A MODEL OF FIRST AMENDMENT DECISION-MAKING AT A DIVIDED COURT

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On First Amendment issues, today's Supreme Court is arguably the most protective in the institution's history. But the apparent libertarian consensus masks a surprisingly deep disagreement about methodology. The Court's Republican Justices prefer an austere, formal approach in which logical conclusions are pursued to the furthest reach. The Court's Democratic Justices, on the other hand, would follow a more complex, contextual approach in which rules and standards are often custom-tailored to narrow factual domains.

This Article models that divide. I demonstrate that the Court's First Amendment case law over the past three decades has conformed to a small set of unspoken rules that I call "the four tenets." These four tenets have defined First Amendment doctrine for nearly thirty years and are today so deeply ingrained that we barely notice them. Yet they do not represent a consensus position. Instead, the Court's four Democratic Justices stand prepared to break with the four tenets. If the four Democratic Justices ever become five—or if a Republican supplies a fifth vote—it will mean the end of an era in First Amendment jurisprudence and the beginning of a new one.

INTRODUCTION

After Donald J. Trump's election to the Presidency, the Supreme Court's conservative majority is secure—at least for the next four years. But where the freedom of speech is concerned, an older form of judicial conservatism is all but extinct. The conservatives of the

1950s, '60s, and '70s resisted speech protections for profane,[2] erotic,[3] confrontational,[4] and commercial speech.[5] As recently as 1987, Robert Bork argued that protections should extend only to speech that "feeds directly into the political process."[6] No such conservatives sit on today's Court, arguably the most protective in the institution's history.[7]

Beneath an apparent libertarian consensus, however, lies a surprisingly deep disagreement about the manner in which First Amendment decisions should be made. To generalize, the Court's Republican Justices[8] prefer an austere, formal approach in which logical conclusions are pursued to the furthest reach. The Court's

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2. *See, e.g.*, Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting) (characterizing a jacket reading "Fuck the Draft" as an "absurd and immature antic" unworthy of protection.).

3. *See, e.g.*, Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70 (1976) (Stevens, J., writing for the plurality) ("[E]very schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice.").

4. *See, e.g.*, Rosenfeld v. New Jersey, 408 U.S. 901, 906 (1972) (Powell, J. dissenting) ("A verbal assault on an unwilling audience may be so grossly offensive and emotionally disturbing as to be the proper subject of criminal proscription, whether under a statute denominating it disorderly conduct, or more accurately, a public nuisance.").

5. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 583 (1980) (Rehnquist, J., dissenting); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 787 (1976) (Rehnquist, J., dissenting) ("It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment.").

6. STEVEN SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE, 210 n.177 (1990) (quoting *Worldnet: Viability of the United States Constitution-Bork* (United States Information Agency broadcast June 10, 1987)); *see also* 133 CONG. REC. 27341, 28737 (1987) (quoting *Worldnet: Viability of the United States Constitution-Bork* (United States Information Agency broadcast June 10, 1987)) ("Clearly as you get into art and literature, particularly as you get into forms of art—and if you want to call it literature forms of art—which are pornography and things approaching it—you are dealing with something now that is [not] in any way and form the way we govern ourselves, and in fact may be quite deleterious. I would doubt that courts ought to throw protection around that.").

7. *See* Adam Liptak, *Study Challenges Supreme Court's Image as Defender of Free Speech*, N.Y. TIMES, Jan. 8, 2012, at A25 (quoting leading First Amendment litigator Floyd Abrams) ("It is unpopular speech, distasteful speech, that most requires First Amendment protection, and on that score, no prior Supreme Court has been as protective as this.").

8. Chief Justice John Roberts, Justice Anthony Kennedy, Justice Clarence Thomas, and Justice Samuel Alito.

Democratic Justices,[9] on the other hand, would follow a more complex, contextual approach in which rules and standards are often custom-tailored to narrow factual domains. To what extent the methodological divide reflects simple expediency is unclear. As I will demonstrate, the Republican Justices' approach tends to enable Republican-friendly outcomes, and the Democratic Justices' approach tends to constrain them. But the fact that the divide exists means that a number of basic assumptions of First Amendment doctrine that seem like bedrock are in fact much less stable than they appear. I examine four of these assumptions in this paper:

1. In principle, speech is speech. Courts should not attempt to weigh the comparative value of the speech or the magnitude of the interest in speaking.
2. Wherever possible, courts should resolve speech issues under a unified rubric of content-neutrality.
3. Business regulations are not exempt from First Amendment scrutiny.
4. First Amendment interests are a shield against regulation, and never a justification for regulation.

Each of these assumptions contains more than a kernel of wisdom, and none of them can be abrogated without some level of risk. But taken together, they have produced a policy trajectory that is unsustainable and often perverse. On the Court's docket, the traditional First Amendment underdogs—the lone pamphleteer,[10] the civil rights picketer,[11] the literary subversive[12]—have mostly been replaced by a new cast of First Amendment overdogs—the pharmaceutical advertiser,[13] the corporate human resource manager,[14] and the billionaire political donor.[15] These parties have

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9. Justice Stephen Breyer, Justice Ruth Bader Ginsburg, Justice Sonia Sotomayor, and Justice Elena Kagan.

10. *See* Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 165 (1939) (invalidating anti-handbilling ordinance as applied to canvasser).

11. *See* Edwards v. South Carolina, 372 U.S. 229, 238 (1963) (reversing conviction of peaceful civil rights protestors under breach of the peace ordinance).

12. *See* Roth v. United States, 354 U.S. 476, 506 (1957) (declaring the novel "Lady Chatterley's Lover" beyond the obscenity exception to First Amendment protection).

13. *See* Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2672 (2011) (invalidating Vermont law regulating the purchase and sale of pharmaceutical prescriber data).

14. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014) (invalidating the Affordable Care Act's mandate that employers' health insurance

flourished in an environment in which political, artistic, and business communications are all "speech" for constitutional purposes and in which, as Justice Scalia has said, there can never be too much of it.[16] At the margins, meanwhile, the Court's extreme formalism has invited opportunists to seek protections for phenomena that have little to nothing to do with speech—3D-printable handguns,[17] public smoking,[18] and cash payment mechanisms,[19] to name a few. The doctrine needs correction, and that will have to mean relaxing the methodological tenets that have defined the Court's approach to free speech in the last three decades.

Part II of this paper offers the four tenets described above as a model of First Amendment decision-making in the Rehnquist and Roberts Courts. It is not an elegant model, nor does it claim to unify the Court's decisions under any particular normative vision of what the freedom of speech should actually mean. But it is highly consistent with the Court's work over the past twenty or so years. Then, in Part III, I demonstrate that my four-tenets model, while dominant at the Court, does not represent a consensus position. Instead, it seems to be highly contingent on the ideological makeup of the Court—so much so, in fact, that the four-tenets model would no longer apply if President Obama had succeeded in placing his nominee Merrick Garland on the Court. Even today, the Court is so closely divided on methodology that the Trump-appointed Justice

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benefits cover contraceptives as applied to a religiously-objecting private for-profit corporation).

15. *See* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1443 (2014).

16. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 695 (1990) (Scalia, J., dissenting) ("The premise of our system is that there is no such thing as too much speech—that the people are not foolish but intelligent, and will separate the wheat from the chaff.").

17. Def. Distributed v. United States Dep't of State, 838 F.3d 451, 461 (5th Cir. 2016).

18. These claims have been rejected. *See, e.g.*, Gallagher v. City of Clayton, 699 F.3d 1013, 1021 (8th Cir. 2012); Roark & Hardee LP v. City of Austin, 522 F.3d 533, 550 (5th Cir. 2008); NYC C.L.A.S.H., Inc. v. City of N.Y., 315 F. Supp. 2d 461, 474 (S.D.N.Y. 2004); Curious Theatre Co. v. Colo. Dep't of Pub. Health & Env't, 220 P.3d 544, 550 (Colo. 2009).

19. Expressions Hair Design v. Schneiderman, 808 F.3d 118, 121 (2d Cir. 2015), *cert. granted*, 137 S. Ct. 30, 195 L. Ed. 2d 902 (2016); Comments on BitLicense, the Proposed Virtual Currency Regulatory Framework from Marcia Hoffman, Special Counsel, Elec. Frontier Found., to New York Dep't of Fin. Services, 12-13, 16 (Oct. 21, 2014) (available at <https://www.eff.org/files/2014/10/21/bitlicense-comments-eff-ia-reddit-hofmann-cover.pdf>) (arguing that the digital currency Bitcoin's architecture deserves First Amendment protections). *But see* Kyle Langvardt, *The Doctrinal Toll of "Information as Speech"*, 47 LOY. U. CHI. L.J.761, 795–801 (2016) (criticizing the Bitcoin argument).

could conceivably make common cause with the Court's liberal bloc in unexpected areas.

My method for demonstrating the closeness of the divide is simple. I examine three areas of First Amendment doctrine where the Court consistently divides into five-to-four ideological blocs. In each of these areas, the conservative majority issued holdings consistent with the four-tenets model. Victories for the liberal majorities in these areas, meanwhile, would produce holdings that cannot be reconciled with the four-tenets model. This is a surprising result, because at least some of the four tenets—for instance, the decision to reject hierarchies of speech-value—have no obvious ideological valence.[20]

I. FOUR TENETS OF THE CONSERVATIVE BLOC

The following four "tenets" of First Amendment decision-making offer a highly reliable guide to the Supreme Court's case law following the appointment of Anthony Kennedy in 1989. Before that point, they are less reliable.

A. Tenet 1 (Speech Is Speech). In Principle, Speech Is Speech. Courts Should Not Attempt To Weigh The Comparative Value Of Speech Or The Magnitude Of The Interest In Speaking.

The concept of free speech implies that courts must often suspend judgments as to taste, quality, and so on when speech is threatened. "One man's vulgarity," after all, "is another man's lyric," as Justice Harlan said.[21] Yet this principle has inevitable limits, and the courts have never treated all communications as having truly equal dignity. Instead, First Amendment doctrine has historically incorporated devices for subordinating certain types of "low-value" speech to others.[22] In recent decades, the Court has sought to neutralize those

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20. I would extend this observation to all of the four tenets except for Tenet 3, which holds that the business environment is not exempt from First Amendment scrutiny.

21. Cohen v. California, 403 U.S. 15, 25 (1971) ("[I]t is . . . often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.").

22. *See* Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance

devices and produce something closer to a single-tiered approach to First Amendment decision-making.

1. Categorization

The most well-known of these devices is the technique of formal "categorization." Under this technique, pariah categories of "low-value speech" are removed from the ordinary suite of First Amendment protections.[23] These categories include obscenity, fighting words, and true threats.[24]

Chaplinsky v. New Hampshire, the foundational case for the categorization technique, claimed a historical pedigree for these categories: "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[25] But Justice Murphy's opinion did not cite any actual precedent in case law to prove that these categories had even been named prior to 1942, let alone been "well-defined."[26]

Until recent years, therefore, a later passage in *Chaplinsky* was more influential. This language set out a balancing formula for creating new categories of unprotected speech: "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[27] In short, if a category of speech was uniformly low-value and uniformly costly to society, then that category of speech could be removed from the First Amendment's reach. [28] The *Chaplinsky* court reasoned that fighting words satisfied these criteria.[29]

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inflict injury or tend to incite an immediate breach of the peace."). *But see* Genevieve Lakier, *The Invention of Low Value Speech*, 128 HARV. L. REV. 2166, 2168 (2015) (demonstrating that "low value speech" is ultimately a twentieth-century invention).

23. *See generally* Gregory P. Magarian, *The Marrow of Tradition: The Roberts Court and Categorical First Amendment Speech Exclusions*, 56 WM. & MARY L. REV. 1339, 1340 (2015).

24. *Id*.

25. *Chaplinsky*, 315 U.S. at 571–72.

26. *Id*.; *see also* Lakier, *supra* note 22, at 2177 ("There is little historical evidence, however, to back up the Court's claim that the categories of low-value speech we recognize as such today constituted, in the eighteenth and nineteenth centuries, well-defined and narrowly limited exceptions to the ordinary constitutional rules.").

27. *Chaplinsky*, 315 U.S. at 572.

28. *Id*.

29. *Id*.

