

# Michigan Law Review

---

Volume 115 | Issue 4


---

2017

## Precedent and Speech

Randy J. Kozel  
*Notre Dame Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

 Part of the [Civil Rights and Discrimination Commons](#), [First Amendment Commons](#), [Jurisprudence Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Randy J. Kozel, *Precedent and Speech*, 115 MICH. L. REV. 439 (2017).  
Available at: <https://repository.law.umich.edu/mlr/vol115/iss4/1>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## PRECEDENT AND SPEECH

Randy J. Kozel\*

*The U.S. Supreme Court has shown a notable willingness to reconsider its First Amendment precedents. In recent years, the Court has departed from its prior statements regarding the constitutional value of false speech. It has revamped its process for identifying categorical exceptions to First Amendment protection. It has changed its positions on corporate electioneering and aggregate campaign contributions. In short, it has revised the ground rules of expressive freedom in ways large and small. The Court generally describes its past decisions as enjoying a presumption of validity through the doctrine of stare decisis. This Article contends that within the context of expressive freedom, there has been no such presumption. When the Court concludes that a precedent reflects a cramped vision of expressive liberty, adherence to the past gives way. Unfettered speech, not legal continuity, is the touchstone.*

*This practice is understandable. After all, free expression is crucial to political and social life. Yet departures from precedent can compromise the notion of constitutional law as enduring and impersonal.*

*Responding to the tension between legal continuity and the undiluted protection of speech, this Article defends precedent as a tool for separating the content of constitutional law from contested matters of interpretive philosophy. The key premise is that a precedent's perceived harmfulness should generally be irrelevant to whether it is retained or overruled. Perspectives on harmfulness track underlying interpretive commitments that vary from judge to judge, creating a conceptual gulf that the doctrine of precedent is meant to bridge rather than widen.*

*As an alternative, the Article contends that even within the Court's existing framework, a renewed emphasis on principles of concreteness and content sensitivity would facilitate a more nuanced approach to precedent. Such a development would embrace the reality that not all speech is created equal—and not all limitations on speech are equally bad.*

### INTRODUCTION

False statements of fact possess intrinsic constitutional value.<sup>1</sup> Exceptions to First Amendment protection are based on historical practice rather

---

\* Professor of Law, Notre Dame Law School. Thanks to Laura Myers for excellent research and editorial assistance. For helpful comments and conversations, thanks to Amy Barrett, Will Baude, Joseph Blocher, Sam Bray, Nathan Chapman, Alan Chen, Erin Delaney, Chad Flanders, Nicole Garnett, Richard Garnett, John Inazu, Leslie Kendrick, Jeffrey Pojanowski, Alex Tsesis, and Eugene Volokh. I am also grateful for comments by participants at the 2014 Yale Law School Freedom of Expression Scholars Conference, where I presented the article under its earlier title, *Second Thoughts About the First Amendment*.

1. See *United States v. Alvarez*, 132 S. Ct. 2537, 2546–47 (2012) (plurality opinion).

than evaluation of costs and benefits.<sup>2</sup> Corporations enjoy an unfettered right to praise and criticize political candidates.<sup>3</sup> The government may not restrict citizens' total contributions to political campaigns during an election cycle.<sup>4</sup>

The common thread among these rules is that they were all established within the last ten years. Indeed, each of the rules conflicts with aspects of the Supreme Court's prior case law. Yet the Court saw fit to revise all of these areas of First Amendment doctrine.

There may be more to come. Several justices have questioned the Court's precedents regarding the First Amendment implications of public sector labor unions.<sup>5</sup> Some justices have also urged a fresh look at the Court's longstanding approach to broadcast indecency.<sup>6</sup> The Court's latest word on the line between content-based and content-neutral regulations likewise suggests a possible revision that could make many restrictions on speech more difficult to sustain.<sup>7</sup> And then there is the pivotal distinction between campaign contributions, which are subject to regulation, and independent political expenditures, which receive robust constitutional protection. The Court recently preserved that distinction without reaffirming it. A plurality of justices saw "no need" to reconsider existing doctrine, notwithstanding calls for its repudiation.<sup>8</sup> The uncertainty surrounding campaign finance law exemplifies the state of expressive liberty more broadly. As much as the Court has altered the First Amendment landscape over the past decade, the next few years could be equally dramatic—particularly as a new justice succeeds Justice Scalia and the possibility of retirements looms.

Among the most notable aspects of the Court's new principles of free expression is their genesis. In the opinions that announced the principles, the Court appeared to give little import to the doctrine of stare decisis, which generally counsels retaining precedents absent an exceptional basis for departure.<sup>9</sup> In some of the cases, the Court did not discuss stare decisis at all.

---

2. *United States v. Stevens*, 559 U.S. 460, 471–72 (2010).

3. *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

4. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1442 (2014) (plurality opinion).

5. *E.g.*, *Harris v. Quinn*, 134 S. Ct. 2618, 2630–34 (2014); *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2289–91 (2012).

6. *E.g.*, *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2321 (2012) (Ginsburg, J., concurring in the judgment); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 530–35 (2009) (Thomas, J., concurring).

7. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227–31 (2015) ("A law that is content based on its face is subject to strict scrutiny regardless of the government's . . . content-neutral justification . . .").

8. *McCutcheon*, 134 S. Ct. at 1445. *But see id.* at 1462–64 (Thomas, J., concurring in the judgment) (arguing that contribution limits and expenditure limits should both be subject to strict scrutiny).

9. *E.g.*, *United States v. IBM 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, 842 (1991) (Souter, J., concurring))).

In others, the Court endorsed fidelity to precedent as an abstract ideal but concluded that *stare decisis* should not stand in the way of correcting a constitutional mistake. Back in 2007, Justice Scalia noted that “[t]his Court has not hesitated to overrule decisions offensive to the First Amendment.”<sup>10</sup> That observation has become more resonant with the Court’s recent expansions of expressive freedom at the expense of legal continuity.<sup>11</sup>

The question is why deference to precedent—a feature the Court has described as foundational to the rule of law<sup>12</sup>—is so readily overcome in the First Amendment context. The answer, this Article contends, is that the Court has been applying an exceedingly weak version of *stare decisis* in First Amendment cases. First Amendment *stare decisis* stands in tension with the Court’s more general statements that past decisions must be upheld absent a special justification for overruling them.<sup>13</sup> To the contrary, the Court has treated precedent as readily giving way to expressive rights.<sup>14</sup> In the battle between speech and stability, speech wins.

In one sense, it is difficult to find anything objectionable in such an approach.<sup>15</sup> Depriving a speaker of her liberty—and, at the same time, impoverishing the public discourse to the detriment of society at large—seems like a high price to pay for allowing the law to remain undisturbed. But the value of continuity cannot be dismissed so easily. The doctrine of *stare decisis* can accommodate different perspectives about how best to promote the free exchange of ideas. A useful illustration, which I will discuss at length below, is the Court’s campaign finance jurisprudence. The justices are deeply divided about the lawfulness of governmental efforts to regulate campaign-related speech. But it is misleading to think of the disagreement as pitting justices who support unfettered expression against justices who

---

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

11. See Akhil Reed Amar, *The First Amendment’s Firstness*, 47 U.C. DAVIS L. REV. 1015, 1028 (2014) (“Never in history have First Amendment freedoms been protected as vigorously by the Court, and no other set of freedoms today is protected more vigorously.”).

12. See *infra* Part IV.

13. E.g., *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015) (“[A]n argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then.”); *Alleyne v. United States*, 133 S. Ct. 2151, 2164 (2013) (Sotomayor, J., concurring) (“Of course, under our doctrine of *stare decisis*, establishing that a decision was wrong does not, without more, justify overruling it.”); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 757–58 (1988).

14. The Supreme Court has also treated a variety of other values as subordinate to unfettered speech. See Vikram David Amar & Alan Brownstein, *The Voracious First Amendment: Alvarez and Knox in the Context of 2012 and Beyond*, 46 LOY. L.A. L. REV. 491, 493, 517–24 (2013) (identifying “ways in which expressive autonomy now seems regularly to trump competing constitutional and societal values that have traditionally been given great weight”).

15. See Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 398–99 (2007) (noting that it is not “self-evident that on issues involving morally or politically important individual rights that we can or should expect Supreme Court Justices to suppress their own best moral, political, and constitutional judgment to the values of stability, notice, reliance, or simply being consistent with the past”).

would allow governments to pursue competing objectives, such as decreasing the amount of money in politics. Instead, the Court's campaign finance cases encompass dueling visions of robust political debate: one vision in which the government's job is to step aside, and another in which the government must take measures to ensure that everyone has a voice in the political process.<sup>16</sup>

Without meaningful deference to precedent, judicial interpretations of the First Amendment will fluctuate as these divergent visions compete for primacy. When there are five votes in favor of the former approach, public officials will be sharply restricted in their power to regulate campaign-related speech. If personnel changes on the Court lead to five votes in favor of the latter approach, public officials will have greater discretion to limit certain speech in pursuing a healthy and vibrant marketplace of ideas. As the balance of power on the Court ebbs and flows, so, too, will the First Amendment implications of campaign finance regulation.

Stare decisis reflects a different conception of the law, one in which constitutional rules survive changes in judicial personnel. In contexts such as campaign finance, deference to precedent lends stability to the Court's pronouncements about how to protect and promote robust expression. But even when that is not the case—even when, in other words, standing by precedent means permitting the restriction of speech in service of some other value—stare decisis has an important role to play. If the purpose of stare decisis is to promote the law's stability, predictability, and impersonality, the doctrine cannot wilt at the mention of free speech. Sometimes it is better for the law to remain settled despite its failure to protect expressive liberty as vigorously as today's Court may deem appropriate.

I begin in Part I by analyzing the doctrine of stare decisis as the Court customarily describes it. In Part II, I examine several recent fluctuations in First Amendment doctrine as well as the possibility of other potential revisions in the years ahead. Along the way, I pay particular attention to the Court's attitude toward legal continuity. Part III contends that the recent First Amendment innovations are best understood as reflecting a specialized, and diluted, version of stare decisis that applies to situations in which precedent threatens to interfere with expressive liberty. Part IV responds to the tension between precedent and expression by defending a *second-best* approach to stare decisis that is designed to operate in a world of interpretive disagreement among the justices. At the core of second-best stare decisis is the recognition that justices will tend to reach different conclusions about precedent when they hold different philosophies of constitutional interpretation. Determining whether a prior decision is so bad as to warrant overruling entails asking which of the decision's implications are constitutionally relevant and which are legally inapposite. That inquiry, in turn, requires an interpretive theory that distinguishes between relevant and irrelevant (legally speaking) consequences.

---

16. See *infra* Section II.B.

Yet we cannot assume that interpretive harmony will prevail at the Court. To the contrary, disagreement among the justices is a fact of life. Second-best stare decisis responds by reconceptualizing the criteria for overruling in order to break free from underlying disputes over interpretive philosophy. The theory I propose emphasizes considerations such as factual accuracy, procedural workability, and reliance expectations. Those factors take the same shape regardless of the interpretive philosophy that a particular justice applies. Second-best stare decisis also limits the role of a precedent's substantive impact—for example, the perceived severity of its intrusion on expressive liberty—as a justification for overruling it. The role of a precedent's substantive effects is deeply bound up with an individual justice's beliefs about which types of harms are legally relevant. While it may be appropriate to consider substantive effects in a system marked by widespread interpretive agreement, that practice breaks down in our second-best world of interpretive pluralism. Understandable though it may be, a focus on substantive effects and perceived harms makes it more difficult for justices of different interpretive persuasions to find common ground in the treatment of precedent.

The second-best approach is more deferential to precedent than the Court has tended to be in its recent First Amendment cases. But it does not follow that second-best stare decisis is revolutionary. At the theory's core is a desire to make good on the Court's own description of stare decisis as promoting stability, continuity, and the rule of law.<sup>17</sup> Second-best stare decisis is a means of pursuing those values even when the First Amendment is in play.

As an alternative to second-best stare decisis, Part IV develops two principles for ensuring meaningful deference under the Court's existing approach to precedent. The first principle is *concreteness*, which resists the tendency to describe the harms of speech-restrictive precedents in abstract, generalized terms. The second principle is *content sensitivity*, which acknowledges that not all speech is created equal—and not all speech-restrictive precedents are equally problematic. Together, these principles provide the framework for a practicable doctrine of stare decisis. They embody the premise that in the First Amendment context, as in all others, stare decisis should be more than a concept frequently invoked but just as frequently overcome.

I close in Part V by considering whether free speech occupies a unique place in the constitutional landscape, or whether the elevation of civil liberty over precedent reflects a broader principle of constitutional law.

#### I. PRINCIPLES OF PRECEDENT

American courts manage the line between continuity and progress using the doctrine of stare decisis. Current debates over stare decisis continue to draw on Justice Brandeis' famous dichotomy between the value of the law

---

17. See *infra* Section IV.A.

being “settled” and the value of it being “right.”<sup>18</sup> The Supreme Court’s attempts at weighing legal resolution against interpretive accuracy have yielded a “series of prudential and pragmatic considerations” that bear on “the respective costs of reaffirming and overruling a prior case.”<sup>19</sup> This depiction of *stare decisis* as a flexible policy rather than an “inexorable command” does not mean precedent is immaterial.<sup>20</sup> It does, however, make clear that fidelity to precedent “is capable of being overridden” by countervailing concerns.<sup>21</sup>

Among the familiar considerations in determining a precedent’s fate are its procedural workability, its compatibility with related lines of cases, the accuracy of its factual premises, and the extent to which it has engendered reliance.<sup>22</sup> Other features that crop up from time to time include a precedent’s age,<sup>23</sup> the number of justices who voted in its favor,<sup>24</sup> and whether it deals with “procedural and evidentiary rules” as opposed to substantive rights and obligations.<sup>25</sup> In addition, the Court has suggested that a decision is more vulnerable if it was not “well reasoned”<sup>26</sup> and, in particular, if it “has been proved manifestly erroneous.”<sup>27</sup> That inquiry links a precedent’s durability to the soundness—or, more accurately, the degree of unsoundness—of its rationale.<sup>28</sup>

---

18. *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*.”).

19. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992); see also, e.g., Jill E. Fisch, *The Implications of Transition Theory for Stare Decisis*, 13 J. CONTEMP. LEGAL ISSUES 93, 106 (2003) (“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.”).

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

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

22. *Casey*, 505 U.S. at 854–55.

23. E.g., *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009) (noting that the applicable precedent “is only two decades old, and eliminating it would not upset expectations”).

24. E.g., *Payne*, 501 U.S. at 828–29.

25. *Id.* at 828.

26. *Montejo*, 556 U.S. at 792–93.

27. *United States v. Gaudin*, 515 U.S. 506, 521 (1995); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 4–5 (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.” (quoting THE FEDERALIST NO. 78, at 298 (Alexander Hamilton) (Clinton Rossiter ed., 1999))).

28. *Contra Monaghan*, *supra* note 13, at 758 (“Even an ‘overriding conviction’ of prior error is not enough; the precedent must have some palpable adverse consequences beyond its

Understanding the operation of stare decisis requires accounting for these enumerated factors and the broader principles that frame them. In constitutional disputes, the judicial task is to consider issues such as workability and reliance as a means of navigating the overarching tension between maintaining continuity and correcting mistakes. To guide this analysis, the Court has emphasized that its default presumption is adherence to precedent.<sup>29</sup> There must be a “special justification” above and beyond a precedent’s incorrectness to warrant overruling it.<sup>30</sup>

## II. FIRST AMENDMENT FLUCTUATIONS

Notwithstanding the value the Supreme Court customarily ascribes to stare decisis, the doctrine seems to lose its resonance in the context of free speech. To illustrate, this Part discusses several recent revisions of the Court’s First Amendment jurisprudence. In some instances, the Court expressly discussed stare decisis. In others, the Court did not understand itself as overruling precedent in a formal sense, even if the result was the re-orientation of existing law. Whichever path the Court took, the outcome was the same: speech received protection at the expense of continuity.

### A. Corporate Electioneering

In contemporary law and politics, to talk about stare decisis and free speech is to talk about *Citizens United v. FEC*.<sup>31</sup> Given its immediate impact and continued prominence, the case hardly needs an introduction.<sup>32</sup> Still, a brief refresher is in order. At issue were provisions of federal law that restricted the political activities of corporations and labor unions.<sup>33</sup> *Citizens United* involved the application of these restrictions to a documentary about senator and presidential hopeful Hillary Clinton.<sup>34</sup>

---

existence.” (footnote omitted) (quoting Roscoe Pound, *What of Stare Decisis?*, 10 *FORDHAM L. REV.* 1, 6 (1941))).

29. *E.g.*, *Citizens United v. FEC*, 558 U.S. 310, 362 (2010) (“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.”).

30. *E.g.*, *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (quoting *United States v. IBM Corp.*, 517 U.S. 843, 856 (1996)).

31. 558 U.S. 310 (2010).

32. *See, e.g.*, Adam Liptak, *A Rare Rebuke, in Front of a Nation*, *N.Y. TIMES*, Jan. 29, 2010, at A12 (describing President Obama’s criticism of *Citizens United* at the State of the Union address); Thomas B. Edsall, Opinion, *Is There a Silver Lining to Citizens United?*, *N.Y. TIMES*, (Oct. 28, 2015), <http://www.nytimes.com/2015/10/28/opinion/is-there-a-silver-lining-to-citizens-united.html> [<https://perma.cc/PX57-KKAZ>] (on file with the *Michigan Law Review*) (discussing the impact of *Citizens United*).

33. *Citizens United*, 558 U.S. at 318–19.

34. *Id.* at 319–21.



After the case was argued at the Court, the justices ordered additional briefing and argument on the status of two precedents.<sup>35</sup> The first, *Austin v. Michigan Chamber of Commerce*, upheld a prohibition against the use of corporate treasury funds to advocate for or against political candidates.<sup>36</sup> The second, *McConnell v. FEC*, applied *Austin*'s rule in a different statutory context.<sup>37</sup>

In *Citizens United*, a five-justice majority rejected *Austin* and the corresponding portion of *McConnell*. The Court explicitly stated that it was reconsidering the holdings of controlling precedents.<sup>38</sup> It described its obligation to respect a past decision "unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error."<sup>39</sup> Ultimately, though, the Court viewed the importance of getting the law right as overcoming the pull of precedent. It explained that *Austin*'s rationale was flawed from the beginning and had been further "undermined" over time.<sup>40</sup> The *Austin* approach relegated corporate speakers to the sidelines despite their "valuable expertise" and ability to "point out errors or fallacies in speech of all sorts."<sup>41</sup> The Court also characterized *Austin* as departing from cases that came before it.<sup>42</sup> Finally, in litigating *Citizens United*, the government had asked the Court to reaffirm *Austin*'s rule but to ground it in a new rationale. According to the Court, that request for rehabilitation further diluted the respect *Austin* warranted as a precedent.<sup>43</sup>

As noted in Part I, the Supreme Court commonly emphasizes the role of reliance interests within the stare decisis calculus.<sup>44</sup> The *Citizens United* majority recognized the potential relevance of reliance but found that there were "[n]o serious reliance interests . . . at stake."<sup>45</sup> Under the *Austin* regime, corporations had been prohibited from using treasury funds for candidate advocacy. Giving them a new right would not disrupt their reliance on the old rules.<sup>46</sup>

---

35. *Citizens United v. FEC*, 557 U.S. 932 (2009) (mem.) (ordering supplemental briefing).

36. 494 U.S. 652, 668–69 (1990).

37. 540 U.S. 93, 203–09 (2003), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

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

39. *Id.* at 362.

40. *Id.* at 363–64.

41. *Id.*

42. *Id.* at 363.

43. *Id.* ("When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished."); *see also id.* at 384 (Roberts, C.J., concurring) ("*Stare decisis* is a doctrine of preservation, not transformation. . . . There is therefore 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.").

44. *See supra* Part I.

45. *Citizens United*, 558 U.S. at 365 (majority opinion).

46. *Id.*

What about Congress and the state legislatures that had restricted corporate expenditures under the *Austin* regime? Did their reliance count for anything? Justice Stevens thought so, noting in his partial dissent that “[s]tate legislatures have relied on their authority to regulate corporate electioneering . . . for more than a century.”<sup>47</sup> He added that Congress “relied on this authority for a comparable stretch of time” and paid particular attention to *Austin* in crafting the Bipartisan Campaign Reform Act of 2002.<sup>48</sup> These considerations, Justice Stevens reasoned, were significant given the Court’s prior statements about the relevance of governmental reliance.<sup>49</sup> Yet the justices in the majority saw matters differently. For them, reliance by Congress and state legislatures was “not a compelling interest for *stare decisis*.”<sup>50</sup>

The majority’s willingness to depart from precedent cohered with its depiction of the constitutional stakes. In the view of the majority, by treating corporations differently from other speakers, *Austin* embraced a profoundly disconcerting principle. It permitted the government to use its coercive powers “to command where a person may get his or her information or what distrusted source he or she may not hear.”<sup>51</sup> In so doing, *Austin* allowed the government to “use[ ] censorship to control thought.”<sup>52</sup> Chief Justice Roberts echoed this point in his concurrence, arguing that *Austin*’s “logic threatens to undermine our First Amendment jurisprudence and the nature of public discourse more broadly.”<sup>53</sup> He and his colleagues in the majority saw fit to rectify the Court’s prior mistakes notwithstanding the principle of *stare decisis*.<sup>54</sup>

---

47. *Id.* at 411 (Stevens, J., concurring in part and dissenting in part).

48. *Id.* at 411–12.

49. *Id.* at 411. Justice Stevens relied on *Hubbard v. United States*, 514 U.S. 695, 714 (1995) (plurality opinion), where the plurality noted that “[s]tare decisis has special force when legislators or citizens ‘have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.’ ” *Id.* (alteration in original) (quoting *Hubbard*, 514 U.S. at 714). For comparable statements see, for example, *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (opinion of Breyer, J.) (recognizing reliance on precedent by “Congress and state legislatures”); *Harris v. United States*, 536 U.S. 545, 567–68 (2002) (plurality opinion) (noting the relevance of legislative reliance); and *Harris v. Quinn*, 134 S. Ct. 2618, 2652 (2014) (Kagan, J., dissenting) (including in the reliance analysis the fact that “[m]ore than 20 States have enacted statutes” that would need to be revised or reexamined if the relevant precedent were overruled).

50. *Citizens United*, 558 U.S. at 365 (majority opinion).

51. *Id.* at 356.

52. *Id.*

53. *Id.* at 382 (Roberts, C.J., concurring).

54. For a competing account, see Geoffrey R. Stone, *Citizens United and Conservative Judicial Activism*, 2012 U. ILL. L. REV. 485, 488–89 (arguing that “[a]lthough the majority made a half-hearted effort to legitimize its decision to overrule [the relevant] precedents, the plain and simple fact is that nothing had really changed in the intervening years—except the makeup of the Court itself” (footnote omitted)).

### B. Campaign Contributions

The expenditure limits at issue in *Citizens United* are only part of the story of campaign finance regulation. There is also the matter of political contributions.

As the Court explained in *Buckley v. Valeo*, expenditure limits must survive “exacting scrutiny.”<sup>55</sup> This standard is tantamount to strict scrutiny, which requires the government to cite a compelling interest for the restriction and pursue that interest in the least restrictive way possible.<sup>56</sup> The government has a freer hand to regulate campaign contributions. Contribution limits are permissible so long as the government is pursuing a “sufficiently important interest” and uses “closely drawn” means.<sup>57</sup>

The rules for regulating campaign contributions moved to the foreground in *McCutcheon v. FEC*.<sup>58</sup> The Court held that limits on a donor’s total contributions during an election cycle are unlawful.<sup>59</sup> A plurality of justices reasoned that the “[g]overnment 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.”<sup>60</sup>

*McCutcheon*’s holding was inconsistent with *Buckley*, which upheld aggregate limits in the face of a challenge.<sup>61</sup> But according to the *McCutcheon* plurality, *Buckley*’s discussion of aggregate limits was not entitled to deference because the issue received “a total of three sentences” of analysis that “were written without the benefit of full briefing or argument on the issue.”<sup>62</sup> Further, the “legal backdrop” had changed since the time of *Buckley*, including through the creation of “more targeted anticircumvention measures” that made limits on aggregate contributions seem “heavy-handed.”<sup>63</sup> In light of these factors, the *McCutcheon* plurality departed from *Buckley*’s approach to aggregate contribution limits.

It is worth noting that *McCutcheon* did not go as far as it could have in reconsidering precedent. The parties and amici had devoted “significant energy” to debating whether the distinction between contributions and expenditures is sound.<sup>64</sup> Justice Thomas responded by explaining his view that contribution limits are every bit as suspect as expenditure limits.<sup>65</sup> Yet the plurality declined the invitation to reconsider the standard of review for contributions. It reasoned that because the aggregate contribution limits

---

55. 424 U.S. 1, 44–45 (1976) (per curiam).

56. See *Citizens United*, 558 U.S. at 340.

57. *Buckley*, 424 U.S. at 25.

58. 134 S. Ct. 1434 (2014).

59. *McCutcheon*, 134 S. Ct. at 1442 (plurality opinion).

60. *Id.* at 1448.

61. *Buckley*, 424 U.S. at 38.

62. *McCutcheon*, 134 S. Ct. at 1446–47 (plurality opinion).

63. *Id.* at 1446.

64. *Id.* at 1445.

65. *Id.* at 1463–64 (Thomas, J., concurring in the judgment).

could not meet the standard set forth in *Buckley*, there was no need to consider whether a more demanding standard was appropriate.<sup>66</sup>

While the plurality refused to renounce the distinction between contributions and expenditures, neither did it explicitly endorse *Buckley*'s approach. It is natural to wonder if a further revision to the Court's campaign finance jurisprudence is in the offing. Among the uncertainties is whether, in light of the Court's recent emphasis on unfettered expression and the need for a wide-open democratic dialogue, *Buckley*'s portrayal of contribution limits as "only a marginal restriction upon the contributor's ability to engage in free communication" continues to hold sway.<sup>67</sup> By way of comparison, consider the *McCutcheon* plurality's statement that "[t]here 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."<sup>68</sup>

For now, the fate of contribution limits remains a matter of speculation. Such speculation will undoubtedly be influenced by presidential elections and the comings and goings of justices to and from the Court. Absent a meaningful doctrine of precedent, those comings and goings will determine whether the Court revises the law of campaign contributions in the years ahead.

### C. Falsehood

Whether they are bland or incendiary, accurate statements receive presumptive First Amendment protection. Such statements, the thinking goes, enrich the marketplace of ideas to the benefit of society at large.

But what about false statements? In *New York Times Co. v. Sullivan* the Court held that in certain defamation suits by government officials, it is not enough for the plaintiff to show that the offending speech was false.<sup>69</sup> The defendant must have acted with knowledge of the statement's falsity or reckless disregard for its accuracy.<sup>70</sup> Some of *Sullivan*'s language characterized the protection of falsehood as prophylactic. Robust debate "inevitab[ly]" will lead to mistakes, and the chilling effect would be too great if every utterance created the prospect of liability.<sup>71</sup> But the Court also indicated that false speech possesses intrinsic value: the marketplace of ideas operates more effectively with falsity in the mix, because the juxtaposition of falsehood leads to a "clearer perception and livelier impression of truth."<sup>72</sup>

In the ensuing years, the Court focused on the prophylactic justification for *Sullivan* and distanced itself from the idea that false speech is inherently

---

66. *Id.* at 1445–46 (plurality opinion).

67. *Buckley v. Valeo*, 424 U.S. 1, 20–21 (1976) (per curiam).

68. *McCutcheon*, 134 S. Ct. at 1440–41 (plurality opinion).

69. 376 U.S. 254, 279 (1964).

70. *Sullivan*, 376 U.S. at 279–80.

71. *Id.* at 271–72.

