenting).

²⁵⁹ *Id.*; see also *id.* (Scalia, J., dissenting) (“Restrictive views of the First Amendment that have been in dissent since the 1930’s suddenly find themselves in the majority.”).

²⁶⁰ Brief for Petitioners ii (No. 12-1168) (Sept. 2013).

with the Court’s other First Amendment jurisprudence, and unworkable or destructive in practice.”²⁶¹

[Note to Yale conference participants: More to come in this section after the Supreme Court decides McCullen. And if the Court uses McCullen as a vehicle for overruling Hill, this discussion will migrate to the early part of the paper, which chronicles the Court’s recent First Amendment innovations.]

D. Commercial Speech

Commercial speech occupies a unique place in First Amendment jurisprudence.²⁶² Although speech proposing commercial transactions is within the First Amendment’s purview, it receives “lesser protection” than “other constitutionally guaranteed expression.”²⁶³ Rather than facing the nearly insurmountable burden of strict scrutiny, restrictions on commercial speech are valid if they “directly advance[] a substantial governmental interest” and are properly “drawn to achieve that interest.”²⁶⁴

Along with scholarly debates over the inappropriate treatment of commercial speech,²⁶⁵ there have been deep divisions at the Supreme Court. In recent years Justice Thomas has taken a leading position in criticizing extant doctrine. He contends that “when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as ‘commercial.’”²⁶⁶ To him, there is no “philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial

²⁶¹ Id. at 54.

²⁶² See, e.g., VOLOKH, FIRST AMENDMENT AND RELATED STATUTES, supra note __, at 257 (“‘Commercial speech’—more properly called commercial *advertising*—is less protected than other kinds of speech.”).

²⁶³ *Central Hudson Gas & Elec. Corp. v. Public. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562 (1980).

²⁶⁴ *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667–68 (2011); see also *Central Hudson*, 447 U.S. at 564; VOLOKH, FIRST AMENDMENT AND RELATED STATUTES, supra note __, at 258. Commercial speech may also be restricted if it is false, deceptive, or “related to illegal activity.” *Central Hudson*, 447 U.S. at 563–64.

²⁶⁵ Compare C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 981 (2009) (“The world would do well not to follow the lead of the United States in its view that commercial speech is an aspect of free speech.”), with Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 628 (1990) (“It is the thesis of this Article that the commercial/noncommercial distinction makes no sense.”).

²⁶⁶ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001) (Thomas, J., concurring in part and concurring in the judgment); see also *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in the judgment) (describing as “*per se* illegitimate” the government’s “asserted interest . . . to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace”).

speech.”²⁶⁷ With Justice Thomas having made clear his desire to revisit precedent, the pivotal issue going forward is whether there are four additional Justices who are willing to reconsider the treatment of commercial speech and move the doctrine in the direction urged by Justice Thomas.²⁶⁸

Without squarely overruling its prior decisions, the Court has increasingly treated commercial speech as akin to other speech in the protection it receives, “both by applying the governing . . . test more strictly and by classifying less and less speech as commercial in the first place.”²⁶⁹ An intriguing data point is *Sorrell v. IMS Health Inc.*²⁷⁰ In *Sorrell*, the Court invalidated a Vermont law that “restrict[ed] the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors.”²⁷¹ Because the Court found that the law did not satisfy even the lenient standards that are applied to regulations of commercial speech, it had no occasion to contemplate its commercial speech doctrine more generally.²⁷² Even so, the Court offered some hints of concern. It squarely rejected the authority of government “achieve . . . policy objectives through the indirect means of restraining certain speech by certain speakers.”²⁷³ It also emphasized that “the ‘fear that people would make bad decisions if given truthful information’ cannot justify content-based burdens on speech.”²⁷⁴ By restricting the sale of prescriber information, Vermont violated the Constitution in a fundamental way: It “engag[ed] in content-based discrimination to advance its own side of a debate” and “burdened a form of protected expression that it found too persuasive.”²⁷⁵

Sorrell may foretell a diminishing power of governments to regulate commercial speech. The opinion suggests that only a risk of fraud is sufficient to justify restriction, at least where the speech is directed at “‘sophisticated and experienced’ consumers.”²⁷⁶ To be sure, this leaves open the prospect of

²⁶⁷ 44 *Liquormart*, 517 U.S. at 522 (Thomas, J., concurring in part and concurring in the judgment).