The Warren and Burger Courts relied heavily on this method to create new low-value speech categories. These include obscenity,[30] defamation,[31] and incitement of lawbreaking.[32] In *New York v. Ferber*, when the Court created a low-value speech category for child pornography, it did not use the *Chaplinsky* approach, but it relied on balancing nevertheless: possession of child pornography was punishable, the Court reasoned, because it would "dry up the market" for child abuse.[33] Despite some boundary-setting difficulties—obscenity in particular proved embarrassingly difficult to define[34]—the categorical method gave courts cover to maintain strong protections for most speech by routing indefensible distractions away from the mainstream of the doctrine.

The Rehnquist and Roberts Courts have turned away from this maneuver. In 1993, Justice Scalia's opinion in *R.A.V. v. St. Paul* placed new limits on the government's power to regulate within low-value speech categories.[35] The common wisdom before *R.A.V. v. St. Paul* was that speech within the "unprotected categories" totally lacked Constitutional significance, and that any regulation of that speech would be upheld under rationality review. Justice Scalia's opinion rejected this view.[36] For the *R.A.V.* court, the existence of an unprotected category instead meant only that a legislature had a free hand to regulate the entire category equally.[37] If, on the other hand, it regulated *within* the category on a content-discriminatory basis, it

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30. *See generally* Miller v. California, 413 U.S. 15 (1973); Roth v. U.S., 354 U.S. 476 (1957).

31. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 751, 758–59 (1985); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); New York Times v. Sullivan, 376 U.S. 254, 268–69 (1964).

32. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

33. 458 U.S. 747, 760 (1982). ("While the production of [child] pornographic materials is a low-profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution. The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.").

34. Potter Stewart's endearing observation in *Jacobellis v. Ohio* that "I know it when I see it" lives on famously as an epigram of befuddlement. 378 U.S. 184, 197 (1964).

35. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992).

36. *Id.* at 383 ("Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government 'may regulate [them] freely.'").

37. *Id.*

would trigger the same strict scrutiny that would apply in a case that did not concern low-value speech at all.[38]

R.A.V. weakened the categorical method in two ways. First, it narrowed the practical gap between high-value and low-value speech; low value speech was now far less regulable than it had been before *R.A.V.* Second, at a deeper level, it gave the content discrimination principle logical primacy over the categorical analysis.

The Court has also purportedly forsworn the creation of new categories. In *U.S. v. Stevens*, the Court put to rest any idea that further categories could be created by means of *Chaplinsky* or *Ferber* balancing.[39] The Court in that case considered "crush videos," depictions of extreme animal cruelty that catered to a bizarre sexual fetish.[40] *Chaplinsky*'s balancing method would seem to justify the low-value speech treatment here, as would *Ferber's* "dry up the market" rationale.[41] But the *Stevens* court rejected balancing altogether. Instead, Chief Justice Roberts wrote, history was the exclusive source of unprotected categories.[42] The list of unprotected categories was therefore permanently fixed to those "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[43] In short, the Court announced a halt in new implementations of the categorical method.[44]

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38. This rule is limited by three exceptions, but they are not germane here. *Id*. at 388–90.

39. 559 U.S. 460 (2010).

40. *Id*. at 465–66 (quoting H.R. REP. NO. 104-347, at 2-3 (1999)).

41. *Id*. at 493 (Alito, J., dissenting) ("The most relevant of our prior decisions is *Ferber*, which concerned child pornography. The Court there held that child pornography is not protected speech, and I believe that Ferber's reasoning dictates a similar conclusion here.") (citation omitted).

42. *Id*. at 469.

43. *Id*. at 468–69 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)) (emphasis added).

44. Of course, there is no reason to expect that new "history" will not be discovered when exigency requires it. In *U.S. v. Alvarez*, decided two years after *Stevens*, three dissenting Justices found historical support for the proposition that false statements have never been protected and should constitute an unprotected category of their own. United States v. Alvarez, 132 S. Ct. 2537, 2557 (2012) (Alito, J., dissenting). For the four Justices in the plurality, history disclosed the opposite message. *Id.* at 2546–47 ("As our law and tradition show . . . there are instances in which the falsity of speech bears upon whether it is protected. Some false speech may be prohibited even if analogous true speech could not be. This opinion does not imply that any of these targeted prohibitions are somehow vulnerable. But it also rejects the notion that false speech should be in a general category that is presumptively unprotected."). *See* David S. Han, Transparency in First Amendment Doctrine, 65 EMORY L.J. 359, 384 (2015) (discussing *Alvarez* as an illustration of the *Stevens* test's

The doctrine of low-value speech was once the Court's primary means of establishing tiers of First Amendment significance. Today it remains in effect, but it has been demoted, weakened, narrowed, and permanently contained.[45]

2. Subcategorization

Aside from the formally-recognized low-value speech categories lie "stealth categories" or "subcategories"[46] such as "indecent" speech and nude dancing. These categories are often loosely defined, and the Court applies normal First Amendment doctrine within them as a formal matter. But as a practical matter, the application of that doctrine is conspicuously watered-down.

The classic stealth category encompasses "indecent" expression such as foul language or non-obscene eroticism. In *FCC v. Pacifica,* the Court upheld FCC sanctions against the Pacifica Radio Network for its daytime broadcast of the comedian George Carlin's "seven words you can't say on television" bit.[47] All parties agreed that the broadcast fell outside the formal category of obscenity, and no one could argue that the penalty was not based on the broadcast's content.[48] Yet the court avoided applying strict scrutiny. Instead Justice Stevens' opinion summarily approved the FCC's actions after casting off Carlin's routine as an obnoxious "pig in the parlor" that did not belong on daytime radio.[49]

Today, *Pacifica*'s authority is questionable. In *Fox v. FCC*, the FCC fined the Fox television network and other major broadcasters in connection with several minor primetime television scandals involving "fleeting expletives."[50] On an episode of *The Simple Life,* for instance, the actress Nicole Richie had asked, "[w]hy do they even

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normative "opacity") ("Even assuming the underlying premises of the Court's analysis, however, the purely historical approach fails on its own terms, since the Court's fundamental assumption that such a test will prevent courts and legislatures from using value judgments to 'revise' the scope of the First Amendment is untenable.").

45. *See generally* John D. Moore, *The Closed and Shrinking Frontier of Unprotected Speech*, 36 WHITTIER L. REV. 1 (2014).

46. *See* Keith Werhan, *The Liberalization of Freedom of Speech on A Conservative Court*, 80 IOWA L. REV. 51, 57 (1994).

47. F.C.C. v. Pacifica Found., 438 U.S. 726 (1978); GEORGE CARLIN, *Seven Words You Can Never Say on Television, on* CLASS CLOWN (Atlantic Recording Corp. 1972).

48. *Pacifica*, 438 U.S. at 726.

49. *Id*. at 750.

50. F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 546 (2009).

call it 'The Simple Life?' Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."[51] And while accepting an award at the Golden Globes Awards, U2 lead singer had exclaimed that "this is really, really fucking brilliant."[52] Network censors occasionally allowed such lines to play uninterrupted, and later faced sanctions under the FCC's long-standing "indecency ban."[53] The FCC defended its actions under *Pacifica*; the Court chose to avoid reaffirming *Pacifica* and instead resolved the case under the Administrative Procedure Act.[54]

A more influential device for dealing with indecency is the "secondary effects" doctrine, designed to make short work of First Amendment challenges to zoning laws that disfavored adult businesses.[55] These laws generally reached too far to be classed as regulations of obscenity, and on their face, they also discriminated based on content. A straightforward application of general First Amendment doctrine would have meant strict scrutiny and almost certainly resulted in striking the laws down. To avoid this unpalatable result, the Court devised a fiction: the law was not motivated by bias against the expression itself, but by the expression's "secondary effects," which included crime and decreased home values.[56] In reality, the test was universally recognized as a Band-Aid approach to an embarrassing judicial problem.[57]

However unconvincing its rationale,[58] the secondary effects doctrine offered courts a mechanism for downgrading to intermediate scrutiny in cases where strict scrutiny would have been excessive. In

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51. *Id*. at 510.
52, *Id*. at 509.
53. *Id*. at 509–10.
54. *Id*.
55. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 43 (1986).
56. *Id*. at 48. Justice Kennedy has acknowledged the artificiality of the rule. City of Los Angeles v. Alameda Books, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) (characterizing the "secondary effects" test and its focus on motive as the touchstone of content-neutrality as "something of a fiction").
57. *See, e.g*., LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* §12-3, n.17 (2d ed. 1988) ("Carried to its logical conclusion, the doctrine could gravely erode first amendment protections . . . The *Renton* view will likely prove to be an aberration limited to the context of sexually explicit materials.").
58. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 115 (1987) (characterizing *Renton* as "a disturbing, incoherent, and unsettling precedent."); *see generally* David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms"*, 37 WASHBURN L.J. 55 (1997) (citing Boos v. Barry, 485 U.S. 312, 338 (1988) (Brennan, J., concurring)).

certain classes of cases, including regulation of nude dancing[59] and the regulation of software,[60] this intermediate scrutiny by way of secondary effects became a matter of rote.

But in 2015's *Reed v. Town of Gilbert*,[61] discussed *infra,* the Court raised serious questions about the secondary effects doctrine's validity.[62] According to *Reed*'s holding, regulations that on their face discriminate based on content must be evaluated under strict scrutiny, whatever their motivation.[63] Between *Reed* and *Stevens*, courts have lost not only the ability to recognize new formal categories of speech,[64] but the ability to observe informal ones as well. Much depends on how scrupulously the courts adhere to those precedents, but it is at any rate remarkable that the Court would even attempt such a dramatic flattening of the First Amendment hierarchy in a mere five years.[65]

3. The Rhetorical "Core" and "Periphery"

Though the phrases do not have any defined doctrinal effect, the courts have long referred to "core political speech" or speech on "matters of public concern" as occupying some place of priority in

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59. *See* City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Oasis Goodtime Emporium I, Inc. v. City of Doraville, 773 S.E.2d 728, 736–37 (2015), reconsideration denied (July 13, 2015); RCI Entm't (San Antonio), Inc. v. City of San Antonio, 373 S.W.3d 589, 601 (Tex. App. 2012) (quoting Erie, 529 U.S. at 296); Flirts, Inc. v. City of Harris, Minn., 796 F. Supp. 2d 974, 979 (D. Minn. 2011) (quoting Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565–66 (1991)).

60. *See* Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 329 (S.D.N.Y.), *judgment entered*, 111 F. Supp. 2d 346 (S.D.N.Y. 2000), *aff'd sub nom.* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001); Def. Distributed v. U.S. Dep't of State, 121 F. Supp. 3d 680, 693–94 (W.D. Tex. 2015), *aff'd sub nom.* Def. Distributed v. United States Dep't of State, 838 F.3d 451 (5th Cir. 2016).

61. 135 S. Ct. 2218 (2015).

62. Brian W. Blaesser, Alan C. Weinstein, "*Renton v. Playtime Theatres, Inc.* and the "Secondary Effects" Doctrine." FEDERAL LAND USE LAW & LITIGATION § 6:5 (2016 ed.).

63. *Reed*, 135 S. Ct. at 2227.

64. *See* discussion of United States v. Stevens, *supra* ns. 39–44.

65. *See* Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981 (2016) (arguing that lower courts have taken early and aggressively measures to *Reed*). For an example of a court simply ignoring *Reed*'s message on secondary effects only a month after *Reed* came down, see Def. Distributed v. U.S. Dep't of State, No. 1-15-CV-372 RP, 2015 WL 4658921, at *8 (W.D. Tex. Aug. 4, 2015).

First Amendment practice.[66] Today, those terms are used extremely generously.

In *Snyder v. Phelps,* for instance, members of the Westboro Baptist Church picketed a military funeral with signs reading, "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Fag Troops," "Semper Fi Fags," "God Hates Fags," "Maryland Taliban," "Fags Doom Nations," "Not Blessed Just Cursed," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "You're Going to Hell," and "God Hates You."[67] After describing speech on matters of public concern as "occupy[ing] the highest rung of the hierarchy of First Amendment values,"[68] the Court held that "[w]hile these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import."[69]

As for speech that does not occupy the "highest rung," the Court cited two examples–first, *Dun & Bradstreet v. Greenmoss Builders*, dealing with disclosure of a private credit rating, and second, *San Diego v. Roe*, in which a former police officer who sold sex tapes of himself in uniform claimed to have been terminated in retaliation for exercising his speech rights.[70] With these two examples in mind, one has to wonder how many rungs the ladder of "public concern" really has; the hierarchy begins to look much more like a stepstool with the broad majority of litigable cases sitting beside each other on the top and a few odd ones sitting on the floor.