72. *Id.* at 279 n.19 (quoting JOHN STUART MILL, ON LIBERTY 15 (Oxford: Blackwell, 1946) (1859)).

valuable. Within the field of defamation law, the Court underscored that “there is no constitutional value in false statements of fact.”<sup>73</sup> It reiterated this principle in other contexts, for example by noting that “[u]ntruthful speech . . . has never been protected for its own sake”<sup>74</sup> and that false statements are “particularly valueless.”<sup>75</sup> The takeaway seemed to be that although falsity disrupts the marketplace of ideas, its protection is necessary to avoid chilling truthful speech.

This understanding changed with *United States v. Alvarez*, which invalidated a prohibition against false claims of military commendation.<sup>76</sup> Though the *Alvarez* plurality recognized language in the Court’s decisions indicating that false speech is valueless, it cautioned that such language must be viewed in context. According to the *Alvarez* plurality, the Court’s prior decisions related only to issues of “defamation, fraud, or some other legally cognizable harm associated with a false statement.”<sup>77</sup> While falsity “was not irrelevant” to those decisions, “neither was it determinative.”<sup>78</sup> The plurality concluded that there had never been a “categorical rule” denying the constitutional value of false speech.<sup>79</sup>

Concerns about continuity played little role in the *Alvarez* analysis. The focal points were dedication to robust expression and distrust of government intervention. The plurality held up *Alvarez*—a case involving deliberate lies that did nothing to enrich understandings or advance debates—as “illustrat[ing], in a fundamental way, the reasons for the Law’s distrust of content-based speech prohibitions.”<sup>80</sup> For the plurality, it was but a short step from prohibiting lies about military service to validating “Oceania’s Ministry of Truth.”<sup>81</sup> At stake was nothing less than the government’s “broad censorial power” over its citizens.<sup>82</sup> As in cases like *Citizens United*, stability and legal continuity were simply no match for fears about government orthodoxy.

#### D. *Exceptions to Protection*

Not all speech is entitled to First Amendment protection. Restrictions on certain categories of speech do not offend the Constitution. Obscenity,

---

73. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

74. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (discussing falsity in a case dealing with commercial speech).

75. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (discussing falsity in a case dealing with intentional infliction of emotional distress).

76. 132 S. Ct. 2537, 2542–43 (2012) (plurality opinion).

77. *Alvarez*, 132 S. Ct. at 2544–45.

78. *Id.* at 2545.

79. *Id.*

80. *Id.* at 2547.

81. *Id.*

82. *Id.* at 2547–48.

threats, and incitement are among the familiar examples.<sup>83</sup> The government possesses considerable discretion to restrict these types of speech.<sup>84</sup> That discretion is particularly significant for content-based regulations that would otherwise face the rigors of strict scrutiny.<sup>85</sup>

For decades, the Court's case law suggested that one way to identify exceptions to protection was through a systematic analysis of costs and benefits.<sup>86</sup> In *Chaplinsky v. New Hampshire*, the Court noted 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.<sup>87</sup> The Court reasoned that fighting words "are no essential part of any exposition of ideas," and their "slight social value . . . is clearly outweighed by the social interest in order and morality."<sup>88</sup> *Chaplinsky's* broader lesson appeared to be that "there are some categories of speech that are not covered by the First Amendment" because the relevant speech "is not worth it."<sup>89</sup> If a particular category of speech causes great harm but

---

83. *E.g.*, *Virginia v. Black*, 538 U.S. 343, 359 (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))); *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."); *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."); Alexander Tsesis, *The Categorical Free Speech Doctrine and Contextualization*, 65 EMORY L.J. 495, 506 (2015).

84. There is a limited exception for situations in which the government makes content-based distinctions within a given category of unprotected speech. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992) ("[T]he government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.").

85. *E.g.*, *Brown v. Entm't Merch. 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.").

86. *E.g.*, Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 385–86, 388 (2009) (noting that certain types of speech "are thought to be entirely outside the bounds of the [First] Amendment, and no balancing is required to suppress them in a given case. But importantly, the boundaries of these categorical exclusions may be a result of balancing" (footnotes omitted)).

87. 315 U.S. 568, 572 (1942).

88. *Chaplinsky*, 315 U.S. at 572; *cf.* ZECHARIAH 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.").

89. Mark Tushnet, *The First Amendment and Political Risk*, 4 J. LEGAL ANALYSIS 103, 113 (2012) (quoting *United States v. Stevens*, 559 U.S. 460, 470 (2010)).

produces only meager benefits, cost-benefit analysis might justify restriction.<sup>90</sup>

In *New York v. Ferber*, a case dealing with the prohibition of child pornography, the Court again referred to its practice of dispensing with “case-by-case adjudication” for categories of speech in which “the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake.”<sup>91</sup> Ten years later, *R.A.V. v. City of St. Paul* reiterated that the First Amendment permits content-based regulation when the harms flowing from a category of speech clearly outweigh the benefits.<sup>92</sup> And the Court followed suit in 2007 by explaining that obscenity and defamation are unprotected “because the social interest in order and morality outweighs the negligible contribution of those categories of speech to the marketplace of ideas.”<sup>93</sup>

The landscape changed in 2010 with the Court’s decision in *United States v. Stevens*.<sup>94</sup> *Stevens* involved a federal statute directed at depictions of animal cruelty.<sup>95</sup> One of the Solicitor General’s arguments in defending the statute was that such depictions should be denied protection based “upon a categorical balancing of the value of the speech against its societal costs.”<sup>96</sup> Despite its endorsement of cost-benefit analysis in prior cases, the Court rejected the Solicitor General’s contention. The Court acknowledged that it had “described historically unprotected categories of speech” as characterized by high costs and meager benefits.<sup>97</sup> Nevertheless, the Court explained that those descriptions should not be understood as a legal rule. Rather, the proper question is whether a category of speech has been “historically unprotected.”<sup>98</sup> Without a basis in history, no amount of cost-benefit analysis can justify the denial of protection.

To the *Stevens* majority, the previous regime for identifying First Amendment exceptions did not do enough to protect speakers’ rights. In the words of *Stevens*, the application of cost-benefit analysis is not just wrong; it is “startling and dangerous.”<sup>99</sup> Such an approach contravenes the balance

90. Blocher, *supra* note 86, at 394 (“This is a balancing method (‘outweighed’) but a categorical result (exclusion from coverage), and it is informed by First Amendment values (the value of the ‘exposition of ideas’ and the ‘social value as a step to truth’).” (quoting *Chaplinsky*, 315 U.S. at 572)).

91. 458 U.S. 747, 763–64 (1982); *see also Ferber*, 458 U.S. 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.”).

92. 505 U.S. 377, 382–83 (1992).

93. *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 188 (2007).

94. 559 U.S. 460 (2010).

95. *Stevens*, 559 U.S. at 464–65.

96. *Id.* at 470 (quoting Brief for the United States at 8, *United States v. Stevens*, 559 U.S. 460 (2010) (No. 08-769)).

97. *Id.*

98. *Id.*

99. *Id.*

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.”<sup>100</sup> 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].”<sup>101</sup> The statements to the contrary in the Court’s prior decisions could not shake the resolve of the *Stevens* majority.

#### E. *More to Come?*

Political speech, false speech, and exceptions to protection are just some of the areas of First Amendment jurisprudence the Court has reappraised in recent years. This Section describes several other domains in which the Court has either begun the process of revision or raised the possibility of changes to come.

##### 1. Labor Unions

The interplay between speech and precedent has pervaded the Court’s recent inquiries into the financing of public sector labor unions. *Knox v. Service Employees International Union, Local 1000* involved a union’s imposition of special assessments for unanticipated political expenses.<sup>102</sup> The Court concluded that such assessments cannot be imposed on objecting employees who do not belong to the union.<sup>103</sup> Nor is it enough for a union to give nonmembers the power to opt out. Instead, nonmembers must indicate their “affirmative consent” to contribute.<sup>104</sup> The Court explained that requiring nonmembers to opt out increases the risk of their money being channeled toward “political and ideological ends with which they do not agree.”<sup>105</sup>

Based on its treatment of opt-out requirements in the context of special assessments, *Knox* seemed to anticipate reconsideration of the broader rule that public employees may be required to opt out of funding a union’s political and ideological activities.<sup>106</sup> More fundamentally, *Knox* raised the question whether the Court was correct when it ruled in 1977 that public unions

---

100. *Id.*

101. *Id.* at 471–72.

102. 132 S. Ct. 2277 (2012).

103. *Knox*, 132 S. Ct. at 2295.

104. *Id.* at 2296.

105. *Id.* at 2290.

106. See 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. The Court opined in *Knox* that an opt-out rule ‘represents a remarkable boon for unions.’ Such a boon will likely not last for long.” (footnote omitted) (quoting *Knox*, 132 S. Ct. at 2290)); Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After*



may demand fees from nonmembers to support collective bargaining.<sup>107</sup> The case responsible for that rule, *Abood v. Detroit Board of Education*,<sup>108</sup> drew criticism from the *Knox* majority as validating “a form of compelled speech and association”<sup>109</sup> that leads to a “significant impingement on First Amendment rights.”<sup>110</sup> *Knox* gave new salience to the possibility that public employees may refuse to contribute money to labor unions.

The issue of compelled funding arose fast on the footsteps of *Knox* in *Harris v. Quinn*.<sup>111</sup> In *Harris*, a majority of justices renewed their disapproval of *Abood*'s regime. The majority's analysis included a litany of factors that customarily appear in explanations of why a flawed precedent is being overruled—factors including factual accuracy, procedural workability, and consistency with prior cases.<sup>112</sup> Writing in dissent, Justice Kagan responded in kind by emphasizing that “governments and unions across the country have entered into thousands of contracts involving millions of employees in reliance on *Abood*.”<sup>113</sup> Her reasoning drew on the Court's established practice of considering reliance implications when deciding whether to overrule a precedent.<sup>114</sup>

As in *Citizens United*, the interplay between speech and precedent had moved to center stage. But when the curtain fell, *Abood* remained intact. The *Harris* majority concluded that the case before it did not require overruling *Abood*.<sup>115</sup> It only required a refusal to extend *Abood* to a new factual setting.<sup>116</sup>

---

*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. . . . Moreover the Court's majority suggested in dicta that its reasoning would apply not only to the special assessment at issue in that case but might also apply to all union fundraising from represented employees, including annual dues and fees.”).

107. See *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”); Fisk & Chemerinsky, *supra* note 106, at 1028 (arguing that the Court's “expansive dicta” in *Knox* “has potentially enormous implications for the rights of public employees to bargain collectively and to participate in politics through their unions”).

108. 431 U.S. 209 (1977); see also 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” (footnote omitted)).

109. *Knox*, 132 S. Ct. at 2289.

110. *Id.* (quoting *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 455 (1984)).

111. 134 S. Ct. 2618 (2014).

112. *Harris*, 134 S. Ct. at 2632–34.

113. *Id.* at 2652 (Kagan, J., dissenting).

114. See *supra* Part I.

115. *Harris*, 134 S. Ct. at 2638 n.19.

116. *Id.* at 2638.

For a time, it looked as though a resolution was close at hand. In 2015, the Court granted certiorari in *Friedrichs v. California Teachers Association*, which presented the question whether *Abood* “should be overruled and public-sector ‘agency shop’ arrangements invalidated under the First Amendment.”<sup>117</sup> It seemed possible, and perhaps even likely, that the Court would overrule *Abood* once and for all. But that was before the death of Justice Scalia in February of 2016. Several weeks after his passing, the Court split four-to-four in *Friedrichs* and affirmed the decision under review without addressing its merits.<sup>118</sup> *Abood* remains good law, at least until another justice is appointed and the issue is reopened. Even so, by approaching the precipice of an overruling, the Court provided further evidence of the power of expressive freedom (as understood by a majority of sitting justices) to overwhelm established precedent.

## 2. Political Protesting

*McCullen v. Coakley* dealt with a Massachusetts law that restricted speech within thirty-five feet of the entrances, exits, and driveways of abortion clinics.<sup>119</sup> Challengers to the law claimed that it foreclosed efforts to provide counseling “through up-close, gentle conversations.”<sup>120</sup> The First Circuit Court of Appeals rejected that argument, deeming the law a “valid time-place-manner regulation” that left open adequate channels of communication.<sup>121</sup>

In reaching its decision, the First Circuit relied in part on the Supreme Court’s decision in *Hill v. Colorado*.<sup>122</sup> In *Hill*, a divided Court upheld a law that regulated the areas surrounding healthcare facilities by prohibiting any person from approaching someone else in order to distribute literature or “engag[e] in oral protest, education, or counseling.”<sup>123</sup> The *Hill* majority treated the statute as a content-neutral restriction justified by “the State’s interest in protecting access and privacy.”<sup>124</sup> In contrast, the dissenters characterized the statute as a serious imposition on core expression.<sup>125</sup> As Justice Kennedy put it, the majority went astray by “approv[ing] a law which bars a

---

117. Petition for a Writ of Certiorari in *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083 (2016) (mem.) (per curiam) (No. 14-915).

118. *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083 (2016).

119. 708 F.3d 1, 3 (1st Cir. 2013), *rev’d*, *McCullen v. Coakley*, 134 S. Ct. 2518 (2014).

120. *McCullen*, 708 F.3d at 12.

121. *Id.* at 14.

122. *Id.* at 12–14 (citing *Hill v. Colorado*, 530 U.S. 703 (2000)).

123. *Hill v. Colorado*, 530 U.S. 703, 707 (2000) (quoting COLO. REV. STAT. § 18-9-122(3) (1999)).

124. *Id.* at 719–20.