²⁶⁸ See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (noting that “several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases”).

²⁶⁹ Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 *DUKE L.J.* 821, 887 (2008).

²⁷⁰ 131 S. Ct. 2653 (2011).

²⁷¹ *Id.* at 2659.

²⁷² *Id.* at 2667 (“As in previous cases . . . the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied.”).

²⁷³ *Id.* at 2670.

²⁷⁴ *Id.* at 2670–71 (quoting *Thompson v. Western States Medical Center*, 535 U.S. 357, 374 (2002)).

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 2671 (quoting *Edenfield v. Fane*, 507 U.S. 761, 775 (1993)); see also *Central Hudson Gas & Elec. Corp. v. Public. Serv. Comm’n of N.Y.*, 447 U.S. 557, 574 (1980) (Blackmun, J., concurring in the judgment) (“I seriously doubt whether suppression of information

retaining some differences between the treatment of commercial speech and ordinary speech. For example, the Court’s acknowledgement that fear of deception is a sufficient basis for restricting commercial advertising is unlikely to extend to political speech, where the value of robust expression is at its apex. Likewise, there remains the possibility that commercial products may be regulated in their appeals to minors,²⁷⁷ even if minors generally enjoy significant expressive liberty.²⁷⁸ Nevertheless, redefining the doctrine of commercial speech as extending only to deceptive practices and appeals to minors would represent a marked shift from what the doctrine once appeared to be.²⁷⁹ The effect would be especially pronounced to the extent that regulatory efforts are viewed as (impermissible) speech restrictions as opposed to (impermissible) economic mandates with incidental effects on speech.²⁸⁰

Sorrell is the latest “continuation of the Court’s trend [of assimilating] commercial speech to political speech.”²⁸¹ The endgame might well be the conclusion that truthful commercial speech is entitled to the same robust protection that is extended to political speech. If First Amendment stare decisis remains in its enfeebled state, whether such a shift will occur depends entirely on the interpretive conclusions of a majority of sitting justices.

E. Collective Bargaining and Union Funding

Under an “agency shop” arrangement, employees are represented by a labor union that negotiates on their behalf.²⁸² The Supreme Court has explained that employees within an agency shop may not be forced to join the

concerning the availability and price of a legally offered product is ever a permissible way for the State to ‘dampen’ demand for or use of the product.”).

²⁷⁷ Cf. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (“[N]one of the petitioners contests the importance of the State’s interest in preventing the use of tobacco products by minors.”).

²⁷⁸ See *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729, 2735–36 (2011) (“[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.”) (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 212–213 (1975)).

²⁷⁹ See *Central Hudson Gas & Elec. Corp. v. Public. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562 (1980).

²⁸⁰ See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2673 (2011) (Breyer, J., dissenting) (“[The statute at issue] deprives pharmaceutical and data-mining companies of data, collected pursuant to the government’s regulatory mandate, that could help pharmaceutical companies create better sales messages. In my view, this effect on expression is inextricably related to a lawful governmental effort to regulate a commercial enterprise.”).

²⁸¹ Tushnet, *First Amendment and Political Risk*, supra note __, at 121.

²⁸² See *Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277, 2284 (2012).

union or fund its political activities.²⁸³ But the First Amendment does not shield employees from an obligation to “pay the union an annual fee to cover the cost of union services related to collective bargaining.”²⁸⁴ Historically, employees could also be required to opt out of paying the portion of union dues relating to political and ideological activities.²⁸⁵

This arrangement—in which employees must finance collective bargaining but may withhold their support from the union’s political or ideological activities—reflected a compromise.²⁸⁶ It was an uneasy one from the beginning, for the Court expressly acknowledged that “[a]n employee may very well have ideological objections to a wide variety of activities undertaken by the union,” and perhaps even “to unionism itself.”²⁸⁷ Still, the compromise has managed to hold for decades.