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66. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position. . . .") (Stevens, White and Blackmun, JJ., concurring); F.C.C. v. League of Women Voters, 468 U.S. 364, 381 (1984) ("Expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values.") (quoting Carey v. Brown, 447 U.S. 455, 466–67 (1980)); Long Beach Area Peace Network v. City of Long Beach, 574 F.3d 1011, 1021 (9th Cir. 2009) ("Political speech is core First Amendment speech, critical to the functioning of our democratic system."); Zapach v. Dismuke, 134 F. Supp. 2d 682, 687 (E.D. Pa. 2001) ("Speech on public issues and political matters lies at the heart of protected speech.").

67. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 454 (2011).

68. *Id*. at 452.

69. *Id*. at 454.

70. *Id*. at 453 (discussing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762 (1985); San Diego v. Roe, 543 U.S. 77, 84 (2004) (per curiam)).

4. Schauer's Boundary

Still more subtle is the scope of First Amendment "coverage." Professor Frederick Schauer has argued that many regulations of communicative activity simply lie beneath the First Amendment's notice.[71] No one even argues, for instance, that the linguistic aspect of a contract should move a court to hesitate before imposing damages against a contracting party.[72] To give another example, courts do not bother to consider how the First Amendment might apply to insider trading laws.[73] These situations, Professor Schauer argues, add up to the rule rather than the exception: the vast majority of speech is regulable without any constitutional concern.[74] Yet the First Amendment's "coverage," for complex reasons, is always expanding. At one time, the Court did not deign to consider arguments that advertisements might receive constitutional protection; today, they receive strong protection.[75] At one time, it was unclear that computer code or consumer data were even First Amendment subject matter; today they are.[76]

I have argued in a previous paper that courts at all levels have committed themselves at least in theory to what Justice Kennedy refers to as "the rule that information is speech."[77] Taken literally, this "information rule" defines the scope of the First Amendment in the broadest possible terms—terms that produce absurd results. There is litigation pending today over the government's ability to regulate computer-aided-design files used to produce 3D-printable handguns.[78] All parties agree that the files "are speech" because they contain "information."[79] The Electronic Frontier Foundation has argued that the digital currency Bitcoin "is speech" because

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71. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768 (2004).

72. I set aside contracts such as non-disclosure agreements that impose speech-related obligations on the parties—First Amendment arguments concerning those contracts should fail, but they are nevertheless within Schauer's boundary. *See generally Cohen v. Cowles* Media Co., 501 U.S. 663 (1991).

73. Schauer, *supra* note 71, at 1779.

74. *Id*. at 1779–80.

75. *Id*. at 1776–77.

76. Kyle Langvardt, *The Doctrinal Toll of "Information as Speech"*, 47 LOY. U. CHI. L.J. 761, 768–774 (2016).

77. *Id*. at 762.

78. Def. Distributed v. U.S. Dep't of State, 838 F.3d 451, 454 (5th Cir. 2016).

79. *Id*. at 469 (Jones, J., dissenting).

"information" is used to keep a record of transactions.[80] Scholars, as well as practicing attorneys in the patent field, have begun to argue that DNA "is speech" because it contains "information."[81]

To the extent that this unspoken boundary is always expanding, the courts are again leveling a hierarchy of First Amendment value—a hierarchy in which some forms of regulated communication have never before called for any First Amendment analysis at all. Narrowing the scope of the First Amendment would require the Court to articulate some sort of limiting principle, and no such principle appears to be forthcoming.

B. Tenet 2 (Doctrinal Austerity). Whenever Possible, Courts Should Resolve Speech Issues Under A Unified Rubric Of Content-Neutrality.

By the end of the 1960s, the Supreme Court had laid down an important new dividing line in First Amendment law. In *Mosley v. City of Chicago*, the Court had held that state regulations of speech call for strict scrutiny if they discriminate on content.[82] In *United States v. O'Brien*, meanwhile, the Court had held that intermediate scrutiny applies when "the governmental interest is unrelated to the suppression of free expression."[83]

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80. Comments from Marcia Hoffman, Special Counsel, Elec. Frontier Found., to New York Dep't of Fin. Services, on BitLicense, the Proposed Virtual Currency Regulatory Framework, 12–13, 16 (Oct. 21, 2014) (quoting City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 759 (1988)), https://www.eff.org/document/bitlicense-comments-eff-internet-archive-and-reddit; *see also* Press Release, Elec. Frontier Found., EFF, Internet Archive, and reddit Oppose New York's BitLicense Proposal (Oct. 21, 2014), https://www.eff.org/press/releases/eff-internet-archive-and-reddit-oppose-new-yorks-bitlicense-proposal; Langvardt, *supra* note 76, at 796–801.

81. Vincent Y. Ling, *Patently Ours? Constitutional Challenges to DNA Patents*, 14 U. PA. J. CONST. L. 813, 813–16 (2012) (discussing First Amendment arguments raised against a patent in Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office, 702 F. Supp. 2d 181, 238 (S.D.N.Y. 2010), *as amended* (Apr. 5, 2010), *aff'd in part, rev'd in part*, 653 F.3d 1329 (Fed. Cir. 2011), *cert. granted, judgment vacated sub nom*. Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 132 S. Ct. 1794, 182 (2012), and *opinion vacated, appeal reinstated*, 467 F. App'x 890 (Fed. Cir. 2012), and *aff'd in part, rev'd in part*, 689 F.3d 1303 (Fed. Cir. 2012)); *see generally* Jorge R. Roig, *Can DNA Be Speech?*, 34 CARDOZO ARTS & ENT. L.J. 163 (2016). *But see* Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 59 (2014) ("Every cell contains DNA, the body's ultimate archive of information, and yet the proper disposal of used syringes does not, and should not, implicate First Amendment scrutiny.").

82. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

83. 391 U.S. 367, 377 (1968) ("[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important

Within a decade, the content-neutrality principle was a staple of First Amendment law. At the same time, though, it coexisted with an assortment of localized tests that applied within narrow factual settings. In *Nebraska Press Association v. Stuart,* for instance, the Court laid down a specialized multi-pronged test to deal with judge-imposed gag orders.[84] In *F.C.C. v. Pacifica*, the Court created a specialized yet vague standard for dealing with foul language and broadcasting.[85] In *Buckley v. Valeo*, the Court devised a specialized two-tier standard to deal with political campaign-related expenditures.[86] And so on. Many of the localized tests remain in place today.[87] However, their number has decreased under the Kennedy court, and the dichotomy between "content-based" and "content-neutral" has emerged as the law's predominant motif.

There is no single reason for this development, and it does not seem to be the result of any focused effort on the Court. But there are a couple of reasons that one might prefer to see a body of First Amendment doctrine unified around content neutrality. First, any theoretical model that can address a wide variety of situations under a common approach has an obvious appeal that needs no explanation. Second, the content-neutrality rule implements at the case level the Court's overarching policy of treating varying classes of speech equally. Finally, the content-neutrality test produces a lot of strict scrutiny, because it is so easy to characterize regulations of speech as content-based. A balkanized approach would probably produce a lower level of scrutiny on average, which is undesirable if libertarian outcomes are preferred.

In practice, the Court's approach to content-neutrality has served these ends imperfectly. The basic problem, if one sees it as a

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or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

84. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976) ("we must examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger. The precise terms of the restraining order are also important.").

85. *See* discussion supra notes 47–54.

86. Buckley v. Valeo, 424 U.S. 1 (1976). *See* discussion, *infra* Part II.A.1.

87. See Neb. Press Ass'n, discussed supra note 84; Buckley, discussed infra notes 146–57; Pacifica, discussed supra notes 47–54; *see also* Abood v. Detroit Bd. of Educ.. 431 U.S. 209 (1977) (mandatory union dues in public employment); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969) (student speech); Roberts v. U.S. Jaycees, 468 U.S. 609, 618–22 (1984) (membership criteria in clubs).

problem, is that courts vary the meaning of the content-neutrality dichotomy from case to case. At times, it asks simply whether a law's operation turns in some way on the content of the speech being regulated. But at other times, it inquires into legislative motive.[88] Those two approaches to the question often if not always offer conflicting results in a given case, as if to provide two opposite platforms for the majority and the dissent. And indeed, the fault line in many First Amendment cases has boiled down essentially to a difference in vision over the content discrimination problem.[89] The result is a superficially unified field of doctrine that is nevertheless balkanized at a subdoctrinal level.

Six Justices attempted to whip the content-neutrality dichotomy back into shape in 2014's *Reed v. Town of Gilbert*, a case involving an obviously harmless law that nevertheless drew equally-obvious content discriminations on its face.[90] At issue was a municipal signage law that imposed a complex schedule of time and space restrictions for various categories of signs. "Ideological Signs" could be up to 20 square feet in area and could be displayed anywhere without a time limit.[91] "Political signs" meant to influence elections

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88. *See generally* Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 237–239 (2012); Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595 (2003) ("Although the content-based/content neutral and content/viewpoint discrimination determinations are central to free speech doctrine, the Court has experienced increasing difficulty in making them, and in making them consistently.").

89. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 723 (2000) (upholding Colorado law establishing a "buffer zone" near medical facilities as content-neutral: "it simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners."); *Cf. id*. at 769 (Kennedy, J., dissenting) (characterizing Colorado's law as content based: "The legislature's purpose to restrict unpopular speech should be beyond dispute.); Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez, 561 U.S. 661 (2010) (upholding law school's nondiscrimination policy for student organizations as viewpoint-neutral); *id*. at 723–24 (Alito, J., dissenting) ("when Hastings refused to register CLS, it claimed that the CLS bylaws impermissibly discriminated on the basis of religion and sexual orientation. As interpreted by Hastings and applied to CLS, both of these grounds constituted viewpoint discrimination.").

90. 135 S. Ct. 2218, 2224 (2015).

91. *Id*. ("This category includes any 'sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency.'" Sign Code, Glossary of General Terms (Glossary), p. 23 (emphasis deleted). Of the three categories discussed here, the Code treats ideological signs most favorably, allowing them to be up to 20 square feet in area and to be placed in all "zoning districts" without time limits. § 4.402(J).") (citations omitted).

could be only 16 or 32 square feet depending on whether they were located on residential property.[92] They could only be shown within a time window beginning 60 days before a primary and ending 15 days after a general election.[93] Finally, "Temporary Directional Signs Relating to a Qualifying Event" ("Qualifying Event Signs") could not exceed 6 feet in area.[94] The could be displayed up to twelve hours before and one hour after "qualifying events," defined as any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization."[95]

The Good News Community Church fell into trouble under the Code when it overstepped the time limits for Qualifying Event Signs.[96] The Church was too small and cash-poor to own a building, which meant that it had to relocate its services regularly.[97] It found that placing 15 to 20 signs around town on the Saturday before Sunday service, and then removing them on midday Sunday, was a good way to communicate an upcoming service's location.[98] After two Sign Code citations and no success in reaching an accommodation, the Church and its pastor Clyde Reed sued the Town.[99]

Reed's facts make the contrast between these two conceptions of content discrimination as stark as it can possibly be. On the one hand, the statute discriminates facially among twenty-four classes of

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92. *Id*.

93. *Id*. at 2224–25 ("This includes any 'temporary sign designed to influence the outcome of an election called by a public body.' The Code treats these signs less favorably than ideological signs. The Code allows the placement of political signs up to 16 square feet on residential property and up to 32 square feet on nonresidential property, undeveloped municipal property, and 'rights-of-way.' These signs may be displayed up to 60 days before a primary election and up to 15 days following a general election.") (citations omitted).

94. *Id*. at 2225.

95. *Id*. ("This includes any 'Temporary Sign intended to direct pedestrians, motorists, and other passersby to a "qualifying event."' Glossary 25 (emphasis deleted). A 'qualifying event' is defined as any 'assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.' The Code treats temporary directional signs even less favorably than political signs. Temporary directional signs may be no larger than six square feet. They may be placed on private property or on a public right-of-way, but no more than four signs may be placed on a single property at any time. And, they may be displayed no more than 12 hours before the 'qualifying event' and no more than 1 hour afterward.") (citations omitted).

96. *Id*.

97. *Id*.

98. *Id*.