125. See *id.* at 741 (Scalia, J., dissenting); *id.* at 765 (Kennedy, J., dissenting).

private citizen from passing a message, in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk.”<sup>126</sup>

*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 invalidating the law, the Court should take the opportunity to limit or overrule *Hill* itself.<sup>127</sup> They argued that “*Hill* has proved to be badly reasoned, out of step with the Court’s other First Amendment jurisprudence, and unworkable or destructive in practice.”<sup>128</sup>

Though a majority of justices voted to strike down the Massachusetts law, they did not go so far as to overrule *Hill*.<sup>129</sup> Instead, the majority held the Massachusetts statute was not narrowly tailored to advance the government’s asserted interests.<sup>130</sup> *Hill* did not factor heavily into the Court’s analysis, though one point was clear: as compared to the Colorado law at issue in *Hill*, the Massachusetts law in *McCullen* effectively forced speakers to stand significantly farther away from the people they wished to address.<sup>131</sup> The *McCullen* Court concluded that, given the Massachusetts law’s impact on expressive liberty, the Commonwealth had “too readily forgone options that could serve its interests just as well, without substantially burdening the kind of speech in which [the speakers] wish to engage.”<sup>132</sup>

At the end of the day, *Hill* had survived. Indeed, the majority echoed *Hill*'s conclusion that restrictions on protesting or counseling outside abortion clinics can be content-neutral rather than content-based—a distinction that is relevant to the validity of restrictions that are narrower than the law struck down in *McCullen*.<sup>133</sup> Given the Court’s refusal to overrule *Hill*, *McCullen* may appear to represent a rare victory of stare decisis over unfettered speech. But three aspects of *McCullen* complicate that conclusion. First, the *McCullen* majority did not explicitly reaffirm *Hill* on stare decisis grounds. Second, although no justice advanced a stare decisis argument in favor of *Hill*, three justices expressed their desire to reject that decision. Writing for

126. *Id.* (Kennedy, J., dissenting); 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.”).

127. Brief for Petitioners at 53–56, *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) (No. 12-1168).

128. *Id.* at 54.

129. *McCullen v. Coakley*, 134 S. Ct. 2518, 2541 (2014) (“Respondents assert undeniably significant interests in maintaining public safety on . . . streets and sidewalks, as well as in preserving access to adjacent healthcare facilities. But here the Commonwealth has pursued those interests by the extreme step of closing a substantial portion of a traditional public forum to all speakers.”); *id.* at 2545 (Scalia, J., concurring in the judgment) (“The majority avoids [the question whether to overrule or narrow *Hill*] by declaring the Act content neutral on other . . . grounds.”).

130. *Id.* at 2537–41 (majority opinion).

131. See *id.* at 2535–36.

132. *Id.* at 2537.

133. See *id.* at 2534 (“We . . . conclude that the Act is neither content nor viewpoint based and therefore need not be analyzed under strict scrutiny.”).

himself and two others, Justice Scalia would have overruled *Hill*.<sup>134</sup> Notably, Justice Scalia did not feel the need to marshal any special justification to support the overruling. Rather, his reasons for overruling *Hill* “are set forth in the dissents in that case.”<sup>135</sup> By equating *Hill*’s worthiness of retention with its soundness (or unsoundness) on the merits, Justice Scalia provided a poignant illustration of the privileged place of expressive liberty as compared to stare decisis.

Finally, notwithstanding its nominal retention of *Hill*, *McCullen* can be read as implicitly—and significantly—revising *Hill*’s approach to content neutrality in the context of abortion protesting and counseling. The *McCullen* majority explained that “offense or discomfort” on the part of people entering abortion clinics “would not give the Commonwealth a content-neutral justification to restrict” speech outside the clinics.<sup>136</sup> That language stands in contrast to *Hill*’s approval of laws aimed at “the harassment, the nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching that can accompany an unwelcome approach.”<sup>137</sup> *McCullen* thus appears to have redefined the interests that can justify a governmental restriction—and, as a result, to have increased speech protection beyond what was available after *Hill*.<sup>138</sup> In this way, the Court managed to expand expressive liberty even while avoiding a direct collision with precedent.

### 3. Commercial Speech

Commercial speech occupies a unique place in First Amendment geography.<sup>139</sup> Although speech proposing commercial transactions falls within the First Amendment’s ambit, it receives “lesser protection” than other

---

134. See *id.* at 2545 (Scalia, J., concurring in the judgment) (“In concluding that the statute is content based and therefore subject to strict scrutiny, I necessarily conclude that *Hill* should be overruled.”).

135. *Id.*

136. *Id.* at 2532 (majority opinion); see also *id.* (“Whether or not a single person reacts to abortion protestors’ chants or petitioners’ counseling, large crowds outside abortion clinics can still compromise public safety, impede access, and obstruct sidewalks.”); Leslie Kendrick, *Nonsense on Sidewalks: Content Discrimination in McCullen v. Coakley*, 2014 SUP. CT. REV. 215, 226 (noting that the *McCullen* “majority, without mentioning *Hill*, rejected the claim that the [relevant statute] had anything to do with shielding unwilling listeners. Instead it relied solely upon patient safety and access”).

137. *Hill v. Colorado*, 530 U.S. 703, 724 (2000); see also Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 278 (2012) (describing *Hill* as a case in which “the government justified the restrictions partly by an interest in enabling potential patients to avoid the unwanted messages of abortion protestors”).

138. See *McCullen*, 134 S. Ct. at 2546 (Scalia, J., concurring in the judgment) (arguing that the majority “has *sub silentio* (and perhaps inadvertently) overruled *Hill*” because “[t]he unavoidable implication of [its] holding is that protection against unwelcome speech cannot justify restrictions on the use of public streets and sidewalks”).

139. See, e.g., EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* 257-59 (5th ed. 2014) (“‘Commercial speech’—more properly called commercial *advertising*—is less protected than other kinds of speech[.]”).

forms of expression.<sup>140</sup> Rather than facing the extraordinary rigors of strict scrutiny, restrictions on commercial speech are sustained if they satisfy the so-called *Central Hudson* test: they must “directly advance[ ] a substantial governmental interest” and be properly “drawn to achieve that interest.”<sup>141</sup>

The treatment of commercial speech has prompted extensive debate in the academic literature<sup>142</sup> and the Court’s case law.<sup>143</sup> Justice Thomas has taken a leading role in arguing for the application of strict scrutiny to regulations limiting commercial speech.<sup>144</sup> To him, there is no “philosophical or historical basis” for singling out commercial speech for reduced protection.<sup>145</sup> The pivotal issue going forward is how many other justices—present and future—are willing to reconsider the doctrine of commercial speech.<sup>146</sup>

Regardless of what lies ahead, the Court’s commercial speech jurisprudence has already undergone a tonal shift. Without overruling its prior decisions, the Court has increasingly characterized commercial speech as akin to other speech in the protection it receives. The Court has achieved this result “both by applying the governing . . . test more strictly and by classifying less and less speech as commercial in the first place.”<sup>147</sup>

*Sorrell v. IMS Health Inc.* is an illuminating data point.<sup>148</sup> In *Sorrell*, the Court invalidated a Vermont law that restricted the sale of records revealing how doctors prescribe drugs.<sup>149</sup> Because the law could not satisfy even the relatively lenient requirements for regulation of commercial speech, the

---

140. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561–63 (1980).

141. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667–68 (2011); *see also Cent. Hudson*, 447 U.S. at 564; VOЛОКН, *supra* note 139, at 258. Commercial speech may also be restricted if it is false, deceptive, or “related to illegal activity.” *Cent. Hudson*, 447 U.S. at 563–64.

142. 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.”).

143. *E.g., Cent. Hudson*, 447 U.S. at 584 (Rehnquist, J., dissenting) (“I . . . think that the Court errs here in failing to recognize that the state law is most accurately viewed as an economic regulation and that the speech involved (if it falls within the scope of the First Amendment at all) occupies a significantly more subordinate position in the hierarchy of First Amendment values than the Court gives it today.”).

144. *See 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”).

145. *44 Liquormart*, 517 U.S. at 522 (Thomas, J., concurring in part and concurring in the judgment).

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

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

148. 131 S. Ct. 2653 (2011).

149. *Sorrell*, 131 S. Ct. at 2659.

Court had no occasion to reconsider its commercial speech doctrine more generally.<sup>150</sup> Even so, the Court offered some words of concern. It denied the authority of the government to pursue “policy objectives through the indirect means of restraining certain speech by certain speakers” under the auspices of commercial regulation.<sup>151</sup> It also denied that the government’s desire to protect consumers from their own unwise choices justifies commercial speech regulations.<sup>152</sup> By restricting the sale of prescriber information, Vermont violated these tenets. The state had “engag[ed] in content-based discrimination to advance its own side of a debate” and restricted speech merely because it was “too persuasive.”<sup>153</sup>

It is natural to wonder whether *Sorrell* foretells a diminished power of government to regulate commercial speech. The majority opinion suggests that only the risk of deception or misunderstanding is sufficient to justify restrictions on commercial speech, at least where the speech is directed at “‘sophisticated and experienced’ consumers.”<sup>154</sup> To be sure, this position leaves open the possibility of retaining some differences between the treatment of commercial speech and other speech. For example, the Court’s acknowledgement that deceptiveness is a legitimate basis for restricting commercial advertising might not extend in full measure to political speech, where the value of robust expression is at its apex.<sup>155</sup> There is also the possibility that commercial speakers may be regulated in their appeals to minors,<sup>156</sup> even if minors (and those who wish to address them) generally enjoy substantial expressive liberty.<sup>157</sup> Nevertheless, limiting regulation to these types of situations would represent a departure from what the doctrine of commercial speech once appeared to be.<sup>158</sup> The effect could be especially

---

150. *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.”).

151. *Id.* at 2670.

152. *Id.* at 2670–71 (quoting *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002)).

153. *Id.* at 2672.

154. *Id.* at 2671–72 (quoting *Edenfield v. Fane*, 507 U.S. 761, 775 (1993)); see also *Cent. Hudson Gas & Elec. Corp. v. Pub. 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 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.”).

155. This is among the issues left open after *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2338 (2014), which the Court decided on grounds of justiciability. *Id.* at 2347.

156. See *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.”).

157. *Brown v. Entm’t Merch. 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.” (alteration in original) (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–13 (1975))).

158. See *Cent. Hudson*, 447 U.S. at 562.

pronounced to the extent that, as in *Sorrell*, laws are increasingly characterized as unlawful speech restrictions as opposed to benign economic regulations with incidental effects on expression.<sup>159</sup>

#### 4. Broadcast Indecency

In 1978, the Court ruled in *FCC v. Pacifica Foundation* that broadcasters can be punished for disseminating indecent speech.<sup>160</sup> The Court has faced criticism for the reduced constitutional protection it extended to broadcast media.<sup>161</sup> The impact of its approach was amplified by the FCC's decision roughly a decade ago to treat even momentary, "fleeting" expletives as justifying punishment.<sup>162</sup>

Challenges to the *Pacifica* regime have made their way to the Court twice in recent years. Both times, the Court disposed of the case without addressing *Pacifica*'s continued vitality.<sup>163</sup> Notwithstanding the Court's reticence, Justice Thomas and Justice Ginsburg penned separate opinions renouncing the *Pacifica* rule. Justice Ginsburg was brief in her remarks, arguing that *Pacifica* was "wrong when it issued" and had become even worse in light of factors including "technological advances."<sup>164</sup> Justice Thomas offered greater elaboration along similar lines. He described *Pacifica*

---

159. See *Sorrell*, 131 S. Ct. at 2673 (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.").

160. 438 U.S. 726, 750–51 (1978); see also J.M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1132–33 (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").

161. E.g., *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 325–27 (2d 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 (2d 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").

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

163. *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.").

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

and a predecessor case, *Red Lion Broadcasting Co. v. FCC*,<sup>165</sup> as a “deep intrusion into the First Amendment rights of broadcasters.”<sup>166</sup> He also emphasized technological advances as having undermined the notion of broadcast media as “uniquely pervasive” and, thus, entitled to weakened constitutional protection.<sup>167</sup>

Even if *Pacifica*’s factual premises had remained intact, its distinction between broadcasting and other media—which is to say, between different types of speakers—would be uneasy in a post-*Citizens United* world.<sup>168</sup> *Pacifica* also raises vexing questions about why the effectiveness of a particular form of media furnishes added justification for restricting it.<sup>169</sup> And the fact that broadcasting is presently only one of many pervasive sources of information exacerbates *Pacifica*’s vulnerability. The Court has stated that factual changes provide a legitimate basis for reconsidering precedent,<sup>170</sup> and *Pacifica* seems to fit the bill.

*Pacifica*, though, has managed to survive. And there may be hope for the decision in the years ahead. For example, the *Pacifica* rule could be recast as an instantiation of “government speech” doctrine,<sup>171</sup> whereby the government has greater discretion to regulate the expressions of those to whom it issues licenses.<sup>172</sup> Alternatively, perhaps the Court will recognize an ongoing need for a “safe harbor” where media consumers can steer clear of indecent material.<sup>173</sup> Whatever *Pacifica*’s eventual fate, the most salient point for now

165. 395 U.S. 367, 394 (1969) (“It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern.”).

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

167. *Id.* at 533 (quoting *Pacifica*, 438 U.S. at 748); see also 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”).

168. 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.”).

169. Balkin, *supra* note 160, at 1136 (“[T]he fact that a mode of communication is particularly powerful or ubiquitous is not necessarily a reason for regulating it.”).

170. 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”).

171. See 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 Lili 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 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).”).

172. Cf. *FCC v. Fox Television Stations*, 132 S. Ct. 2307, 2320 (2012) (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”).

173. See Transcript of Oral Argument at 28, *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) (No. 10-1293).



is that despite its apparent vulnerability, it remains on the books. The Court has not gone so far as to reaffirm *Pacifica* for reasons of stare decisis, but it has allowed the case to survive.

The Court's apparent reluctance to overrule *Pacifica* arguably reflects some institutional dedication to doctrinal continuity.<sup>174</sup> The case appears to have served a "braking" function by encouraging a methodical approach to legal change rather than an abrupt reversal-of-course.<sup>175</sup> While it does not follow that *Pacifica* will hang on indefinitely, the Court's hesitance to overrule the case lends a degree of stability to the law by affecting the manner in which constitutional doctrine evolves. At the same time, though the Court has not overruled *Pacifica*, neither has it pledged fidelity to the case on stare decisis grounds. Perhaps one day we will see an opinion expressly reaffirming *Pacifica* for the sake of continuity. Until such day arrives, the only certainty is that *Pacifica* has been granted a momentary reprieve.<sup>176</sup>

\* \* \*

There are three important links between the cases discussed in this Section. First, the Court has been willing to revise its First Amendment precedents when it concludes they have gone astray. Second, the Court has indicated that further revisions may lie ahead. Third, notably absent from the Court's discussions has been commitment to the idea that stare decisis can compel the continued retention of a First Amendment precedent that is flawed on the merits. The Court has sometimes avoided the need to address the continued vitality of controversial precedents by deciding cases on other grounds. But there has been no unequivocal demonstration that stare decisis shields erroneous First Amendment precedents.