In *Knox v. Service Employees International Union*, the Supreme Court examined the First Amendment’s application to a union’s imposition of special assessments.²⁸⁸ The Court concluded that “when a public-sector union imposes a special assessment or dues increase,” it cannot compel funding from nonmembers.²⁸⁹ What is more, it is not enough for the union to give nonmembers the power to opt out. Rather, unions that are imposing special assessments or dues increases “may not exact any funds from nonmembers without their affirmative consent.”²⁹⁰ In other words, nonmembers are financially liable only if they make the choice to opt in.

²⁸³ See *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 235–36 (1977) (“[T]he Constitution requires . . . that [political and ideological] expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.”); *Knox*, 132 S. Ct. at 2284 (“[I]n *Abood* . . . we held that a public-sector union, while permitted to bill non-members for chargeable expenses, may not require nonmembers to fund its political and ideological projects.”).

²⁸⁴ *Knox*, 132 S. Ct. at 2284.

²⁸⁵ See *id.* at 2290 (acknowledging the Court’s “acceptance of the opt-out approach,” and attributing it to “historical accident”).

²⁸⁶ See, e.g., Benjamin I. Sachs, *Unions, Corporations, and Political Opt-out Rights After Citizens United*, 112 COLUM. L. REV. 800, 815–16 (2012) (summarizing the rule of *Abood* as follows: “While compelled support for [collective bargaining and contract administration activities] passed constitutional muster, compelled support for union political activity did not.”).

²⁸⁷ *Abood*, 431 U.S. at 222; see also *id.* at 257 (Powell, J., concurring in the judgment) (“Collective bargaining in the public sector is ‘political’ in any meaningful sense of the word.”); *Davenport v. Washington Ed. Ass’n*, 551 U.S. 177, 181 (2007) (“[A]gency-shop arrangements in the public sector raise First Amendment concerns because they force individuals to contribute money to unions as a condition of government employment.”).

²⁸⁸ See *Knox*, 132 S. Ct. at 2285.

²⁸⁹ *Id.* at 2295.

²⁹⁰ *Id.* at 2296.

In explaining its opt-in requirement, the Court reasoned that “requiring objecting nonmembers to opt out of paying the nonchargeable portion of union dues . . . represents a remarkable boon for unions.”²⁹¹ Permitting an opt-out regime also places First Amendment rights in jeopardy. Based on the reasonable assumption that “most employees who choose not to join the union . . . prefer not to pay the full amount of union dues,” the “default rule” that better approximates those nonmembers’ preferences is one in which nonmembers avoid the expense unless they affirmatively consent to pay it.²⁹² The opt-out mechanism, by contrast, “creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree.”²⁹³

Through its indictment of opt-out requirements, *Knox* seems to foreshadow reconsideration of the general rule that public employees may be required to opt out of funding a union’s political and ideological activities.²⁹⁴ The Court was candid in its assessment: “By authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system . . . , our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate.”²⁹⁵ As Justice Sotomayor reasoned in her concurrence, while *Knox*’s requirement of an opt-in rule “is, on its face, limited to special assessments and dues increases,” the majority’s language “strongly hints that this line may not long endure.”²⁹⁶ Justice Breyer raised similar concerns in noting that “each reason the Court offers in support of its ‘opt-in’ conclusion seems in logic to apply, not just to special assessments, but to ordinary yearly fee charges as well.”²⁹⁷ Constitutionalizing an opt-in requirement for political and ideological expenses would reflect a departure from precedent, even if, as the *Knox* majority concluded, the distinction between opting in and opting out has not received a great deal of attention in the Court’s prior cases.²⁹⁸

²⁹¹ Id. at 2290.

²⁹² Id.

²⁹³ Id.

²⁹⁴ See Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU, Local 1000*, 98 CORNELL L. REV. 1023, 1040 (2013) (“*Knox* goes beyond anything the Court previously held by concluding that the First Amendment requires an opt-in regime with respect to certain forms of union fees.”); Matthew T. Bodie, *Labor Speech, Corporate Speech, and Political Speech: A Response to Professor Sachs*, 112 COLUM. L. REV. SIDEBAR 206, 210 (2012) (“As long as the underlying issue is the alleged compulsion of nonmembers to contribute to political causes against their will, the Court will continue to make it more difficult for the union to collect these funds.”).