99. *Id*. at 2225–26.

signs based on their contents and subjects them to differing treatment. Yet on the other, the statute cannot possibly reflect governmental "disagreement with the message" communicated by a sign reading "services this Sunday at 9:00 am at the elementary school." The two differing conceptions of content discrimination cannot be reconciled on any possible interpretation of the facts.

Justice Thomas's majority opinion took the hard line: content-discrimination turns on the law's application and disregards considerations of motive.[100] This approach most likely tracks the understanding that most law students would take away from a First Amendment course in law school, and it is consistent with the majority of the Supreme Court's case law on the question. But where an excess of formalism would produce an unreasonable outcome, courts tend to take the more lenient approach.[101] Justice Thomas's doctrine would have courts repent of these earlier sins and hew to the formal variant unbendingly in all future cases. In *Reed*, he gets six of the Justices, including Justice Kennedy, the author of *Ward*, to commit to this straighter path.

Reed's hard line is almost certainly too extreme to hold, and there is evidence even now that the lower courts are already at pains to minimize its practical effects.[102] But if nothing else, *Reed* tells us how a majority of the Court at the time *Reed* came down believed speech cases *should* be decided: by an all-purpose and heavily formal rule that buys real clarity at the cost of severely overprotecting speech at the margin.

C. Tenet 3 (Laissez-faire). First Amendment Rights Operate As A Shield For Speech, And Never As A Justification For Regulation.

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100. *Id*. at 2227 ("On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.").

101. *See, e.g.*, Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 303–04 (S.D.N.Y.) *judgment entered*, 111 F. Supp. 2d 346 (S.D.N.Y. 2000) *aff'd sub nom*. Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001) (upholding as content-neutral the Digital Millennium Copyright Act's prohibition against computer code designed to crack copy-protection software).

102. *See* Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981 (2016) (arguing that lower courts have taken early and aggressive measures to *Reed*). For an example of a court simply ignoring *Reed*'s message on secondary effects only a month after *Reed* came down, *see* Def. Distributed v. U.S. Dep't of State, No. 1-15-CV-372 RP, 2015 WL 4658921, at *8 (W.D. Tex. Aug. 4, 2015).

Justice Scalia wrote in two of his campaign-finance dissents that "there is no such thing as too much speech."[103] It is easy to write the line off as a banal if high-handed scolding for a supposedly overreaching state.

But the statement is not a truism. Instead, it articulates a judicial choice to reject a range of plausible First Amendment theories that envision a relatively active role for the state. If there is "no such thing as too much speech," then that implies that First Amendment interests only cut in the deregulatory direction. The freedom of speech is therefore delivered entirely through judicial review, and never through lawmaking. Arguments that First Amendment interests might *justify* regulation are rejected.

This point has practical consequences for parties other than speakers who might claim a stake in the freedom of speech. These parties might claim a right of access to information, for instance, or an interest in promoting a balanced or diverse public discourse. But these are not the kinds of interests that are easily channeled into litigation. The constitutional harms are diffuse, and the stakeholders are numerous. Even those claims that are not filtered out for a lack of justiciability appear dubious for other reasons: they are beholder harms, for instance. In short, these are the types of claims that are more properly vindicated through the ordinary political process. But the "no such thing as too much speech" concept mostly cuts that approach off.

The result for decades has been a First Amendment jurisprudence focused obsessively on the rights of speakers. Speakers and listeners alike have interests in deregulating speech from time to time, but the speaker naturally has the better litigation posture.

When they are litigated, claims that cite rights to listen, newsgather and so on get little traction. The Burger Court recognized a right of access to criminal trials[104] and a limited right of access to certain court documents. [105] Beyond that, press activities

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103. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 259 (2003) (Scalia, J., concurring in part and dissenting in part), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) ("Given the premises of democracy, there is no such thing as too much speech."); Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 695 (1990) (Scalia, J., dissenting), *overruled by Citizens United*, 558 U.S. 310 ("The premise of our system is that there is no such thing as too much speech—that the people are not foolish but intelligent, and will separate the wheat from the chaff.").

104. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 558 (1980).

105. *See* Press-Enter. Co. v. Superior Court (Press-Enter. II), 478 U.S. 1, 13–14 (1986); *see also* Meliah Thomas, *The First Amendment Right of Access to Docket Sheets*, 94 CAL. L. REV. 1537 (2006) (arguing for an expanded right).

other than the final act of publication have fared poorly at the Supreme Court.[106] The Court declined in *Branzburg v. Hayes* to recognize a reporter's privilege not to disclose confidential sources.[107] In *Houchins v. KQED*, the Court upheld a state prison's "no access" policy against reporters seeking to report on conditions there.[108] In both *Cohen v. Cowles* and *Harper & Row v. Nation Enterprises,* the Court rejected claims that the press might enjoy a degree of institutional immunity from civil suits.[109] "Generally applicable laws," the *Cohen* Court wrote, "do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[110]

Listeners' rights are similarly downplayed. *Stanley v. Georgia*, a 1969 decision vacating a conviction for home possession of obscene material provides the Court's strongest articulation of a "listener's right" that can be separated conceptually from a speaker-based right.[111] In *Board of Education v. Pico*,[112] a student's challenge to a school board's decision to remove controversial books from school libraries, the Court split three ways, failing to form a majority for any listener's-rights position. That case came down in 1982. These are the only decisions in which a listener successfully presses a First Amendment challenge, and the message is tepid at best.

It is common to hear the Court frame the value of free speech in terms of benefit to the listener, but only when doing so is consistent with a "marketplace of ideas" approach that maximizes listener benefit by deregulating speakers. What is missing from the discussion is the possibility that the government might intervene to prevent market failure. In *Red Lion v. F.C.C.*, Justice White wrote for the Court's majority that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in

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106. *See generally* Erwin Chemerinsky, *Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143, 1145–58 (2000) (demonstrating that "the Supreme Court and the lower courts consistently have rejected First Amendment protection for newsgathering.").

107. 408 U.S. 665 (1972).

108. Houchins v. KQED, Inc., 438 U.S. 1 (1978).

109. Cohen v. Cowles Media Co., 501 U.S. 663, (1991) upheld an award of damages under promissory estoppel against a journalist who violated a confidentiality agreement. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 542 (1985) upheld a copyright infringement award against a magazine that leaked newsworthy excerpts from the memoir of former President Gerald Ford.

110. *Cohen*, 501 U.S. at 669.

111. 394 U.S. 557, 564 (1969).

112. *See* Bd. of Educ., Island Trees Union Free Sch. Dist., No. 26 v. Pico, 457 U.S. 853 (1982).

which truth will ultimately prevail, rather than to countenance monopolization of that market. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."[113] That relatively complex, situational view of the relationship between the freedom of speech and the powers of government is completely out of step with the modern *laissez-faire* sensibility.

Instead, the Court has treated interests in promoting healthy discourse as *forbidden* rather than supported by the First Amendment. In *Citizens United,* for example, Justice Kennedy writes that "[w]hen Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves."[114] Listeners' interests are paramount within this framework, but "Government" has no role to play in serving them.

The Burger Court's decision in *Miami Herald v. Tornillo* provides an early and well-known rejection of Justice White's view. In that case, the Court evaluated a Florida "right of reply" statute applied to newspapers. The statute provided that if a newspaper gave editorial space to a candidate for public office, then the same newspaper must provide equal space to the opposing candidate to reply to any personal attacks.[115] The rationale for the law was similar to one the Warren Court had seemingly approved only five years earlier in *Red Lion*: namely, that the government had a strong interest in preventing large media entities from exerting too much control over public debate.[116] For the *Tornillo* Court, that interest was constitutionally illegitimate: an "uninhibited, robust, and wide open" debate meant a debate untouched by public power.[117] Private powers who would exercise control over the debate were speakers and private counter-speech was the only permissible remedy.

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113. Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 390 (1969).

114. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 356 (2010).

115. Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 244 (1974).

116. Red Lion Broad. Co., 395 U.S. at 369, dealt with the "fairness doctrine," a Federal Communications Commission rule requiring "that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage." *Id*.

117. Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 252, 94 S. Ct. 2831, 2837, 41 L. Ed. 2d 730 (1974) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

Buckley v. Valeo, the seminal *per curiam* campaign-finance case, provides another famous Burger-era example of First Amendment *laissez-faire*. In an 8-to-1 decision, the Court held that campaign finance laws cannot be justified by an interest in "leveling the playing field" among candidates' campaigns. The Court described a First Amendment designed to secure an informed democracy by deregulating the marketplace of ideas:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed 'to secure "the widest possible dissemination of information from diverse and antagonistic sources,' and 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'[118]

As Timothy Kuhner has argued, the Roberts Court's case law carries *Buckley*'s laissez-faire approach to extreme lengths. In *Davis v. FEC*, the Court struck down a Federal "millionaire's law" that relaxed fundraising restrictions for candidates in races against wealthy self-financed candidates.[119] In *Arizona Free Enterprise Club Freedom PAC v. FEC,* the Court struck down a similar law that provided matching funds for candidates whose opponents spent in excess of a quota defined by state law.[120] In both cases, the Court reasoned that the laws' dollar-for-dollar matching funds operated as disincentives or penalties against speech by the opponent. This position reflects an understanding that the marketplace of ideas must operate on a strictly laissez-faire basis. The state must not intervene in any way, even if the political branches judge that a market failure has occurred. As Kuhner has written, the outsized role of money in the campaign finance cases can make one wonder whether the Court has forgotten that the "marketplace" of ideas is only metaphorical.[121]

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118. Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).

119. Davis v. Fed. Election Comm'n, 554 U.S. 724, 729 (2008) (striking down "Millionaire's Amendment" to the Bipartisan Campaign Finance Reform Act, 2 U.S.C. § 441a–1(a)).

120. Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 131 S. Ct. 2806, 2812 L.Ed 2d 664 (2011).

121. Timothy K. Kuhner, *Consumer Sovereignty Trumps Popular Sovereignty: The Economic Explanation for Arizona Free Enterprise v. Bennett*, 46 IND. L. REV. 603 (2013).

The Court's exclusive focus on the interests of private speakers, then, sets a template for all First Amendment litigation. One party builds a claim on high constitutional principle and the opposite party must overcome it by appealing to pragmatic considerations ungrounded in constitutional law. And because the Court dispenses strict scrutiny rather liberally, the game is heavily weighted once the private speaker is identified. Laws challenged on First Amendment grounds are more often than not declared unconstitutional,[122] and one wonders whether this is because the First Amendment challenger is the only party permitted to appeal to constitutional interests.

D. Tenet 4 (Lochnerism). The Business Environment Is Not Exempt From First Amendment Scrutiny

In 1949, the Court decided *Railway Express Agency v. New York*, a case about advertising regulation. The petitioner challenged a ban on "billboard trucks" as an equal protection violation: the law allowed some types of trucks to advertise—moving trucks, for instance—while forbidding the billboard trucks to do the same.[123] That challenge failed, which comes as no surprise from a contemporary perspective. What is more striking, however, is the absence of any First Amendment discussion at all. No First Amendment argument appears even to have been raised.

The case reflected a broad and implicit understanding that the business environment should not be brought under First Amendment scrutiny. In part, *Railway Express* can be understood as the product of an early era when the understood range of First Amendment subject matter was will relatively narrow. *Mutual Film Corp. v. Industrial Comm'n of Ohio*, for instance, which held that motion

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122. A quick survey of the Supreme Court database reveals that the Court declared some portion of a statute unconstitutional in 55% of First Amendment challenges since 1990. The number rises to 60% if religion clause cases are excluded. WASHINGTON UNIVERSITY LAW: THE SUPREME COURT DATABASE, http;// http://scdb.wustl.edu (last visited Nov. 3, 2017).

123. Ry. Exp. Agency v. New York, 336 U.S. 106, 107–08 (1949) ("Section 124 of the Traffic Regulations of the City of New York promulgated by the Police Commissioner provides: 'No person shall operate, or cause to be operated, in or upon any street an advertising vehicle; provided that nothing herein contained shall prevent the putting of business notices upon business delivery vehicles, so long as such vehicles are engaged in the usual business or regular work of the owner and not used merely or mainly for advertising.'").

pictures were not "speech" for First Amendment purposes, had not yet been overruled.[124]

But there is more to it than that. *Railway Express* came down at a time when the *Lochner* era was still a recent memory—and more particularly, the Court's dramatic repudiation of the jurisprudence of economic *laissez-faire* in 1937. That moment profoundly altered the balance of power between the Court and the political branches relative to public policy. The narrow message was that the Court should back off of certain commerce clause and substantive due process doctrines. But the broader, unmistakable message was that the Court should not subject economic and commercial legislation to close constitutional review of any kind. It is an understanding that has eroded steadily since the 1970s, and little of it remains intact today.