If stare decisis is marginalized, the constitutional protection of speech will depend on the justices' individual interpretive conclusions. With the justices applying their own views about the best understanding of the law, potential changes in the Court's composition—which is to say, presidential

---

174. The desirability of allowing change to occur organically rather than through judicial decree was one of the themes during the Court's discussion of *Pacifica* in 2012. Consider this statement 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[?]" *Id.* at 33–34.

175. See Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1851–53 (2013) (discussing the braking function of precedent).

176. Two other recent First Amendment decisions warrant brief mention here. In *Garcetti v. Ceballos*, the Court ruled that public employees do not receive constitutional protection from employer discipline for statements made in the course of their official duties. 547 U.S. 410, 421 (2006). A year later, the Court ruled in *Morse v. Frederick* that students in public schools do not receive constitutional protection for statements that promote the use of illegal drugs without rising to the level of social commentary. 551 U.S. 393, 403 (2007). Both *Garcetti* and *Morse* were described by dissenting justices as departures from the principles underlying the Court's preexisting case law. See *Morse*, 551 U.S. at 437–38 (Stevens, J., dissenting); *Garcetti*, 547 U.S. at 430–34 (Souter, J., dissenting). Whether or not those characterizations are correct, the cases did not elevate stare decisis over principles of expressive liberty; in neither case did the majority describe itself as bound, for reasons of stare decisis, to apply precedents notwithstanding doubts about their soundness.

elections and the judicial appointments they yield—will guide the path of the law. That is not how the Court has described its role in the constitutional order.

### III. EXPRESSIVE LIBERTY AND STARE DECISIS

The previous Part claimed that the Supreme Court has regularly elevated expressive liberty over doctrinal continuity. That practice puts pressure on the Court's more general statements that deference to precedent is the rule rather than the exception. In Part IV, I will argue that stare decisis should retain an important role in shaping the freedom of speech. This does not mean precedents are absolutely insulated from overruling. But it does mean the value of deferring to precedent—and the ideal of the Court as an enduring institution rather than a fluctuating assemblage of individuals—warrants solicitude. Before reaching that discussion, this Part considers the explanations for, and implications of, a weakened approach to stare decisis in the First Amendment context.

#### A. *Explanations*

In considering the appropriate role of precedent in First Amendment disputes, the initial task is explaining the current state of the law. One possibility is that numerous portions of the Court's free speech case law are essentially unsettled. Some commentators have characterized the Court's First Amendment case law as lacking internal coherence, such that it “dances . . . macabrely on the edge of complete doctrinal disintegration.”<sup>177</sup> We can detect similar, if less vivid, concerns in Justice Breyer's caution against “turn[ing] ‘free speech’ doctrine into a jurisprudence of labels” divorced from effects and purposes.<sup>178</sup> When doctrine seems sprawling or difficult to synthesize, it can create an “unstable equilibrium” that is vulnerable to further revision precisely because the instability has prevented firm expectations from taking hold.<sup>179</sup>

This explanation falters against the recognition that many of the Court's recent innovations have dealt with First Amendment rules that were quite clear. It is not only the unsettled or murky aspects of the case law that have been subject to revision. There was already substantial clarity surrounding

---

177. Robert Post, *Recuperating First Amendment Doctrine*, 47 *STAN. L. REV.* 1249, 1270 (1995); see also PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 48 (2013) (arguing that First Amendment doctrine can become mired in “incoherence and inconsistency” due to “the fact that what purports to be a system of general legal rules and concepts is in fact a Swiss cheese, a collection of partial rules and partial exceptions with plenty of holes in between”).

178. *Pleasant Grove City v. Summum*, 555 U.S. 460, 484 (2009) (Breyer, J., concurring).

179. Cf. Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 *HARV. L. REV.* 1055, 1105 (1997) (connecting, in the context of retroactivity, the justifiability of protecting reliance interests with the question whether the law is in stable equilibrium).

issues such as the worthlessness of false speech and the inability of corporations to make independent expenditures in support of political candidates. The Court has now provided a *different* set of answers, but not a *clearer* set.

Alternatively, it may be that—as Chief Justice Burger once observed—freedom of speech “is an area in which there are few eternal verities.”<sup>180</sup> Perhaps the complex and ever-shifting nature of social and political expression has discouraged the Court from treating the law as truly settled. That conclusion, however, contradicts the Court’s statements that expressive liberty demands protections that are stable and unwavering.<sup>181</sup> Without the Court’s resolute commitment to durable principles of expressive liberty, it is difficult to see how, for example, the freedom to resist governmental orthodoxy could maintain its position as a (and perhaps *the*) “fixed star in our constitutional constellation.”<sup>182</sup>

There is also the possibility that at least some of the Court’s First Amendment innovations are best understood as reflecting the age-old distinction between holding and dicta. On that account, the Court has not been abandoning stare decisis, but rather applying it carefully and strictly. Return to the example of *United States v. Alvarez*, which I discussed above.<sup>183</sup> In discarding the Court’s prior statements about the worthlessness of false speech, the *Alvarez* plurality may be viewed as making an argument about when deference is due: while the Court’s prior applications of the First Amendment to particular types of false speech warrant deference, no such deference is owed to its teachings that false speech lacks inherent worth. Framed in this way, *Alvarez* does not represent a victory of expressive liberty over judicial precedent. It is simply an affirmation of the principle that holdings are entitled to deference while dicta are not.

This argument misses its mark. In resolving its prior cases the Court did not strictly *need* to suggest a general rule denying the value of false speech. But that is what the Court did.<sup>184</sup> What is more, the Court frequently describes the binding scope of its precedents in capacious terms, encompassing features such as doctrinal frameworks that sweep beyond the case at hand.<sup>185</sup> While this practice has not been entirely consistent, it is sufficiently pervasive to cast doubt on any suggestion that the Court’s prior statements about false speech were not entitled to presumptive deference under ordinary principles of stare decisis.<sup>186</sup>

---

180. *Miller v. California*, 413 U.S. 15, 23 (1973).

181. *See, e.g., United States v. Stevens*, 559 U.S. 460, 470 (2010) (“The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document ‘prescribing limits, and declaring that those limits may be passed at pleasure.’” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803))).

182. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

183. *See supra* text accompanying notes 76–82.

184. *See supra* text accompanying notes 69–75.

185. Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 193–96 (2014).

186. *See id.* at 190–97.

Much the same is true of *United States v. Stevens*, which considered the appropriate test for identifying categorical exceptions to First Amendment protection.<sup>187</sup> The *Stevens* Court did not directly address issues of stare decisis. Instead, the Court treated its prior endorsements of cost-benefit analysis as undeserving of deference. As in *Alvarez*, one way to understand the Court's approach is through the lens of the holding–dicta dichotomy. The statements about cost-benefit analysis, the argument goes, were extraneous dicta. As such, they were relevant only for their persuasive value. The problem with this account is the same one I discussed with respect to *Alvarez* (which *Stevens* preceded by two years). The distinction between the application of rules and the description of rationales is not a universal principle of jurisprudence, even at the Supreme Court. To the contrary, the Court has characterized its underlying rationales as entitled to stare decisis effect.<sup>188</sup> And it often defines the binding scope of its precedents as sweeping well beyond propositions that were strictly necessary.<sup>189</sup> Nevertheless, the *Stevens* Court disavowed its past statements about cost-benefit analysis.

The better explanation for the Court's willingness to depart from First Amendment precedent flows from the perceived significance of the rights at issue. The Court has treated robust expression as more important than legal stability. Holding all else constant, the greater the import one ascribes to getting the law right, the greater the chances that one will decide to overrule a dubious precedent. That correlation is crucial to understanding free speech jurisprudence, because the Court has made unmistakable its view that protecting First Amendment liberties is of the utmost significance.

The link between the Court's recent decisions on everything from campaign finance to autobiographical dishonesty is an emphasis on the seemingly incomparable value of free speech. It is that feature, I submit, that best explains the weakness of First Amendment stare decisis. This conclusion draws support from the Court's rulings as well as its rhetoric. As notable as the Court's recent First Amendment decisions have been are the stark terms in which the Court has described the dangers of adhering to its prior interpretations. Recall the plurality opinion in *Alvarez*, where a law against contriving military honors raised concerns about the roving censorial power of government.<sup>190</sup> Recall, too, the Court's opinion in *Stevens*, which depicted the application of cost-benefit analysis as “startling and dangerous” in what it portends for expressive liberty.<sup>191</sup> Finally, recall *Citizens United* and its linking of a restriction on corporate political expenditures with governmental efforts to “control thought.”<sup>192</sup> The vision that emerges is fiercely protective of a wide array of expressions—true or false, offensive or innocuous, personal or corporate—and deeply distrustful of governmental efforts at

---

187. See *supra* text accompanying notes 94–101.

188. Kozel, *supra* note 185, at 197.

189. See *id.* at 193–96.

190. *United States v. Alvarez*, 132 S. Ct. 2537, 2547–48 (2012) (plurality opinion).

191. *United States v. Stevens*, 559 U.S. 460, 470 (2010).

192. *Citizens United v. FEC*, 558 U.S. 310, 356 (2010).

regulation. Understood in this way, judicial precedents that permit the restriction of expressive rights threaten enormous damage to the social and political order.

In defending this position, the Court has looked primarily to First Amendment theory.<sup>193</sup> The justices have determined that the constitutional guarantee of free speech is “most intelligible” when understood against a backdrop of a substantial commitment to robust expression and a commensurate limitation of the government’s regulatory authority.<sup>194</sup> That determination, of course, is contestable; future justices might well interpret the First Amendment as evincing a different conceptual focus.<sup>195</sup> But it captures the existing state of the law, and it helps to explain why the Court often overrules or limits precedents that permit the restriction of speech.

When the costs inflicted by an erroneous decision are framed in such dramatic terms, *stare decisis* has little role to play. We are not likely to see an opinion that contains the line: “Though this precedent authorizes the government to control thought, we nevertheless uphold it on grounds of *stare decisis*.” So long as the Court perceives all types of First Amendment restrictions 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.<sup>196</sup>

### B. *Evaluation*

It is understandable for the Court to treat the pursuit of certain values, such as robust expression, as more important than others, such as legal stability. Prioritization is compatible with the doctrine of *stare decisis*, whose flexibility reflects the recognition that competing interests may sometimes support departures from precedent. Yet it is difficult to square the Court’s readiness to overrule First Amendment precedents with its customary demand for a “special justification” above and beyond a precedent’s wrongness

---

193. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1200 (1987) (explaining that such arguments “claim to understand the Constitution as a whole, or a particular provision of it, by providing an account of the values, purposes, or political theory in light of which the Constitution or certain elements of its language and structure are most intelligible”).

194. See *id.*

195. See *id.* at 1201–02 (“[T]he first amendment appears to some to create a general marketplace of ideas. But others ascribe to the free speech guarantee the purpose, for the most part, of protecting the value only of individual . . . self-expression. Still others view the object as limited to preserving the freedom of political speech essential to a democracy.” (footnotes omitted)).

196. 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.”).

to warrant an overruling.<sup>197</sup> Though “adhering to our prior case law” is the Court’s stated “norm,”<sup>198</sup> it has taken a different approach in speech cases. The Court’s case law reveals a strong inclination toward rectifying constrained interpretations of expressive liberty. The result is to place precedent on a precarious footing. If the importance of protecting speech invariably outweighs the value of continuity, *stare decisis* falls away.

This is not to say precedent lacks any function at all. Among other things, precedent can slow the pace of legal change by dissuading justices from overruling past decisions when such overruling is unnecessary to reach the correct result<sup>199</sup>—a phenomenon arguably on display in the Court’s recent cases involving campaign contributions, labor unions, and broadcast indecency.<sup>200</sup> But *stare decisis* cannot play its most significant role by counseling the retention of a flawed precedent unless the value of leaving things settled sometimes trumps the value of deciding a case correctly in the eyes of today’s Court.

The question is whether an unyielding focus on protecting speech, notwithstanding any precedents to the contrary, is cause for celebration or concern. There are serious arguments for privileging unfettered expression over doctrinal continuity. The most important is also the most obvious: the restriction of expressive liberty can be damaging. It can be damaging to the individual, who is prevented from speaking her mind as she sees fit.<sup>201</sup> It can be damaging to the speaker’s intended listeners, who are denied the benefit of hearing and contemplating her positions.<sup>202</sup> And it can be damaging to the constitutional order, which depends on keeping governmental authority at bay through a vigorous and open discourse.<sup>203</sup> The situation is bad

---

197. *E.g.*, *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015); *see also supra* text accompanying notes 29–30.

198. *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (opinion of Breyer, J.).

199. Kozel, *supra* note 185, at 1851–52.

200. *See supra* Part II.

201. *See, e.g.*, 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.”); 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”).

202. *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.”).

203. *Id.* at 340 (“Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.”); HORWITZ, *supra* note 177, at 262 (“In many respects, distrust of government explains First Amendment doctrine better than the other standard justifications of free speech.” (footnote omitted)); 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,

enough when the 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, compounds its mistake “in the interest of stability.”<sup>204</sup> There may be some areas of the law where it really is best to leave matters settled. But the freedom of speech, the argument goes, is not one of them.

Truncating expressive freedom can also take a toll on popular sovereignty. Viewed through the lens of democratic self-government, cramped interpretations of constitutional liberties may be relatively benign under certain conditions. For example, if the Court construes a right too narrowly, the people can respond by enacting statutory protections through ordinary politics.<sup>205</sup> The calculus may change when the right in question is the freedom of speech, whose restriction can undermine citizens’ ability to protect themselves through the political process.<sup>206</sup>

The possibility thus arises that speech rights, or at least rights involving political speech, should receive special protection “because they are critical to the functioning of an open and effective democratic process.”<sup>207</sup> John Hart Ely famously described judicial review as a mechanism for “ensuring broad participation in the processes and distributions of government.”<sup>208</sup> As applied to the treatment of precedent, this process-based approach suggests that constrained interpretations of expressive liberty are among the most troubling mistakes the Court can make. Those mistakes should be rectified in the interest of “clearing the channels of political change.”<sup>209</sup>

---

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.” (footnote omitted)); 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”).

204. ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 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.”).

205. See Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1443 (2007) (“Cases where the Court erroneously fails to intervene generally allow the continued functioning of the political process and thus impose lower costs in terms of popular sovereignty. . . . On the other hand, errors of intervention that involve issues of immunity (constitutional rights) generally remove the subject from majoritarian action.”).

206. Kurt T. Lash, *The Cost of Judicial Error: Stare Decisis and the Role of Normative Theory*, 89 NOTRE DAME L. REV. 2189, 2211 (2014) (“[A] judicial error involving a failure to strike down an act criminalizing speech critical of the national government is as problematic from a popular sovereignty standpoint as is a judicial error that strikes down a law regulating the number of hours bakers can work in a given week.”).

207. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 105 (1980).

208. *Id.* at 87.

209. *Id.* at 105; see also *id.* at 112 (“If the First Amendment is even to begin to serve its central function of assuring an open political dialogue and process, we must seek to minimize assessment of the dangerousness of the various messages people want to communicate.”).

Another potential explanation for the Court's readiness to reconsider First Amendment precedent involves the flexible nature of stare decisis. The Court invariably describes stare decisis as a "principle of policy" rather than an "inexorable command."<sup>210</sup> While deference to precedent is a weighty consideration, society should not have to endure the Court's most grievous constitutional mistakes without hope of remedy.<sup>211</sup> Unblinking fidelity to judicial errors could undermine the rule-of-law benefits that the doctrine of stare decisis is meant to foster, both by "stifling the practical effectiveness of reasoned argumentation" and by entrenching departures from the Court's best reading of the Constitution.<sup>212</sup> The flexibility of stare decisis, one might conclude, makes the frequent reconsideration of First Amendment precedents unremarkable and unobjectionable.

There is no denying the importance of free speech. Yet the justifications animating the doctrine of stare decisis do not lose all their force in the First Amendment context. Departures from precedent can be disruptive, regardless of whether they enhance expressive liberty. *Citizens United* is a case in point.<sup>213</sup> Despite acknowledging that its prior decisions had influenced governmental efforts to regulate campaign finance, the Court stated that legislative reliance "is not a compelling interest for *stare decisis*."<sup>214</sup> This conclusion is perplexing if one takes a comprehensive and systemic view of legal disruption—a view the Court has endorsed on other occasions.<sup>215</sup>

*Citizens United* makes more sense as a product of the Court's abiding regard for expressive liberty and its corresponding distrust of speech restrictions. In light of the perceived harms of denying First Amendment rights to corporate and union speakers, there was little point in poring over the disruptive effects that would accompany the overruling of settled law. Such

---

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

211. 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").

212. Randy J. Kozel, *The Rule of Law and the Perils of Precedent*, 111 MICH. L. REV. FIRST IMPRESSIONS 37, 40 (2013), [http://repository.law.umich.edu/mlr\\_fi/vol111/iss1/](http://repository.law.umich.edu/mlr_fi/vol111/iss1/) [<https://perma.cc/T886-VCAP>]; see also *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.").

213. *Citizens United*, 558 U.S. 310.

214. *Id.* at 365.

215. See, e.g., *Harris v. United States*, 536 U.S. 545, 567–68 (2002) (plurality opinion) ("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 in that case. . . . We see no reason to overturn those statutes or cast uncertainty upon the sentences imposed under them."); see also, e.g., *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); *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (opinion of Breyer, J.) ("*Buckley* has promoted considerable reliance. Congress and state legislatures have used *Buckley* when drafting campaign finance laws.").



effects could never tip the balance toward preserving the status quo—which is to say, they could never be “compelling.”<sup>216</sup> Yet the Court’s solicitude for unfettered expression does not change the fact that its opinion disrupted the regulatory backdrop. Nor does it change the fact that campaign finance jurisprudence looks the way it does today because a particular understanding of the First Amendment commanded the allegiance of five sitting justices while a competing understanding fell one justice short.

This latter point is important, because stare decisis does more than protect expectations. It also promotes judicial impersonality by allowing legal rules to retain their content as judges come and go.<sup>217</sup> Impersonality is valuable in the First Amendment context as in all others. As Justice Frankfurter once observed, the role of the judge is to “take a view of longer range than the period of responsibility entrusted to Congress and legislatures.”<sup>218</sup> Without such a perspective on the part of the judiciary, “that which was deemed to be of so fundamental a nature as to be written into the Constitution to endure for all times” may become “the sport of shifting winds of doctrine.”<sup>219</sup>

A focus on continuity dovetails with a commitment to judicial decision-making grounded “in the law rather than in the proclivities of individuals.”<sup>220</sup> To defer to precedent is to recognize the value of subordinating personal judgments to the general, publicly accessible principles established by a tribunal with its own identity, history, and practices. The individual becomes less important than the institution. And the individual’s conclusions, wise though they may be, are tempered by the judgments of those who came before.

The ideal of judicial impersonality stands in tension with unconstrained (or weakly constrained) overruling, irrespective of whether the case being overruled deals with expressive liberty. Absent a meaningful doctrine of stare decisis, determining whether to overrule a case requires asking whether there are five justices who disagree with it. In turn, if the Court votes to overrule, the longevity of its new approach depends on whether the four dissenters can add, through the process of presidential appointment, another

---

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

217. *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.”).

218. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 665 (1943) (Frankfurter, J., dissenting).

219. *Id.*

220. *Vasquez*, 474 U.S. at 265.

like-minded justice to their ranks.<sup>221</sup> When decisions ebb and flow in this way, it becomes more difficult to characterize them as the judgments of a unified Court acting in a collaborative manner across time.<sup>222</sup> Instead, the decisions appear to track the Court's balance of power. To be sure, a legal system can remain compatible with the rule of law and still leave room for departures from precedent.<sup>223</sup> But there must be some mechanism for maintaining stability and continuity as the composition of the bench changes.<sup>224</sup>

This requirement is all the more resonant in First Amendment cases due to the prominence of expressive liberty in legal and political culture.<sup>225</sup> A vacillating body of First Amendment case law may not disrupt economic rights as much as a vacillating body of contract law or property law. But given widespread interest in the ground rules of expressive freedom, fluctuations can contribute to the perception that constitutional doctrine is driven more by personality rather than principle.<sup>226</sup> Stare decisis promotes "a conception of a court continuing over time."<sup>227</sup> Take away that conception, and what remains are individual judgments by individual judges.<sup>228</sup>

---

221. There is also the possibility that a sitting justice will have a change of heart, though that prospect seems unlikely—at least in the near term—with respect to a case like *Citizens United*, which the justices debated fervently and in considerable detail. See 558 U.S. 310.

222. 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").

223. 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 . . .").

224. See *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (opinion of 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.'" (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984))); 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.").

225. See Amar, *supra* note 11, at 1028–29 ("Ordinary citizens of all persuasions and of all regions fiercely claim expressive and religious rights and embody them in their daily practices.").

226. 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 222, at 569 (including among the justifications for 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").

227. Dorf, *supra* note 223, at 683.

228. 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, *supra* note 224, at

It is also important to bear in mind that the current, speech-protective state of First Amendment doctrine is not the only possible equilibrium. Without a presumption of deference to precedent, the case law could swing between periods of robust and meager protection. Of course, it is possible to imagine an asymmetrical rule whereby speech-restrictive precedents receive no deference while speech-protective precedents receive substantial deference, even if they are deemed incorrect. But it is not clear that such a rule would be desirable, as it would be biased toward the entrenchment of speech rights at the expense of countervailing values like privacy, reputational dignity, and public safety.

Even justices who agree that expressive liberty warrants elevated status may have different opinions about the best means of protection. *Citizens United* provides a vivid illustration. On some accounts, the vision of public discourse *Citizens United* adopts is unduly cramped. While the majority described its decision as restoring “‘civic discourse . . . to the people,’”<sup>229</sup> the dissenters countered that *Austin* embodied “a concern to *facilitate* First Amendment values by preserving some breathing room around the electoral ‘marketplace’ of ideas.”<sup>230</sup> Whichever side had the better of the argument, the split among justices was not between those who favored more discourse and those who favored less. The disagreement involved the best way to promote effective discourse in a democratic society.<sup>231</sup>

Stare decisis is a means of injecting consistency and continuity into these debates. Without a meaningful doctrine of stare decisis, each justice is left to rely on her individual philosophy and “private sentiments” in interpreting the First Amendment.<sup>232</sup> That raises the risk of “arbitrary discretion” that led Alexander Hamilton to emphasize the importance of precedent in his classic defense of the proposed Constitution.<sup>233</sup>

#### IV. HARMONIZING SPEECH AND PRECEDENT

I have argued that the doctrine of stare decisis should remain important even when expressive liberty is at stake. That position coheres with the Supreme Court’s repeated descriptions of stare decisis as promoting fundamental values of stability and continuity. But I have also argued that the

---

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”).

229. *Citizens United*, 558 U.S. at 372 (quoting *McConnell v. FEC*, 540 U.S. 93, 341 (Kennedy, J., concurring in the judgment in part and dissenting in part with respect to BCRA Titles I and II), *overruled by Citizens United*, 558 U.S. 310).

230. *Id.* at 473 (Stevens, J., concurring in part and dissenting in part); *see also id.* at 475 (“The Court’s blinkered and aphoristic approach to the First Amendment may well promote corporate power at the cost of the individual and collective self-expression the Amendment was meant to serve.”).

231. *See supra* Section II.A.

232. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (photo. reprint 2002) (1765).

233. THE FEDERALIST No. 78, at 298 (Alexander Hamilton) (Lawbook Exch., Ltd. 2005).

Court's engagements with free speech evince a readiness to elevate expressive freedom over any benefits of fidelity to precedent.

This Part examines ways to address the resulting tension. The first proposal calls for reorienting and reinvigorating the doctrine of stare decisis to make it less dependent on matters of interpretive philosophy that differ from judge to judge and justice to justice. The second proposal emphasizes two principles—which I describe respectively as concreteness and content sensitivity—for preventing the Court's admirable dedication to expressive liberty from overwhelming legal continuity every time the two values conflict.

#### A. *Free Speech and Second-Best Stare Decisis*

The Court's current approach to its First Amendment precedents depends on the justices' interpretive philosophies and normative commitments. For example, devotion to popular sovereignty could explain the protection of political speech at the expense of precedent in cases like *Citizens United*.<sup>234</sup> But it raises questions about why the Court is willing to break with the past even when the implications for popular sovereignty are diluted or attenuated—as with the protection of false biographical statements in *United States v. Alvarez*.<sup>235</sup> Alternatively, if the justices are primarily motivated by the importance of individual self-actualization, we might wonder why the *Citizens United* majority was willing to overrule precedents on corporate electioneering notwithstanding the resulting disruption of reliance interests. And a focus on distrust of governmental authority might explain the Court's references to censorship and thought control, but it would leave open the argument that different speech regulations create different degrees of concern about overreaching and potential for abuse.

In reality, the case law does not furnish a comprehensive account of why it is imperative to protect speech even at the cost of disrupting settled law. Instead, the Court's opinions reflect the idea that speech is valuable for multiple reasons, all of which appear to be more important than continuity. Yet that position is too abstract to be fully satisfying. Given the justices' high praise for the role of stare decisis—exemplified in recent descriptions of the doctrine as “a foundation stone of the rule of law”<sup>236</sup> that “is vital to the proper exercise of the judicial function”<sup>237</sup>—it is difficult to see why speech should so easily trump precedent as a matter of course. It might well be that some First Amendment precedents cannot be tolerated given their failure to protect valuable speech. That result is compatible with the well-established notion of stare decisis as presumptive rather than absolute.<sup>238</sup> But if an overruling is warranted in every case involving restrictions on speech, either the

---

234. See *supra* text accompanying notes 38–54.

235. See *supra* text accompanying notes 76–82.

236. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014).

237. *Citizens United v. FEC*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring).

238. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

value of some speech is being overstated or the value of stare decisis is meager indeed.

Theoretically, the justices could respond by agreeing on a particular theory of constitutional interpretation and a corresponding account of why it is important to overrule flawed precedents. For instance, they might conclude that the First Amendment is uniquely offended by limitations on political expression. Under this approach, precedents permitting restrictions on election-related speech would be viewed with skepticism, while precedents dealing with nonpolitical speech might be tolerable even if today's justices would have decided them differently in the first instance.<sup>239</sup> Alternatively, the justices might conclude the First Amendment is fundamentally concerned with giving each citizen a meaningful opportunity to be heard, in which case the most problematic precedents would be those that allow the domination of some voices over others.<sup>240</sup> Whichever way the justices resolved the issue, they would produce a uniform metric for gauging the harmfulness of a mistaken precedent. In applying the stare decisis analysis, they would consider that harmfulness alongside other factors such as the importance of promoting judicial impersonality and protecting settled expectations.<sup>241</sup>

But ours is not a world of abiding interpretive agreement. It is a world of interpretive pluralism, in which different justices have (very) different beliefs about the proper ends and means of constitutional interpretation. What some justices view as a harmful consequence of precedent—say, the fact that it prevents the government from seeking to level the playing field among different speakers—might be viewed by others as irrelevant, benign, or even praiseworthy.<sup>242</sup> This feature is by no means unique to the First Amendment. It occurs throughout constitutional law, and in the statutory and common law domains as well.<sup>243</sup> When different justices have different views about how the law should be interpreted, they will likewise have different views about which features of a precedent are relevant to its retention or overruling.

---

239. Cf. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011) ("The First Amendment embodies our choice as a Nation that, when it comes to [campaign-related] speech, the guiding principle is freedom—the 'unfettered interchange of ideas'—not whatever the State may view as fair." (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam))).