²⁹⁵ *Knox*, 132 S. Ct. at 2291.

²⁹⁶ Id. at 2299 (Sotomayor, J., concurring in the judgment).

²⁹⁷ Id. at 2306 (Breyer, J., dissenting).

²⁹⁸ See id. at 2290 (majority op.) (“Although the difference between opt-out and opt-in schemes is important, our prior cases have given surprisingly little attention to this distinction.”).

Notwithstanding the considerable importance of the opt-in/opt-out distinction,²⁹⁹ an even larger issue raised by *Knox* is whether public labor unions can demand funding from nonmembers to support their collective bargaining activities.³⁰⁰ The *Knox* majority criticized the imposition of compulsory fees as a general matter. It contended that “[b]ecause a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, . . . the compulsory fees constitute a form of compelled speech and association.”³⁰¹ The result is “a ‘significant impingement on First Amendment rights.’”³⁰² *Knox* gave new salience to the possibility that nonmembers may receive a constitutional right to avoid supporting the collective bargaining activities of public unions.

The issue of compelled funding for collective bargaining arose fast on the footsteps of *Knox* in the case of *Harris v. Quinn*. [*Another note to Yale conference participants: I suspect that Harris will shed some light on broader issues of union funding and collective bargaining, which I intend to discuss here.*]

CONCLUSION

The efficacy of stare decisis depends on a judge’s willingness to prioritize considerations of stability and continuity above implementing her preferred reading of a legal text. That prioritization need not occur in every case, or even in most cases. But it must happen on occasion if the law is to become something more than what contemporary jurists believe it ought to be.

Indeed, acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles.”).

²⁹⁹ See, e.g., *id.* at 2307 (Breyer, J., dissenting) (arguing that when “nonchargeable political expenses are at issue, there may be a significant number of represented nonmembers who do not feel strongly enough about the union’s politics to indicate a choice either way. That being so, an ‘opt-in’ requirement can reduce union revenues significantly . . .”).

³⁰⁰ See Fisk & Chemerinsky, *supra* note __, at 1028 (“The expansive dicta in the Court’s opinion has potentially enormous implications for the rights of public employees to bargain collectively and to participate in politics through their unions.”); see also *Knox*, 132 S. Ct. at 2306 (Breyer, J., dissenting) (noting the “intense political debate” over “whether, the extent to which, and the circumstances under which a union that represents nonmembers in collective bargaining can require those nonmembers to help pay for the union’s (constitutionally chargeable) collective-bargaining expenses”).

³⁰¹ *Knox*, 132 S. Ct. at 2289 (majority op.).

³⁰² *Id.* (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984)); see also Davenport, 551 U.S. at 184 (“Regardless of one’s views as to the desirability of agency-shop agreements . . . it is undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees.”).

Understood in this way, the doctrine of stare decisis is in greatest peril when it is situated within a system that treats considerations other than legal continuity as crucial. If it is always more important to interpret the law correctly than it is to allow the law to remain settled, stare decisis loses its ability to lend stability and impersonality to the law. That prospect is cause for a second look at the Supreme Court's recent First Amendment jurisprudence. By emphasizing the significance of unfettered speech, the Court has made it difficult to argue that a precedent should be retained on grounds of stare decisis when it is insufficiently protective of expressive liberty.

For some, this state of affairs may be unobjectionable. After all, robust expression is a core tenet of American legal and political culture. Still, there is something to be said for stare decisis, even when continuity comes at a serious cost. As the Court has explained, stare decisis promotes the rule of law by solidifying legal principles and establishing them as the product of an institution that retains its identity over time rather than being reconstituted with every new presidential appointment.³⁰³ The coming years will provide the Court with numerous opportunities to consider the durability of its First Amendment precedents. The Court's handling of those opportunities will go a long way toward revealing how much is left of stare decisis in the First Amendment sphere.

³⁰³ See supra Part __.