This understanding that business was "different" manifested itself in a few ways. First, courts did not extend First Amendment protections to advertising until the mid-1970s, and when this changed, advertising still received a weaker protection than other forms of speech.[125] But that protection has strengthened steadily over time. Formally, regulations of commercial speech receive only intermediate scrutiny under a test established in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*.[126] In practice, however, commercial speech appears to receive something close to the full battery of protections. Justice Kennedy's 2011 opinion in *Sorrell v. IMS Health* is particularly striking for the use of language such as "viewpoint discrimination" that is ordinarily associated with strict scrutiny.[127] Citations to *Central Hudson*'s intermediate scrutiny framework are conspicuously absent.[128]

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124. Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 243–44 (1915) ("It cannot be put out of view that the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country, or as organs of public opinion.").

125. The Court began to extend protection to advertising in Bigelow v. Virginia, 421 U.S. 809 (1975), a case involving advertisements for abortion services. In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 755 (1976), the Court confirmed that protection extended to advertisements for more mundane goods and services as well. In Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980), the court announced an intermediate scrutiny test for use in commercial speech cases.

126. 447 U.S. at 566.

127. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 565 (2011) ("Here, the Vermont Legislature explained that detailers, in particular those who promote brand-name drugs, convey messages that are often in conflict with the goals of the state. The legislature designed [the law] to target those speakers and their messages

Second, it no longer offsets the level of constitutional scrutiny when a case is defined by business entities or relationships. In particular, the Court today gives almost no credence to distinctions between natural persons and artificial persons such as corporations. This is much to the chagrin of critics who see the doctrine of corporate personhood as driving right-wing outcomes in the areas of campaign finance, advertising law, and so on.[129] But there is much less to the corporate personhood controversy than meets the eye. The Court has never taken the position that speech rights turn categorically on a party's corporate or natural status, and if it were to do so now, that position would call into question not only the rights of business corporations but of advocacy groups and media organizations such as *The New York Times.*[130]

What the Court *has* done at times—mostly in campaign finance cases that *Citizens United* overruled—is to consider certain attributes of the corporate form relevant to a means-ends analysis. In *Austin v. Michigan Chamber of Commerce*, for instance, the Court upheld restrictions on certain political expenditures by business corporations. The majority justified the restriction on the theory that the corporate form enabled corporate actors to accumulate huge "war chests" of money that individuals could not.[131] But this is a very different kind of justification from the popular understanding. The controversy is not over whether corporations "are people" or possess certain moral characteristics that entitle them to human dignities, but rather over the practical balance of harms.[132]

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for disfavored treatment. In its practical operation, Vermont's law goes even beyond mere content discrimination, to actual viewpoint discrimination.") (citations omitted). *See generally* Oleg Shik, *The Central Hudson Zombie: For Better or Worse, Intermediate Tier Review Survives Sorrell v. Ims Health*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 561 (2015).

128. *Sorrell,* 564 U.S. at 565.

129. *See* Kent Greenfield, *In Defense of Corporate Persons*, 30 Const. Comment. 309 (2015) (listing several such advocacy groups).

130. *See id*. at 316 (observing that when the Pentagon Papers case was decided, N. Y. Times Co. v. United States, 403 U.S. 713 (1971), "no one seriously suggested that the correct answer to the constitutional question was that the *Times* and the *Post*, as corporations, had no standing to bring a constitutional claim at all.").

131. Austin v. Michigan Chamber of Comm., 494 U.S. 652, 666 (1990) ("the State's decision to regulate only corporations is precisely tailored to serve the compelling state interest of eliminating from the political process the corrosive effect of political 'war chests' amassed with the aid of the legal advantages given to corporations.") *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

132. Though it should be observed that Justice Kennedy's language in *Citizens United* gratuitously feeds this impression by speaking of corporations as "disfavored"

For the most part, the Court's turn toward greater protection for corporate entities reflects other methodological tendencies: hypersensitivity to all forms of discrimination in speech cases, including the "speaker discrimination" that occurs when special expenditure limits are placed on corporations;[133] an intolerance for analyses that balance speakers' rights against interests in listeners' rights, speaker parity, or broad conceptions of democracy;[134] an insistence on *laissez-faire* in the "marketplace of ideas;"[135] and generally, a preference for doctrinal austerity. One does not have to endorse *Citizens United* to see that the cases it overruled clashed with the big picture by 2010. No particular corporate personhood "doctrine" ever drove the analysis.[136]

It is therefore unsurprising that corporations remain in the First Amendment fold. What is much more remarkable is the Court's campaign to delegitimize regulatory justifications that refer to finance, marketing, corporate governance, employment, and other aspects of the business environment. Rather than attacking those justifications as insubstantial, the Court has attacked them as

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minorities. *See also* Sorrell v. IMS Health Inc., 564 U.S. 552, 565 (2011) (wherein a statute disfavored speakers such as pharmaceutical manufacturers).

133. *See infra* note 184; Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. ST. U. L. REV. 765, 780 (2015) (demonstrating that "the speaker discrimination principle has been implicit in free speech cases for a long time"); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340–41 (2010) ("Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.").

134. *See Citizens United*, 558 U.S. at 356 ("When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.").

135. *See supra* text accompanying note 130; *Citizens United* 558 U.S. at 354 ("*Austin* interferes with the 'open marketplace' of ideas protected by the First Amendment."); Michael Kent Curtis, *Constitutional Law of Speech and Press: Politics, Rhetoric, and Dialogue,* 103 NW. U. L. REV. 1863 (2009) (reviewing ROBERT L. TSAI, ELOQUENCE & REASON: CREATING A FIRST AMENDMENT CULTURE (2008)).

136. See Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1678 (2015) ("[D]espite public perceptions, the Court has never based its corporate rights jurisprudence on the idea that a corporation is a constitutionally protected 'person' in its own right.").

person-discriminatory. *Lochner*-ism, as many others have observed,[137] is the real story here. The corporate personhood controversy is a loose euphemism for it, and one that, counterintuitively, favors the Court's right wing by creating evidence of forbidden animus against corporate "speakers." Laws that "discriminate" against these disfavored speakers are condemned in pitched terms and struck down under strict scrutiny.

In keeping with the *Lochner* theme, the Court considers multiple facets of the business environment inherently expressive. Advertising springs first to mind. Justice Thomas, often the conceptual vanguard within the conservative bloc, used to call attention to instances in which commercial advertising contained some kind of political message. These, for Justice Thomas, suggested that commercial advertising should be placed on the same doctrinal level as other types of speech. But today, the argument seems almost unnecessary—the data analytics firms in *IMS Health* are celebrated as "disfavored speakers" in spite of the fact that they are only trading "dry information."[138]

Second, as discussed below, the Court today views employment relationships as richly expressive. *Burwell v. Hobby Lobby* held that legally-cognizable crises of conscience can occur when religiously-affiliated corporate employers take on nonobservant employees.[139]

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137. *See, e.g.*, Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133 (2016) ("Once the mainstay of political liberty, the First Amendment has emerged as a powerful deregulatory engine."); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015) (arguing that "businesses, scholars, and courts increasingly incorporate the central premises of Lochner into religious liberty doctrine"); Timothy K. Kuhner, *Consumer Sovereignty Trumps Popular Sovereignty: The Economic Explanation for Arizona Free Enterprise v. Bennett*, 46 IND. L. REV. 603 (2013); *cf.* Enrique Armijo, *Reed v. Gilbert: Relax Everybody*, 58 B.C. L. REV. 1 (forthcoming 2017) (characterizing left-wing criticism of overzealous First Amendment policing as "Lochner derangement syndrome").

138. See Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011) ("The First Amendment protects even dry information, devoid of advocacy, political relevance, or artistic expression") (citation omitted); *id.* at 565 ("Here, the Vermont Legislature explained that detailers, in particular those who promote brand-name drugs, convey messages that are often in conflict with the goals of the state. The legislature designed [the law] to target those speakers and their messages for disfavored treatment.") (citations omitted).

139. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759, 189 L. Ed. 2d 675 (2014) ("The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as $1.3 million per day, or about $475 million per year, in the case of one of the

Today, a campaign is well underway in the lower courts to have exclusive bargaining in government employment declared a violation of nonunion employees' speech rights.[140]

Finally, the payment mechanism itself is slowly becoming constitutionalized. It never made sense to argue that "money is not speech" as a rebuke to *Citizens United*, because the Court never really said that it was. Instead, *Citizens United* and other campaign finance law cases hold that money is used to *fund* speech. But in later cases, courts have moved absurdly close to saying the money itself *really is* the speech. In *McCutcheon v. FEC*, the Tea Party activist Shaun McCutcheon sought to donate $1,776 (get it?) to each member of the House Republican Caucus, and the court treated that figure—the $1,776—as expressive on its own terms.[141]

It gets crazier. In *Expressions Hair Design v. Schneiderman*, the Court granted certiorari in order to resolve a circuit split[142] over the question of whether the First Amendment forbids states to ban credit surcharges by retailers.[143] The argument was as follows: retailers who do not like paying fees for credit transactions are still free to pass the cost on to customers who use credit cards. But if they do so, the anti-surcharge law forced them to change the way they "communicate" the cost to the customer. It could not be referred to as a credit surcharge, but instead a cash discount.[144] The Court remanded the question of the law's ultimate validity to the lower court, but it acceded to the merchants' central argument: "[i]n regulating the communication of prices rather than prices themselves," Chief Justice Roberts wrote, "[the surcharge ban] regulates speech."[145]

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companies. If these consequences do not amount to a substantial burden, it is hard to see what would.").

140. Jarvis v. Cuomo, No. 16-441-CV, 2016 WL 4821029, at *1 (2d Cir. Sept. 12, 2016); D'Agostino v. Baker, 812 F.3d 240, 242 (1st Cir. 2016), *cert. denied*, 136 S. Ct. 2473, (2016); Hill v. Serv. Employees Int'l Union, No. 15 CV 10175, 2016 WL 2755472, at *1 (N.D. Ill. May 12, 2016); Fleck v. Wetch, no. 16–1564 (8th Cir. Aug. 17, 2017).

141. McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1443 (2014).

142. *Id.*; Rowan v. Pettijohn, 816 F.3d 73 (5th Cir. 2016) has rejected the argument; Dana's RR. Supply v. Attorney Gen., Fla., 807 F. 3d 1235 (11th Cir. 2015) has embraced it.

143. Expressions Hair Design v. Schneiderman, 137 S. Ct. 30 (2016).

144. Expressions Hair Design v. Schneiderman, 808 F.3d 118, 132 (2d Cir. 2015), *cert. granted*, 137 S. Ct. 30 (2016) ("Plaintiffs argue [that] New York has violated the First Amendment by banning a label it disfavors ("credit-card surcharge") while permitting a label it approves ("cash discount")").

145. Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1151 (2017).

II. THE FOUR TENETS ALONG THE IDEOLOGICAL BORDERLINE

For the most part, the methodological divide at the Court tracks the ideological divide—one that today falls along straightforward partisan lines. The starkest possible demonstration therefore lies in those lines of cases where the Court reliably divides five-to-four in an ideological bloc voting pattern: campaign spending limits, collective bargaining, and access to contraceptive coverage.

These three areas at first glance have little to do with each other, and the prevalence of ideological bloc voting in them is more easily attributed to political commitments transcending First Amendment jurisprudence in particular than to a strictly methodological divide. The divide over religious exemptions, for instance, seems to reflect a larger difference over the degree of solicitude that should be given to religious minorities. The divide over campaign finance probably tracks divides over economic inequality and the role of business in society. The divide over public sector unions probably tracks the partisan divide over labor and management. In other words, it is at least plausible to say that the "liberal" and "conservative" Justices, respectively, vote in the most politically-contentious areas of First Amendment law as if they were Democratic and Republican legislators.