240. See *id.* at 2830 (Kagan, J., dissenting) ("The First Amendment's core purpose is to foster a healthy, vibrant political system full of robust discussion and debate.").

241. See *supra* Part I.

242. Compare *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2825 ("We have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field' that can justify undue burdens on political speech."), with *id.* at 2830 (Kagan, J., dissenting) (reasoning that the relevant legislation "promotes the values underlying both the First Amendment and our entire Constitution by enhancing the 'opportunity for free political discussion to the end that government may be responsive to the will of the people'" (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964))).

243. Randy J. Kozel, *Stare Decisis in the Second-Best World*, 103 CALIF. L. REV. 1139, 1145–55 (2015).

But one of the most important roles of stare decisis is serving as a bridge between jurists who hold competing interpretive philosophies.<sup>244</sup> Fidelity to precedent helps establish the Court as an institution that is something more than the sum of its ever-changing parts. That is what the justices mean when they describe stare decisis as integral to the rule of law.<sup>245</sup>

The current situation, then, is one in which the very phenomenon of interpretive pluralism that heightens the need for stare decisis interferes with the consistent treatment of precedent. To be effective, the doctrine of stare decisis needs to evolve in a way that can emphasize areas of agreement and minimize considerations that are bound up with contested issues of interpretive methodology. In particular, the doctrine would benefit if the justices focused on factors such as a precedent's procedural workability, factual accuracy, and reliance implications while generally avoiding inquiries into the perceived harmfulness of a precedent's substantive effects.<sup>246</sup>

We can think of this approach in terms of *second-best stare decisis*. Second-best stare decisis builds from the idea that the doctrine of precedent ought to be designed in light of our second-best world of interpretive pluralism instead of assuming an idealized world of interpretive consensus. The theory of second-best posits that when a system suffers from one flaw—such that the ideal state of affairs is unattainable—the best option might be to introduce another flaw that responds to the first. As Adrian Vermeule has explained:

Suppose that at least some of the conditions necessary to produce a given ideal or first-best constitutional order fail to hold. Even if it would be best to achieve full satisfaction of all those conditions, it does not follow that it is best to achieve as many as possible of the conditions, taken one by one. Rather, multiple failures of the ideal can offset one [another], producing a closer approximation to the ideal at the level of the overall system.<sup>247</sup>

In other words, sometimes the wisest course in the face of one imperfection is to introduce another.

These principles apply to the treatment of precedent. The basic rationale of second-best stare decisis is that while inquiries into procedural workability, factual accuracy, and reliance will undoubtedly lead to disagreements from time to time, those disagreements are not bound up with interpretive philosophy and methodological preferences. A justice can determine whether a precedent rests on a factual error or produces procedural snags regardless of how that justice views the purpose of the First Amendment or the proper method of interpreting the Constitution.

---

244. See *supra* Section III.B; see also Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1737 (2013) (“Rather than extinguishing disagreement, constitutional stare decisis moderates it. The doctrine enables a reasoned conversation over time between justices—and others—who subscribe to competing methodologies of constitutional interpretation.”).

245. Kozel, *supra* note 243, at 1159.

246. See *id.* at 1176–77.

247. ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* 10 (2011).

By contrast, evaluating a precedent's substantive effects requires consulting an underlying theory of interpretation. Some interpretive theories prize popular sovereignty, others individual liberty, and still others the practical weighing of costs and benefits.<sup>248</sup> Which of these considerations wins out depends on a threshold determination of which interpretive theory applies. It is natural that if the justices disagree about these underlying matters of interpretive philosophy, they will also disagree about whether a given precedent is so pernicious as to justify its overruling. As a corollary, stare decisis loses much of its ability to transform the work of individual jurists into the work of an enduring court.

Second-best stare decisis avoids this result. It excludes judicial perceptions of a precedent's substantive impact in all but the most exceptional cases.<sup>249</sup> As applied to the First Amendment context, second-best stare decisis would reaffirm the presumption that precedents are to be followed unless they rest on a mistaken factual premise or have yielded a procedurally unworkable set of rules.<sup>250</sup> For example, the fact that broadcast media is no longer uniquely pervasive in American society would be an appropriate reason to reconsider the Court's decision in *FCC v. Pacifica Foundation*.<sup>251</sup> Whatever one's philosophy of constitutional adjudication, the changes to the media market over the past four decades are undeniable.

On the other hand, there was no factual mistake in *Austin v. Michigan Chamber of Commerce*, which was overruled in *Citizens United*.<sup>252</sup> Nor was the *Austin* rule mired in procedural unworkability. As a result, second-best stare decisis would have counseled the retention of *Austin* even if a majority of justices believed it was wrong on the merits. The only exception would be if those justices could explain why *Austin* (or any other precedent) was not simply wrong, but had created substantive effects that were so extraordinary as to be intolerable based on the specific interpretive theory applied. This exception tracks the Court's consistent depiction of stare decisis as fundamental but non-absolute.<sup>253</sup> It allows a justice to invoke her own judicial philosophy in the cases she views as the worst of the worst, even if that means elevating her individual convictions over the Court's institutional identity.<sup>254</sup> The justice who prizes popular sovereignty need not tolerate a precedent she thinks is a devastating affront to that value. The justice who views the freedom of speech through a lens of government distrust may vote to overrule a precedent permitting heavy-handed impositions of prescribed orthodoxy. And the list goes on. Justices will disagree about which effects are constitutionally relevant (as opposed to regrettable but legally immaterial).

---

248. See Kozel, *supra* note 243, at 1146–50.

249. *Id.* at 1177.

250. See *supra* Part I.

251. See *supra* Section II.E.4.

252. See *supra* Section II.A.

253. See *supra* Part I.

254. Kozel, *supra* note 243, at 1173–76.

Whichever theory a given justice adopts, second-best stare decisis allows her to depart from precedents that are not just suboptimal, but disastrous.

At the same time, the exception's extraordinary nature reinforces the fact that in the usual course, such considerations are irrelevant to the stare decisis calculus. Absent some reason for overruling that appeals to justices across the methodological spectrum, precedents—including precedents involving the freedom of speech—must ordinarily be respected.

This second-best reorientation of stare decisis would lend stability and continuity to the case law, bringing the doctrine in line with the Court's repeated statements about the virtues of fidelity to settled law. It would also enable the justices to explain exactly *why* flawed First Amendment precedents are bad, leading to a better understanding of the theories and factors that shape the Court's protection of the freedom of speech. The most salient cost of this approach would be the preservation of some precedents that a majority of sitting justices view as flawed. But given the Court's repeated statements about the crucial role of precedent in constitutional law, this result is unavoidable if we are to have a doctrine of stare decisis that delivers on its promises.

#### B. *Reinvigorating the Existing Doctrine of Stare Decisis*

Even without a second-best reorientation of stare decisis that limits the role of a prior decision's substantive effects, the Court's existing case law provides a workable framework for increased fidelity to precedent. The key is putting the Court's articulated principles of deference into practice. To abide by an imperfect precedent is to promote a vision of law as something more than the proclivities of those who come and go from the bench. The converse is also true. Even if one believes freedom of speech is profoundly important, allowing speech to trump stare decisis as a matter of course threatens to undermine the impersonality of constitutional law.

I have described several recent cases in which the Court adopted an expansive view of expressive liberty despite the existence of contrary precedent. But as I noted above, there is no guarantee future justices will adhere to a similar view of the value of free speech. That creates the potential for vacillation in the resolution of First Amendment disputes and the articulation of the rules of free speech. The doctrine of stare decisis is a means of moderating such swings.<sup>255</sup> The justice who is fiercely protective of speech must sometimes abide by precedent even in cases she would have resolved differently as an initial matter. The justice who is more accepting of speech regulations must sometimes do the same. Through this process of precedent-based compromise, the justices preserve the essential stability and impersonality of the constitutional framework.

---

255. See Barrett, *supra* note 244, at 1722 (“In hot-button cases where differences in constitutional philosophy are in the foreground, the preference for continuity disciplines jurisprudential disagreement.”).



Agreement among the justices must extend beyond the platitude that fidelity to precedent is a beneficial aspiration. For the doctrine of stare decisis to have meaningful 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 Court has taken numerous stands for the protection of First Amendment liberty. If the Court wishes to preserve the vitality of stare decisis and the virtues of continuity in the context of free speech, it occasionally must interrupt that trend to issue a reminder that stare decisis is something more than rhetoric to be recited and overborne. Prior decisions would still be subject to reconsideration; an absolute doctrine of stare decisis has no currency at the Court.<sup>256</sup> But if an argument from stare decisis is not an automatic winner, neither should it be an automatic loser. 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, for that matter, more) protective of speech than today's justices would prefer. The invocation of stare decisis en route to a surefire overruling is deference in name alone.

Two principles are instrumental in accommodating the robust protection of expressive liberty within a system that preserves a meaningful role for precedent. Those principles, which we can think of as *concreteness* and *content sensitivity*, are related but distinct. Concreteness entails a targeted inquiry into the benefits that would arise, or the harms that would be avoided, by overruling a speech-restrictive precedent. Content sensitivity means that in making such an inquiry, the Court should be willing to acknowledge that different categories of speech have different ramifications. Even if the standard account of First Amendment jurisprudence is resistant—though, as I will explain, not entirely resistant—to distinguishing among categories of expression based on their content and consequences, the doctrine of stare decisis may take a different path.

### 1. Concreteness

I have suggested that we can explain the Court's departures from First Amendment precedent by recognizing its tendency to emphasize the harms flowing from restrictions on speech. Failing to protect false biographical statements raises concerns about roving ministries of truth. Regulating speech because its costs outweigh its benefits creates startling dangers of governmental oppression. Limiting a corporation's right to engage in political advocacy enables the government to control thought. And so on.<sup>257</sup>

---

256. 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.”).

257. See *supra* Section IV.A.

In theory, the other side of the scale includes the value of stare decisis. But stability, continuity, and impersonality are no match for thought control and ministries of truth. Describing all First Amendment harms in such dramatic terms eliminates any prospect of a meaningful doctrine of stare decisis.

Assuming that the Court wishes to preserve a role for precedent in the First Amendment context, it would be well served to begin by describing the relevant constitutional harms in a more targeted and concrete fashion. For example, in a case like *Alvarez*, the harm that stems from allowing the restriction of false statements should be aligned with the type of speech at issue: namely, falsified details about one's own life.<sup>258</sup> The question would be whether retaining a line of decisions that impedes one's ability to make false biographical statements is so problematic as to justify a departure from precedent. The relevant considerations might include the value of protecting such falsity, perhaps on grounds that making inaccurate biographical statements is a component of "human self-expression."<sup>259</sup> But more generalized anxieties about governmental censorship would become relevant only if there were a direct connection between those worries and the case at hand. Absent a direct connection, abstract principles of governmental distrust would have no role in the stare decisis calculus. Those principles might inform the threshold question of how the First Amendment ought to be interpreted, but they would be cordoned off from the distinct question of whether implementing the correct constitutional rule justifies the costs of deviating from precedent.

For another illustration of the concreteness principle, consider *Citizens United* and its protection of corporate campaign expenditures. Concreteness requires venturing beyond the argument that "[w]hen Government seeks to use its full power . . . to command where a person may get his or her information . . . it uses censorship to control thought."<sup>260</sup> That argument, even if valid on its own terms, is too abstract to inform the inquiry into how harmful it would be to retain a precedent that allows the restriction of corporate electioneering. For stare decisis purposes, the more pertinent question is how pre-*Citizens United* case law was affecting public debate about candidates for political office. This is a demanding inquiry, to be sure. But if a precedent's ill effects are to be treated as relevant, a targeted inquiry is more illuminating than generalized anxieties.

A third illustration comes from the Court's recent discussions of labor unions in the public sector. Some justices have suggested that requiring public employees to fund a labor union's collective bargaining activities may amount to a First Amendment violation.<sup>261</sup> Should a majority of justices adopt this view, they would need to confront the further question of

---

258. See 132 S. Ct. 2537, 2544–45 (2012) (plurality opinion).

259. *United States v. Alvarez*, 638 F.3d 666, 674 (9th Cir. 2011) (Kozinski, C.J., concurring in the denial of rehearing en banc).

260. *Citizens United*, 558 U.S. at 356.

261. See *Harris v. Quinn*, 134 S. Ct. 2618, 2631–34 (2014).

whether the consequences of the violation are so problematic as to warrant the overruling of precedent. Does the authorization of compulsory fees represent a significant interference with employees' expressive liberty, or is the effect more marginal? Is it relevant that employees have alternative avenues for expressing themselves? By making targeted inquiries like these, the Court would replace an abstract commitment to the value of expressive liberty with a more nuanced investigation of the interplay between the value of speech and the value of continuity.

## 2. Content Sensitivity

Despite the Court's general wariness of content-based restrictions,<sup>262</sup> it is common for the Court to take content into account in determining the level of protection speech is due. Part II discussed the exceptions to constitutional protection for categories of speech such as defamation, fighting words, and incitement. These exceptions remain overtly content-based, notwithstanding the Court's recent emphasis on linking them with historical practice.<sup>263</sup>

Much the same is true of the Court's protection of discourse on issues of public concern. Speech on matters of public concern receives added insulation in contexts such as defamation,<sup>264</sup> employer retaliation,<sup>265</sup> and intentional infliction of emotional distress.<sup>266</sup> The rationale, the Court has explained, is that speech related to issues of public concern is "at the heart of the First Amendment's protection."<sup>267</sup>

Along similar lines, the Court's definition of obscenity continues to depend on whether speech has "serious literary, artistic, political, or scientific value."<sup>268</sup> That definition provides another link between constitutional protection and value judgments. Indeed, the justices have noted that even when sexually explicit depictions possess "arguably artistic value" that triggers constitutional protection, "few of us would march our sons and daughters

---

262. See, e.g., *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (recognizing the "guiding First Amendment principle that the 'government has no power to restrict expression because of its message, its ideas, its subject matter, or its content' " (quoting *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972))).

263. See *supra* Part II.

264. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (plurality opinion) ("In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of 'actual malice.' " (footnote omitted)).

265. See *Connick v. Myers*, 461 U.S. 138, 146 (1983) (noting that if a public employee's speech "cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge" (footnote omitted)).

266. See *Snyder v. Phelps*, 562 U.S. 443, 451 (2011) ("Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case.").

267. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978).

268. *Miller v. California*, 413 U.S. 15, 24 (1973).

off to war to preserve the citizen's right to see" them.<sup>269</sup> The point is plain: some types of speech are more valuable, both doctrinally and practically, than others.

From time to time, justices have suggested that political speech exists on a special plane due to its importance in democratic society. Justice Scalia once stated that "[i]t is perhaps our most important constitutional task to ensure freedom of political speech."<sup>270</sup> Likewise, Justice Kennedy has argued 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 and in the forum of unrestrained speech."<sup>271</sup> The underlying theory is that limitations on political speech are uniquely self-insulating because they stifle efforts to generate democratic opposition. In light of that concern, 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."<sup>272</sup> The Court recently underscored these sentiments in *Knox v. Service Employees International Union, Local 1000* by noting "the close connection between our Nation's commitment to self-government and the rights protected by the First Amendment."<sup>273</sup> *McCutcheon v. FEC* likewise declared that "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders."<sup>274</sup> After all, as Professor Amar has noted, the Constitution itself "came to life through and because of uninhibited, robust, and wide-open political speech."<sup>275</sup>

The law of precedent should recognize distinctions such as these. The importance of striking a flawed decision from the books informs the application of *stare decisis* under existing law. The Court should embrace the principle of *content sensitivity* by acknowledging that different speech-restrictive precedents may create different levels of harm. In other words, certain precedents should be more vulnerable to overruling precisely because

---

269. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion).

270. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 503 (2007) (Scalia, J., concurring in part and concurring in the judgment).

271. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 407 (2000) (Kennedy, J., dissenting).

272. *Id.* at 408.

273. 132 S. Ct. 2277, 2288 (2012).

274. 134 S. Ct. 1434, 1440–41 (2014) (plurality opinion). Several state courts have offered similar readings of the Supreme Court's case law. *E.g.*, *Fine v. Bernstein*, 726 N.W.2d 137, 144 (Minn. Ct. App. 2007) ("[P]olitical speech receives greater protection under the First Amendment . . ."); *Golden Triangle News, Inc. v. Corbett*, 700 A.2d 1056, 1062 (Pa. Commw. Ct. 1997) ("Political speech is a special type of expression which is afforded the greatest protection under the First Amendment . . ." (footnote omitted)); *Collier v. City of Tacoma*, 854 P.2d 1046, 1050 (Wash. 1993) ("Wherever the extreme perimeters of protected speech may lie, it is clear the First Amendment protects political speech, . . . giving it greater protection over other forms of speech." (citation omitted)).

275. Amar, *supra* note 11, at 1028; *see also id.* at 1027 ("The Constitution's entire structure presupposes free elections, but elections cannot truly be free if incumbents are able to silence challengers.").

they are worse in terms of the substantive outcomes they produce.<sup>276</sup> This is true regardless of the interpretive philosophy a particular justice applies. Not every speech restriction implicates popular sovereignty in the same way. Neither does every restriction have identical ramifications for self-actualization or for the operation of the marketplace of ideas. The value of getting the law right is too complex to define in the abstract.

I argued in the previous Part that in all but the most exceptional cases, the best approach is to disregard a precedent's substantive effects in deciding whether to overrule it.<sup>277</sup> If, however, the Court is committed to preserving the relevance of substantive effects, it would be well served to acknowledge that the consequences of speech vary depending on the type of expression at issue.

To illustrate, return to the issue of political speech. The Court has left no doubt about its view that restrictions on political speech can pose serious threats to American democracy. The implication is that, all else equal, precedents that stifle political speech will lead to substantial harms.<sup>278</sup> Content sensitivity prevents that same analysis from extending to every precedent that upholds a speech restriction. Consider the example of false statements about one's personal history, as discussed in *Alvarez*. The *Alvarez* plurality characterized restrictions on biographical fabrications as immensely harmful, opening the door to "an endless list of subjects the National Government or the States could single out" and repress.<sup>279</sup> That analysis falls short of content sensitivity. The plurality did not explain how prohibiting falsehoods about one's military record, or even about one's life more broadly, translates into significant substantive harm. Content sensitivity suggests the plurality should have provided such an explanation to justify deviating from its prior statements about false speech.

The same principle applies to other First Amendment precedents. The harms flowing from compelled subsidization of labor unions may be different from the harms arising from limiting the rights of political protestors.<sup>280</sup> Similarly, prohibitions on broadcast indecency are likely to have different effects than limitations on campaign contributions.<sup>281</sup> In determining whether a flawed precedent should be overruled, embracing these distinctions is vital. Only by recognizing differences among types of speech can the

---

276. Cf. Tushnet, *supra* note 89, at 104 (noting that "speech varies in the *magnitude of the social benefit* it occasions: as the Court put it, some utterances are of low social value in their contribution to the discovery of truth or the development of public policy.").

277. See *supra* Section IV.A.

278. Of course, whether a restriction truly stifles speech—as opposed to regulating certain speech as a means to making the broader marketplace of ideas more robust—will sometimes be in dispute.

279. *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) (plurality opinion).

280. Compare *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277 (2012), with *McCullen v. Coakley*, 134 S. Ct. 2518 (2014).

281. Compare *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), with *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

Court resist the tendency to treat all speech-restrictive decisions as overwhelmingly problematic, such that case-by-case analysis morphs into an “analogical stampede” in which every confrontation between speech and stability is resolved in favor of the former.<sup>282</sup>

As we have seen, the Court regularly acknowledges the commonsense point that some expressions are more valuable than others. The principle of content sensitivity extends this recognition to the treatment of precedent. Precedents that restrict the most valuable speech will more readily be overruled. Precedents whose ramifications are limited to less valuable speech will have a better chance of surviving despite their flaws. In this way, the doctrine of stare decisis can promote continuity and impersonality even as it allows the correction of grievous mistakes.

#### V. BEYOND THE FREEDOM OF SPEECH

So far, I have analyzed the Supreme Court’s treatment of speech-related precedents against the backdrop of its more general statements about stare decisis. This Part steps back to ask whether the phenomenon I have described in the First Amendment context has broader application. The question is whether there are pockets of law beyond the freedom of speech in which the stated rules of stare decisis are effectively suspended.

The fact that the Court has revised several important aspects of its free-speech doctrine in recent years suggests a particular sensitivity. Certain language in the justices’ opinions bolsters that conclusion. 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.”<sup>283</sup> 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 a restriction on corporate electioneering.<sup>284</sup> Justice Scalia dissented in relevant part,<sup>285</sup> and when the issue reemerged four years later he held to his view notwithstanding the pull of stare decisis.<sup>286</sup> He described *McConnell* as “unworkable” and inconsistent with cases that came before it, and he argued

---

282. Cf. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 27 (1971) (“If the dialectical progression is not to become an analogical stampede, the protection of the first amendment . . . must be cut off when it reaches the outer limits of political speech.”).

283. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in the judgment) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

284. *McConnell v. FEC*, 540 U.S. 93, 204–07 (2003), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

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

286. See *Wis. 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 BCRA.”).

that neither “reliance interests” nor “cultural impact” provided sufficient reason for reaffirming the decision.<sup>287</sup>

Statements like Justice Scalia’s might suggest free speech has a unique power to overcome restrictive precedents.<sup>288</sup> The Court occasionally has expressed similar sentiments outside the First Amendment context. In *Arizona v. Gant*, for example, the Court considered police officers’ authority to search an automobile after arresting its occupant.<sup>289</sup> The Court ruled that warrantless searches generally are impermissible once the arrestee has been secured.<sup>290</sup> One topic of debate was whether that holding was consistent with the Court’s previous decision in *New York v. Belton*, which dealt with automobile searches following an occupant’s arrest.<sup>291</sup> The *Gant* majority resisted the idea that it was changing the law as opposed to adopting the most sensible reading of *Belton*.<sup>292</sup> In response to the argument that many stakeholders had understood *Belton* as articulating a general rule that authorized automobile searches incident to 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.”<sup>293</sup>

Writing in dissent, Justice Alito contended that the *Gant* majority had overruled *Belton*.<sup>294</sup> He also objected to the majority’s suggestion that *stare decisis* is immaterial in cases involving unlawful police procedures. Justice Alito countered that “the Court cites no authority for the proposition that *stare decisis* may be disregarded or provides only lesser protection when the precedent that is challenged is one that sustained the constitutionality of a law enforcement practice.”<sup>295</sup> Unlike the majority, Justice Alito refused to

287. *Id.* at 501–03.

288. *Cf.* Amar, *supra* note 11, at 1027 (“It is possible to have a robust constitutional democracy without grand juries as screens against unwanted felony prosecutions. . . . But it is not possible to have a robust constitutional democracy without a very broad protection of political expression, opinion formation, and association—without, in other words, something closely akin to the core of our First Amendment.”).

289. 556 U.S. 332, 335 (2009).

290. *Gant*, 556 U.S. at 335.

291. 453 U.S. 454, 455 (1981).

292. *See Gant*, 556 U.S. at 343 (declining to adopt a “broad reading of *Belton*”).

293. *Id.* at 348; *see also 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.”).

294. *Id.* at 356 (Alito, J., dissenting) (“Although the Court refuses to acknowledge that it is overruling *Belton* and [a subsequent case that reaffirmed *Belton*], there can be no doubt that it does so.”). Writing for the Court in *Davis v. United States*, Justice Alito reiterated his view that *Gant* had revised established law. *See Davis v. United States*, 131 S. Ct. 2419, 2424–25 (2011) (“For years, *Belton* was widely understood to have set down a simple, bright-line rule. Numerous courts read the decision to authorize automobile searches incident to arrests of recent occupants, regardless of whether the arrestee in any particular case was within reaching distance of the vehicle at the time of the search.”).

295. *Gant*, 556 U.S. at 359 (Alito, J., dissenting).

elevate freedom from illegal searches above considerations of stare decisis as a categorical matter.

There are arguable counterpoints to this approach, notably including the Court's continued retention of the rule that a criminal defendant's prior convictions can be used in subsequent sentencing hearings without being submitted to a jury and proved beyond a reasonable doubt.<sup>296</sup> Even so, combining the majority opinion in *Gant* with the First Amendment decisions I have discussed, we might imagine an argument that precedent must yield whenever it comes up against a range of individual liberties.<sup>297</sup> If this understanding of the law is correct, it encompasses a striking exception to the doctrine of stare decisis—one that significantly qualifies the Court's express commitment to precedent and continuity. The Court has the power to revise its approach to precedent, but any shift should be explicit, and it should be accompanied by a justification for categorically elevating the protection of individual liberties over the preservation of continuity.

We can also find shades of *Gant* in the Court's discussions of constitutional structure. The Court stated a few decades ago that it has "not hesitated" to overrule precedents that have "departed from a proper understanding of congressional power under the Commerce Clause."<sup>298</sup> Should we view this as another zone in which stare decisis has no meaningful role to play? The justices' close attention to precedent in recent disputes about the Commerce Clause seems to undermine that conclusion.<sup>299</sup> Still, it is an intriguing question whether certain matters of constitutional structure are so foundational as to transcend the domain of stare decisis. Along similar lines is Justice Brandeis' famous statement that precedents are entitled to less respect in the constitutional context than in the statutory context<sup>300</sup>—a distinction the Court has retained even while clarifying that constitutional decisions warrant presumptive deference.<sup>301</sup>

---

296. See *Rangel-Reyes v. United States*, 547 U.S. 1200, 1202 (2006) (Thomas, J., dissenting from denial of certiorari) ("[T]he exception to trial by jury for establishing 'the fact of a prior conviction' finds its basis not in the Constitution, but in a precedent of this Court." (citing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998))); cf. *id.* at 1201–02 (Stevens, J., respecting denial of certiorari) ("The denial of a jury trial on the narrow issues of fact concerning a defendant's prior conviction history . . . will seldom create any risk of prejudice to the accused . . . . The doctrine of *stare decisis* provides a sufficient basis for the denial of certiorari in these cases.").

297. See Richard M. Re, Essay, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1877 (2014).

298. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985).

299. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2587 (2012) (opinion of Roberts, C.J.) ("As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching 'activity.'"); *id.* at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Since 1937, our precedent has recognized Congress' large authority to set the Nation's course in the economic and social welfare realm.").

300. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–08 (1932) (Brandeis, J., dissenting) (drawing a distinction between constitutional and statutory precedents).

301. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 443 (2000).



For present purposes, I wish merely to flag these issues and to offer the beginnings of a response. The curse of stare decisis is that there are always good reasons to renounce it. By definition, deference to precedent interferes with interpretations that a justice may otherwise be inclined to adopt. Yet an equally important part of stare decisis is asking justices to think twice. Perhaps a prior decision has commanded significant reliance. Perhaps an overruling would run counter to the ideal of the judiciary as an enduring and impersonal institution. Perhaps today's judges are actually wrong, and their predecessors right, about the proper resolution of a constitutional controversy. The central point, mundane as it may be, is this: there are good reasons to depart from flawed precedents, but there are also good reasons to stand by them. That is true in the First Amendment context as in all others.

#### CONCLUSION

The effectiveness of stare decisis depends on a justice's willingness to elevate the value of continuity over implementing her best understanding of a legal command. Such elevation need not occur in every case. But it needs to happen *sometimes* if the law is to maintain its cohesiveness and impersonality in a world of interpretive disagreement.

Understood against this backdrop, the doctrine of stare decisis fits uneasily within a system that constantly treats considerations other than legal continuity as paramount. If it is always more important to interpret the law correctly than to keep the law settled, stare decisis loses much of its ability to foster stability and impersonality. That prospect warrants another look at the Supreme Court's recent First Amendment case law. By emphasizing the significance of unfettered speech, the Court has sought to advance the cause of expressive liberty. In doing so, however, the Court has implicitly relegated stability and continuity to a lower tier of constitutional salience.

For some, this state of affairs may be unobjectionable. There is no denying that robust expression is a core tenet of American legal and political culture. The claim of this Article is that there is also something to be said for stare decisis, even when it comes at a hefty price.