This may look like precisely the sort of results-focused analysis that constitutional law professors traditionally warn their students to avoid, but it contains a deeper lesson. Assume for the moment that the party line really is the driving force in First Amendment decision-making and that the Justices' written opinions consist mostly of rationalizations. Even in that case, there is a high degree of methodological consistency in the rationalizations themselves. When the liberal and conservative wings split five-to-four, the conservatives hew consistently to the four tenets discussed above. The preferred liberal outcome, meanwhile, would consistently require a departure from those tenets. Generally speaking, the Court's conservatives are in the habit of pressing rigid and strictly libertarian principles to the furthest possible reach. The Court's liberals, meanwhile, are in the habit of using a flexible, contextual approach to contain the First Amendment's growth. The fact that each wing's methodological habits support that wing's preferred outcomes is ultimately unimportant. The habits are real, and the divergence surprisingly deep.

A. Campaign Finance

The Court has divided five-to-four in almost every campaign finance case since 1990, and the sorting is almost entirely along ideological lines. Until her retirement, Justice O'Connor assisted the liberal wing of the Court in a series of modest victories. After her departure in 2005, the Court's conservative wing began to dismantle the law made in those decisions.

1. From Buckley to Austin

Two Burger-era cases give essential background to the modern controversy: *Buckley v. Valeo*,[146] the roundly-derided Magna Carta of modern campaign-finance litigation, and *First National Bank of Boston v. Bellotti,*[147] a minor amendment to clarify that *Buckley*'s protections extend at least in part to business corporations.

Buckley arose as a challenge to several provisions of the Federal Election Campaign Act of 1971 (FECA).[148] Among other provisions, FECA placed spending caps on direct contributions to candidates ($1,000 for a single candidate, up to $25,000 annually) and independent expenditures by groups "relative to a clearly identified candidate" ($1,000).[149] The Court's *per curiam* opinion upheld the contribution limits while striking down the limits on independent expenditures.[150]

This rule was based on a balancing approach. For the Court, both candidate contributions and independent political expenditures were sufficiently closely associated with political speech to implicate the First Amendment. But the Court considered the expressive interest in independent expenditures to be "significantly more severe."[151] FECA's "$1,000 ceiling on spending 'relative to a clearly identified candidate,'" the Court observed, "would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication."[152] Caps on direct contributions, by contrast, effected

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146. 424 U.S. 1 (1976).

147. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

148. Federal Election Campaign Act of 1971, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93–443, 88 Stat. 1263.

149. *Buckley*, 424 U.S. at 7.

150. *Id*.

151. *Id*. at 23.

152. *Id*. at 19–20.

"only a marginal restriction on expression."[153] *Buckley* itself is cryptic on the appropriate level of scrutiny, perhaps reflecting the thinness of the Court's consensus.[154] The case is nevertheless generally read to apply something like strict scrutiny to expenditure limits and something lower to contribution limits.

On the opposite side of the balance, the Court easily found an interest substantial enough to justify FECA's contribution limits: namely, the risk that political contributions might be given in consideration of official action by members of Congress or the President. Congress had a compelling interest in preventing that kind of corruption or even its appearance. FECA's $1,000 contribution limit was therefore allowed to stand.[155]

However, those same interests were inadequate to justify FECA's limits on expenditures by candidates or independent groups. So long as these parties did not coordinate their efforts, a *quid pro quo* arrangement was in principle impossible.[156] Instead, these limits would have to be justified by an interest in "leveling the playing field." That interest, the court held, was constitutionally illegitimate: "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[157]

As for *Bellotti,* that case held that *Buckley*'s protection of independent expenditures reached at least some political spending by business corporations. A Massachusetts statute barred business corporations from making any contribution or expenditure "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."[158] The statute also barred corporations from spending on questions involving taxes as applied to individuals.[159]

Justice Powell's majority opinion dismissed the idea that the First Amendment might not reach business corporations. Speech, for Justice Powell, was the domain of the speech clause, and the identity

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153. *Id*.

154. The *Buckley* Court leaned on the phrase "exacting scrutiny." *Id*. at 44.

155. *Id*. at 26–29.

156. *Id*. at 46–49 ("The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.").

157. *Id*. at 48–49.

158. MASS. GEN. LAWS ANN., ch. 55, § 8 (West 1977).

159. *Id.*

of the speaker did not restrict it.[160] Among Massachusetts' various arguments for treating politically-active corporations differently from individuals, the majority rejected the state's level-the-playing-field argument with especial distaste: "the fact that advocacy may persuade the electorate is hardly a reason to suppress it."[161]

In *Austin v. Michigan Chamber of Commerce*,[162] however, the Court held that *Bellotti's* reasoning extended only to ballot measure campaigns and not to campaigns for public office. A Michigan law barred all corporate political expenditures related to the election of a candidate for public office, with an exception for independent expenditures made from a specially-segregated fund.[163] Justice Marshall's opinion for a six-Justice majority upheld the law under an "antidistortion" theory that sounded a great deal like the "leveling the playing field" theory rejected in both *Buckley* and *Bellotti*. The state had a compelling interest, he wrote, in preventing "a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[164]

In light of the four tenets I discussed in Section II, the line of case law from *Buckley* to *Austin* contains a number of anachronistic elements. First, the *Buckley* framework rejects the "speech is speech" approach, instead establishing a hierarchy of expressive value in which independent expenditures sit above direct contributions. *Buckley* also offends the modern preference for doctrinal austerity by establishing a *sui generis* rule for a specific topical field. As for *Austin*, its skeptical view of corporate speech is at odds with the modern view of the First Amendment and the business environment. Finally, *Austin* seems to clash with contemporary sensibilities by envisioning a legislative role in preventing "distortions" in the marketplace of ideas.

Over the past decade, the Roberts Court's conservatives have worked to purge these inconsistencies and bring campaign finance law into line with wider methodological trends. The dissenting liberal bloc, meanwhile, has worked to preserve attributes of the old regime that are fundamentally inconsistent with them.

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160. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778–84 (1978).

161. *Id*. at 790.

162. 494 U.S. 652, 659–60 (1990) *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

163. MICH. COMP. LAWS § 169.254(1) (1979).

164. *Austin*, 494 U.S. at 659–60.

2. The Roberts Court

Citizens United v. FEC,[165] the infamous emblem of the Roberts Court's campaign-finance jurisprudence, is primarily an attack on *Austin*. The case arose as a challenge to a Bipartisan Campaign Reform Act provision prohibiting corporations from making "electioneering communications"—i.e., communication urging the election or defeat of a candidate at the polls–within sixty days of an election for public office.[166] Citizens United, a nonprofit advocacy corporation, complained that the provision had prevented it from running a documentary called *Hillary: The Movie* on pay-per-view during the immediate run-up to the 2008 Democratic presidential primaries.[167]

Justice Kennedy's opinion invalidating the "electioneering communications" rested on a repudiation of *Austin.* Justice Kennedy held that there was no compelling governmental interest in preventing "distortion" of political discourse.[168] *Austin*'s "antidistortion interest," Justice Kennedy wrote, was no different from the "leveling the playing field" interest rejected in *Buckley v. Valeo.* Instead, any limitation on independent expenditures would have to be justified by a narrow interest in preventing quid-pro-quo corruption. Within this framework, there was no legitimate basis to discriminate between corporations and natural persons; instead, discrimination between corporations and natural persons in the context of campaign finance would trigger special scrutiny as a form of speaker discrimination.[169]Preventing quid-pro-quo corruption as the Roberts Court defines it is an extremely narrow interest. In *Williams-Yulee v. Florida Bar*, Chief Justice Roberts observed that a political candidate, unlike a judge, may "provide . . . special consideration to his campaign donors.[170]In 2016's *McDonnell v. U.S.,* the entire court held that the federal anti-bribery statute[171] did not

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165. 558 U.S. 310 (2010).
166. *Id*. at 318–19; 2 U.S.C. § 441b.
167. *Id*. at 319–20.
168. *Id*. at 349–56.
169. *Id*. at 349–52 ("Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election . . . The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity.") (quotation omitted).
170. Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1667 (2015).
171. 18 U.S.C. § 201.

forbid the Governor of Virginia to arrange meetings with government officials in exchange for personal loans and designer clothing.[172]

It is therefore not surprising that the Roberts Court's deregulatory program seems to go well beyond anything contemplated in *Buckley*. *Buckley*'s rule that direct campaign contributions may be regulated freely is under particular attack. In *Davis v. FEC,* a pre-*Citizens United* suit discussed briefly above, the Court struck down a "millionaire's amendment" designed to raise fundraising limits for political candidates who ran against wealthy, self-funded opponents.[173] Self-funded congressional candidate Jack Davis argued that the policy operated as an implicit penalty against his First Amendment-protected fundraising activities, and the Court agreed.[174] The Court subjected the millionaire's amendment to strict scrutiny—and in doing so, implicitly elevated the expressive value of direct contributions in *Buckley*'s First Amendment hierarchy.[175]

Six years later, in *McCutcheon v. FEC*, the Court took another swipe at the subordinate status of direct contributions.[176] That case dealt with the BCRA's aggregated contribution limit of $48,600 for all federal candidates combined.[177] This limit interfered with Shaun McCutcheon's plan to donate $1,776 to each member of the House Republican caucus—a plan that would put him in violation of the aggregate contribution limit but not the $2,600 limit on contributions to individual candidates.[178] Writing for the Court, Chief Justice Roberts held that the aggregated contribution limit's relationship with the goal of preventing quid-pro-quo corruption was too tenuous.[179] His opinion contained language that strongly suggested that the contribution/expenditure distinction itself might soon be up for revision.[180]

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172. 136 S. Ct. 2355 (2016).

173. 554 U.S. 724 (2008); 2 U.S.C. § 441a–1(a).

174. *Davis*, 554 U.S. at 738; *see also* Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011), discussed *infra* note 186, which struck down a similarly-inspired matching funds scheme on a similar theory.

175. Davis, 554 U.S. 738–39 ("While BCRA does not impose a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right."). In *Arizona Free Enterprise Club Freedom PAC,* 564 U.S. 721, the Court rejected a similarly-inspired law providing matching funds for candidates whose opponents exceeded a defined spending target.

176. McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434 (2014).

177. *Id*. at 1442.

178. *Id*. at 1442–43.

179. *Id*. at 1446–48.

180. *Id*. at 1445 ("The parties and *amici curiae* spend significant energy debating whether the line that *Buckley* drew between contributions and expenditures should

As I will now explain, the Court's campaign finance case law provides a clear demonstration of the four tenets.

a. Tenet 1: Speech is Speech

First, the long-term trajectory of the Roberts Court's campaign-finance cases tends toward a flattened First Amendment hierarchy. The conservative majority that controlled until Justice Scalia's death has usually spoken of political contributions and expenditures not merely as payments to facilitate speech but as core political speech in themselves. *Buckley v. Valeo* sets up campaign finance as a *sui generis* topic area with its own local doctrine. The Roberts Court's opinions, meanwhile, tend to decide campaign finance questions by reference to the same doctrinal principles—mostly the content-neutrality doctrine—that control "ordinary" speech questions.

Over time, *Buckley* itself has appeared more and more dispensable to the analysis. In *Davis v. FEC*, Justice Alito's opinion nods at *Buckley*'s hierarchy while diluting its effects. Congress was free, Justice Alito granted, to set uniform contribution limits as it pleased subject only to a relatively forgiving scrutiny.[181] But if the limits discriminated among speakers, as the millionaire's amendment did, then the judicial guard would go back up and strict scrutiny would again operate as the rule.[182] (This hierarchy-flattening move, as an aside, strikingly resembles Justice Scalia's hierarchy-flattening move in *R.A.V. v. St. Paul*, which applied strict scrutiny to unprotected categories of speech in cases where laws discriminated on content or viewpoint.)[183]

b. Tenet 2: Doctrinal Austerity

Each new campaign finance decision from the Roberts Court whittles away some feature of campaign finance doctrine that distinguishes it from the more general background of First Amendment law. *Davis* and *McCutcheon* blur the *Buckley* dividing

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remain the law. Notwithstanding the robust debate, we see no need in this case to revisit *Buckley*'s distinction between contributions and expenditures.").

181. *Davis*, 554 U.S. at 737.

182. *Id.* at 740–42 ("Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election.").

183. *See* discussion *supra* note 36.

line between independent expenditures and direct contributions; *Citizens United* wiped away *Austin*'s idea that the voters' interests might justify governmental intervention in the marketplace of ideas. As the court turns away from rules designed with the campaign-finance context in mind, it turns toward the formal content-neutrality approach that governs most other First Amendment cases. Attempts to neutralize the advantages of wealth within the political process are cast as invidious discrimination against "disfavored" speakers and viewpoints.[184]

c. Tenet 3: Laissez-faire

The Court consistently rejects governmental invocations of speech-related interests that might support regulation. *Buckley v. Valeo* rejected arguments based on an interest in leveling the playing field, and the Roberts Court has rejected those rationales with added vigor. *Buckley* famously rejected the notion that government may limit one party's speech to enhance the speech of another.[185] But in 2012's *Arizona Free Enterprise Club Freedom PAC*, the Court went so far as to say that the government is not free even to amplify one party's speech for the sake of leveling. When the state provided matching funds for candidates whose opponents exceeded a defined spending target, the Court chose to characterize the mechanism as an implicit penalty.[186]

"Leveling" arguments draw on two interests: first, the voter's interest in hearing a relatively balanced portfolio of political advertising and second, the interest in a competitive election process. Each of these arguments could easily be framed as drawing on First Amendment values in themselves. Justice Stevens, dissenting in *Davis v. FEC*, wrote that voters deserved "courtesy" and an "opportunity to reflect . . . flooding the airwaves with slogans and

184. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 356 (2010) ("When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.").

185. Buckley v. Valeo, 424 U.S. 1, 48–49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.").

186. Under Arizona's law, the state provided matching funds for candidates whose opponents reached a defined spending target. Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 736 (2011) ("[T]he matching funds provision 'imposes an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right[s].'") (quoting *Davis*, 554 U.S. at 739).

sound bites may well do more to obscure the issues than to enlighten listeners."[187] Justice White, dissenting in *First National Bank v. Bellotti,* was more direct still. "The self-expression of the communicator is not the only value encompassed by the First Amendment," he wrote. "One of its functions, often referred to as the right to hear or receive information, is to protect the interchange of ideas."[188]

But the divide here is profound: the conservative bloc treats these interests not merely as irrelevant but as fundamentally opposed to First Amendment values. For this reason, the campaign finance cases showcase the Roberts Court's *laissez-faire* understanding of free speech and government more fully than any other area.

d. Tenet 4: Lochnerism

Finally, the campaign finance cases represent the Court's indifference to business structures and relationships as factors that might downgrade the level of First Amendment scrutiny. A particularly evocative passage from Justice Alito's opinion in *Davis* characterizes financial wealth as just one more "strength" a candidate for public office might bring to bear in an election for public office:

> Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose... and it is a dangerous business for Congress to use the election laws to influence the voters' choices.[189]

B. Public Sector Unions

Today's Court is rolling quickly toward establishing a national right-to-work principle as a matter of First Amendment law. The

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187. *Davis*, 554 U.S. at 751–52 (Stevens, J., dissenting).

188. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 806 (1978) (White, J., dissenting).

189. *Davis*, 554 U.S. at 742.

campaign has polarized the Court, as one would predict, into two ideological-partisan blocs. Less intuitively, though, the public-sector union cases have also divided the Court along methodological lines—the same lines that divide it in the campaign-finance cases.

1. *Abood v. Detroit Bd. of Educ.*: Avoiding the Free Rider Problem

The "free rider problem"—i.e., the possibility that non-union employees will reap the benefits of collective bargaining without actually joining the union and paying dues—is a central concern of labor law. An early response to the problem was for collective bargaining agreements to require every worker in the shop to join the union. But the Labor Management Relations Act of 1947 outlawed these "closed shop" arrangements in the private sector amid concerns that they would make strikes overly difficult to break.[190] In their place, the Act allowed unions and employers to make "agency shop" agreements in which union dues were compulsory but union membership was not. [191] Such agreements are referred to as "fair share agreements" in the public sector.[192]

In *Abood v. Detroit Board Of Education,*[193] non-union public schoolteachers claimed that the compulsory union dues payments required under their employment contracts amounted to a form of compelled speech. Part of the dues, they argued, would be used to subsidize speech that they did not endorse.[194] Such speech included various ideological or political statements by the union, but it was also said to include the speech associated with collective bargaining.[195]

The Court agreed that "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests."[196] But Justice Stewart's majority opinion nonetheless held that the interest in avoiding the free-rider problem offset the compelled-speech issue up to a point.[197] Insofar as the nonparticipating employee's dues were put toward collective bargaining as such, an agency shop arrangement was held

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190. William B. Gould IV, *Organized Labor, the Supreme Court, and Harris v. Quinn: Déjà Vu All Over Again?*, 2014 SUP. CT. REV. 133, 136–37 (2014).
191. *Id*.
192. *Id*.
193. Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977).
194. *Id*. at 226.
195. *Id*. at 213.
196. *Id*. at 222.
197. *Id*. at 260–61.

to comply with the First Amendment.[198] But as those dues were used to finance ideological activities unrelated to collective bargaining, the First Amendment was violated.[199]

A series of later decisions dealt with the manner in which the *Abood* line must be drawn and policed. But in 2012, the Court's conservative bloc took a more radical turn, issuing a series of opinions that questioned the *Abood* line itself.[200] At the time that Justice Scalia died in 2016, the Court was at the cusp of holding in *Friedrichs v. California Teachers Association* that all "fair share fees"—including those spent on collective bargaining—violated the First Amendment as a form of compelled speech.

2. The Roberts Court

2012's *Knox v. Service Employees Intern. Union, Local 1000* was presented to the Court as one more case dealing with *Abood*'s procedural mechanics.[201] When unions bill nonunion employees for fair share fees, they must provide them with a "*Hudson* notice." The *Hudson* notice provides an account of all union expenditures over the course of the pay period, and specifies which proportion of those expenditures are "chargeable" or "nonchargeable" under the *Abood* framework.[202] Nonunion employees must now be given an opportunity to object to fees they believe have been wrongly identified as chargeable.[203]

In June 2005, the Service Employees International Union (SEIU) Local 1000 sent California employees an annual *Hudson* notice estimating that 56.35% of its expenses for the coming year would be chargeable.[204] Later in the same month, the union informed the same employees that they would be subject to an "Emergency Temporary

198. *Id.*

199. *Id.* at 235–36 ("We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.").

200. *See infra* note 201.

201. 132 S. Ct. 2277, 2288 (2012).

202. *See* Chicago *Teachers Union, Local No. 1 v. Hudson,* 475 U.S. 292, 306–311 (1986) (holding that a teachers union's agency fee collection from non-members is unconstitutional).

203. *Id.*

204. *Knox*, 132 S. Ct. at 2285.

Assessment to Build a Political Fight-Back Fund."[205] This assessment would be used to oppose two ballot propositions recently proposed by then-Governor Schwarzenegger, and it would amount to a 25% increase in dues.[206] Nonunion employees were given no chance to object, and they brought a class action against the union.[207]

The facts of the case lent themselves to a straightforward resolution: the "Emergency Temporary Assessment" had failed *Hudson* by denying nonmembers the customary opportunity to opt out of nonchargeable expenses. [208] Seven of the Court's nine Justices agreed on this much.[209] But Justice Alito, writing for the Court's five conservatives, decided the case on a broader ground: it was not only impermissible to have employees pay for the special assessment, but impermissible to require the employees to opt out of it.[210] For such an assessment, the SEIU should have issued a new *Hudson* notice inviting nonmembers to opt *in*.[211]

The opinion went further, though, casting shade on the constitutionality of fair share fees generally. "By authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses," Justice Alito wrote, "our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate.[212] "[W]e do not revisit today whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake."[213]

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205. *Id*.
206. *Id*. at 2286.
207. *Id*.
208. *Id*. at 2292.
209. Justice Alito wrote for the Court's five conservatives; his expansive opinion is detailed below at note 220. Justice Sotomayor would have decided the case on the narrow, straightforward ground that the SEIU had not provided the nonmembers an opportunity to object. *Id*. at 2297–2300 (Sotomayor, J., concurring in the judgment). Justice Ginsburg joined her opinion concurring in the judgment. *Id*. Only Justice Breyer, joined by Justice Kagan, fully dissented. *Id*. at 2299–2307 (Breyer, J., dissenting). Justice Breyer found the SEIU's procedure acceptable, because it charged members a rolling assessment based on the previous year's chargeable expenses. If nonmembers were overcharged in year x, he reasoned, the assessment for year x+1 would be reduced proportionately. *Id*.
210. *Id*. at 2292.
211. *Id*. at 2291–93 ("Our cases have tolerated a substantial impingement on First Amendment rights by allowing unions to impose an opt-out requirement at all. Even if this burden can be justified during the collection of regular dues on an annual basis, there is no way to justify the additional burden of imposing yet another opt-out requirement to collect special fees whenever the union desires.").
212. *Id*. at 2291.
213. *Id*. at 2289.

The Court's five-to-four opinion in *Harris v. Quinn* placed *Abood* even more obviously on the chopping block. The case concerned home care workers hired by Medicaid recipients under an Illinois state program[214]. The state had little involvement in any aspect of the home care workers' employment except for compensation.[215] An executive order by the governor designated the state as the workers' official employer so that the home care workers could join a labor union and engage in collective bargaining.[216] The Service Employees International Union was then designated the home care workers' exclusive representative.[217]

Nonmember home care workers brought a class action suit seeking an injunction against the imposition of all fair share fees, including those used exclusively for expressive bargaining purposes.[218] They sought, in short, to overrule *Abood*. In a strange and confusing opinion, Justice Alito and the majority stopped just short of accepting that invitation. Instead, he and the majority refused to "extend" *Abood* to Illinois' personal care assistants program on the theory that the personal care assistants were not fully public employees.[219]

Justice Alito's majority opinion devoted an entire section to *Abood*'s deficiencies—much the sort of discussion one would find in an opinion justifying a departure from *stare decisis* to overrule a previous holding. *Abood*'s analysis, he said, was "questionable on several grounds:" it had "seriously erred" in its interpretation of prior holdings authorizing agency shops in the private sector and "failed to appreciate" the conceptual and practical difficulties involved with the distinction between collective bargaining expenditures and ideological expenditures.[220]

In light of these problems, Justice Alito explained, it would be inappropriate to extend the *Abood* doctrine "to encompass partial-public employees, quasi-public employees, or simply private employees."[221] The state's relatively narrow role in the home care workers' employment implied that the governmental interest in maintaining labor peace was too faint to justify the "significant

214. Harris v. Quinn, 134 S. Ct. 2618, 2623–24 (2014).
215. *Id*. at 2624.
216. *Id*. at 2626.
217. *Id*. at 2625.
218. *Id*. at 2626.
219. *Id*. at 2638.
220. *Id*. at 2632–34.
221. *Id*. at 2638.

impingement" on First Amendment rights that fair share fees represent.[222]

In *Harris*, the majority wished to continue softening up a precedent that considerations of *stare decisis* prevented them from overruling immediately. *Harris*'s extended criticisms of *Abood*, together with Justice Alito's dicta in *Knox*, would have provided the foundation for a later case to overrule *Abood* altogether. In other words, the majority was practicing what Justice Scalia in the campaign finance context has called "faux judicial restraint."[223] *Friedrichs* would almost certainly have been the coup de grace to *Abood* if Justice Scalia had survived.

The theory behind the campaign to overrule *Abood* is, again, highly consistent with the four-tenets model.

a. Tenets 1 and 4: Speech Is Speech; The Business Environment Is Expressive

As in the campaign finance cases, we see a long-term trajectory toward a flattened First Amendment. *Abood*, like *Buckley*, depends on a tiered approach. Paying fair share fees toward collective bargaining, much like paying a direct contribution to a candidate for office, is expressive, but only marginally so. Paying fair share fees toward ideological activities, meanwhile, is more meaningfully expressive, and as in the case of *Buckley*'s independent expenditures, it is expressive enough to trigger a closer scrutiny.[224] Both lines of cases have in recent years moved toward an across-the-board deregulatory approach.

The Court's rhetoric tracks this movement. The payment of fair share fees is cast not as a mere speech-facilitating arrangement, but as political speech itself.[225] The economic, transactional nature of the communication does not in any way relax the level of scrutiny to be applied. Indeed, if the government is implicated, then the speech is treated *more* delicately because it is seen as core political speech. Thus collective bargaining with the state becomes political speech on matters of public importance, and the act of contesting a *Hudson*

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222. *Id*. at 2639–40.

223. Fed. Election Comm'n v. Wisconsin Right To Life, Inc., 551 U.S. 449, 498 (2007) (Scalia, J., concurring in part and concurring in the judgment).

224. *See* discussion *supra* notes 209–11.

225. In oral argument in *Friedrichs*, Justice Scalia asserted that "everything that is collectively bargained with the government is within the political sphere, almost by definition." Transcript of Oral Argument at 45, Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016).

notice becomes a form of *compelled* speech on a political matter.[226] Just as the Court treats the political as transactional, the Court treats the transactional as political.

All of this places the recent public sector union cases at the intersection of multiple broad methodological currents on the Roberts Court: first, the willingness to constitutionalize economic activity based on its "expressive" value, and second, the refusal to treat certain forms of minor expression as less constitutionally significant than others.

b. Tenet 2: Doctrinal Austerity

Abood, much like *Buckley v. Valeo*, is a balancing test devised specifically for the narrow factual context of mandatory union dues. This alone suffices to make the case read as an anachronism. It is hard to imagine any Court in the last thirty years devising its rule from scratch, and unsurprising that the Court is quickly replacing its doctrine with a boilerplate approach adapted from the content-neutrality rule. *Harris v. Quinn*'s majority opinion is awkward and difficult to read, but it is not because of anything unnatural in Justice Alito's arguments for overruling *Abood*–those are straightforward and familiar. Instead, the opinion is at its most tortured when Justice Alito struggles to stop short of overruling *Abood*.

c. Tenet 3: Laissez-faire

Another strand of the four-tenets comes through as well, if less conspicuously, in the public sector union cases: namely, the understanding that there is no regulatory interest in promoting expressive values. State and federal governments that run agency shops argue that fair share fees promote a well-functioning relationship between management and a single labor representative. The fees prevent a tragedy of the commons in which the designated representative becomes defunded, weak, and incapable of bargaining effectively with management. If we follow the Court's consensus that these relationships are basically expressive in nature, then it is

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226. Employers, meanwhile, have contended that the First Amendment entitles them to avoid the National Labor Relations Board's requirement to post notice of workers' rights under the National Labor Relations Act. *See* Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31, 54–55 (2016) (discussing employer speech in the workplace and how that speech affects workers).

possible to characterize the agency shop in two ways. First is the Alito bloc's account, in which the agency shop is a mechanism for compelling government workers to mouth a favored pro-union ideology. But there is a second, subtler account as well: namely, that fair-share fees are an ideologically-neutral "individual mandate" designed to prevent market failure within the speech market for union representation.

It is possible to imagine a First Amendment jurisprudence that would give government some extra latitude to intervene in the marketplace of ideas when its aim is to prevent market failure. Justice White in *Red Lion v. FEC* offers a glimpse of such a doctrine with its warnings against "monopolization" in the marketplace of ideas,[227] but the Court has overwhelmingly rejected that idea as marginal.[228]

Friedrichs, then, or the *Friedrichs*-that-would-have-been, would appear to fit comfortably within the First Amendment jurisprudence of the early 21st century. Taken together, these assumptions lock in a conclusion in *Friedrichs* in which *Abood* would have been overruled. What is more, they are assumptions that are well-grounded in the Court's majority opinions over the past two decades or more.

d. An Objection: What About *Garcetti v. Ceballos?*

So far, I have argued that overruling *Abood* follows naturally from the big picture of First Amendment decision-making at the Roberts and Rehnquist Courts. A significant but not insuperable hitch in this account comes from Roberts Court's opinion in *Garcetti v. Ceballos*.[229] In that case, the Court's five conservative Justices signed on to an opinion holding that government employees' speech received no protection if it was made within the scope of employment.[230] After discovering that a sheriff had obtained a search warrant unlawfully, Ceballos, an employee of the Los Angeles District Attorney's Office, cooperated with the defense.[231] The D.A.'s office demoted Ceballos in retaliation, and he sued for damages.[232]

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227. *See* discussion *supra* note 125.

228. In unintentionally paralleling its case law on certain state commercial regulations, the Court grants the state extra latitude when it operates as a market participant.

229. 547 U.S. 410 (2006).

230. *Id*. at 410–26.

231. *Id*. at 414–15.

232. *Id*. at 415.

The Court's five conservative Justices held that Ceballos's speech was unprotected because it was within the scope of his employment.[233]

It is difficult if not impossible to square the public-sector union cases with *Garcetti,* and on this point Justice Kagan's dissent in *Harris v. Quinn* is devastating. She considers a hypothetical government employee who is disciplined after "demanding, at various inopportune times and places, higher wages for both himself and his co-workers (which, of course, will drive up public spending),"[234] and who later brings a First Amendment claim to challenge the disciplinary action. Surely that claim would fail. Yet in *Knox* and *Harris*, those same demands are characterized as protected political speech if they are made in the context of collective bargaining. It is hard to avoid the temptation to explain the incongruity between these cases as results-oriented hackery, and indeed it is probably appropriate to succumb to that temptation.

But even here, with the Court's majority at its most unprincipled and inconsistent, the opinions all rise out of the same jurisprudential culture; even *Garcetti* is ultimately consistent with the four tenets. First, all of them are consistent with Tenet 2 in their strong distaste for *sui generis* balancing tests. Workplace cases lend themselves by nature to a balance-of-interests analysis, and balancing is what the standing precedent would have called for in *Garcetti*, *Knox*, and *Harris*. Yet in each case the Court goes to great lengths to avoid such an analysis in favor of an all-or-nothing approach in which either employer or employee is designated as the only speaker who matters.

Second, consistent with Tenet 1, the Court in each case rejects any notion of a hierarchy of speech-value. In *Garcetti*, Ceballos's politically-salient message concerning police misconduct is treated as on the same keel as ordinary "employee grievances."[235] In the public-sector union cases, mandatory fair share fees are placed on the same keel as compulsory utterances of state ideology.

Finally, consistent with Tenet 3, each opinion defines some basically non-communicative aspect of the workplace as expressive in a wide, abstract sense. In the public-sector union cases, collective bargaining and the payment of fees are treated as expressive. In an earlier iteration of *Garcetti*, the government's employment of people

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233. *Id*. at 430.

234. *Harris*, 134 S. Ct. at 2654 (Kagan, J., dissenting).

235. *Garcetti*, 547 U.S. at 420 ("Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to "constitutionalize the employee grievance.") (citation omitted).

who speak in the course of their employment is treated as a form of speech by the government.[236]

Therefore, it may be fair to say that the Court's solicitous approach toward the non-union employee in *Knox* or *Harris* runs against the grain of the Court's generally indifferent attitude toward government employees who speak. But the common denominators in these inconsistent cases—no balancing, no hierarchies of speech-value, and the expansive vision of what constitutes expression in the workplace—demonstrate that these inconsistent cases all come from the same Court. On that Court, cases like *Abood* are either overruled or placed on death watch alongside *Buckley v. Valeo, Lemon v. Kurtzman,* and other dubious Burger-era creations. As in the campaign-finance area, the Court's conservatives are in the process of purging case law that is out of line with its major methodological tenets.

C. The Contraceptive Mandate

Most of the Court's modern case law on religious exemptions does not arise under the First Amendment at all, but under the federal Religious Freedom Restoration Act (RFRA).[237] RFRA's history and structure, though, are intertwined closely with the Supreme Court's Free Exercise case law, with the result that that RFRA and its case law take on a quasi-constitutional character.

RFRA originated as a rebuke to the Court's 1990 opinion in *Employment Division v. Smith,* where the Supreme Court deconstitutionalized the vast majority of litigation over religious exemptions.[238] A state law withheld unemployment insurance from applicants who had used narcotics identified in the Controlled Substances Act. That list included the hallucinogen Peyote, a sacrament in the Native American Church. Smith, a member of the Church, sought to receive unemployment benefits in spite of his religious Peyote use.[239] Justice Scalia's opinion for the Court held that the Free Exercise Clause did not require such an exemption. Instead, the Court held that "neutral laws of general applicability" should pass review under the Free Exercise clause regardless of any burden they might place on religious practice.[240]

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236. Garcetti v. Ceballos, 126 S. Ct. 1951, 1959–60 (2006).

237. Pub. L. No. 103-141, 107 Stat. 1488 (codified principally at 42 U.S.C. § 2000 (Supp. V 1993)).

238. 494 U.S. 872 (1990).

239. *Id.* at 874–75.

240. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

Congress quickly overrode *Smith* with a statute whose expressed purpose was to restore the status quo ante.[241] The Religious Freedom Restoration Act of 1993 thus replaced *Smith*'s framework with the strict scrutiny test that the Court had applied in its pre-*Smith* cases: "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[242]

After two decades of broad consensus on RFRA, the Court began in 2014 to hear a series of RFRA cases that split it into 5–4 ideological camps. These cases dealt with the Patient Protection and Affordable Care Act's "employer mandate," which, under threat of fines, requires firms with more than fifty employees to provide them health insurance that meets certain minimum criteria.[243] One such criterion is that the offered insurance plan must cover "preventive care and screenings" for women without "any cost sharing requirements."[244] The Department of Health and Human Services (HHS) then promulgated guidelines requiring that employers offering health plans to cover "all Food and Drug Administration approved contraceptive methods."[245]

Some employers complained that providing coverage for some certain forms of contraception would violate their religious scruples. HHS responded by authorizing an exemption for "religious employers" including religious institutions and religiously-affiliated non-profit organizations.[246] The exemption for "religious employers," however, did not reach for-profit corporations.

In *Burwell v. Hobby Lobby*, the Court held that RFRA required an extension of the contraceptive mandate exemption to closely-held for-profit corporations.[247] Justice Alito's opinion for the majority

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241. Section (b) of the statute announces a purpose "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. §§ 2000(b)(1)–(2) (2012).

242. 42 U.S.C. § 2000bb–1(a) –(b) (2012).

243. 42 U.S.C. § 300gg–13(a)(4) (2012).

244. *Id*.

245. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725–26 (Feb. 15, 2012) (codified at 45 C.F.R. pt. 147).

246. 45 C.F.R. § 147.131(a) (2016).

247. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014).

deferred heavily to representations by the heads of the Hobby Lobby and Conestoga Wood Stores corporations that providing coverage for certain forms of contraceptives such as intrauterine devices (IUDs) would make them morally complicit in the abortion of fertilized eggs.[248] Justice Alito also deferred, without discussion, to the plaintiffs' position that this degree of complicity would burden them "substantially."[249]

From here, the Court moved to the strict scrutiny analysis. After assuming that the interest in protecting women's health was compelling, Justice Alito argued that the contraceptive mandate's means of achieving it were overbroad.[250] For the Court's majority, there was no reason that HHS could not accomplish its health-related objectives while accommodating religiously-observant for-profit corporations such as Hobby Lobby and Conestoga. In these instances, the government could pay out of its own funds whatever small portion of the insurance premium would cover the objectionable contraceptives.[251] Justice Alito pointed out that such a scheme was already in place for objecting non-profit organizations, and therefore demonstrably feasible.[252] Narrow tailoring would require the government to extend the same exemption scheme to for-profit corporations such as Hobby Lobby and Conestoga Wood.

Within a week, the Court had waded into the litigation that would later produce *Hobby Lobby's* sequel. *Wheaton College v. Burwell* involved a small religiously-affiliated liberal arts school that was fully eligible for an exemption from the contraceptive mandate.[253] This exemption, however, was not enough for the College. To the College's sensibility, the very act of claiming the exemption—i.e., filling out a short form provided by HHS—somehow added up to complicity in the termination of a human life. The form required objecting employers to provide the name of the insurance company that administered their group plans. In the College's view,

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248. *Id.* at 2775.

249. *Id.* Justice Alito discusses the "substantiality" of the fines for noncompliance, but does not question that the "substantiality" of the religious burden associated with compliance. *Id.*

250. *Id.* at 2780–83.

251. *Id.* at 2780 ("The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections. This would certainly be less restrictive of the plaintiffs' religious liberty, and HHS has not shown, see § 2000bb–1(b)(2), that this is not a viable alternative.").

252. *Id.* at 2781–82.

253. 134 S. Ct. 2806 (2014).

to do so would be "to play a central role in the government's scheme, because [Wheaton] must designate an agent to pay for the objectionable services on Wheaton's behalf, and it has to take steps to trigger and facilitate that coverage."[254]

Wheaton College applied for a preliminary injunction, which both the district court and the Seventh Circuit denied.[255] But the Supreme Court granted it, reasoning that, for the time being, HHS could simply consult its own records to determine which insurance company provided coverage to the College's employees.[256]

Zubik v. Burwell, a consolidation of several similar cases, put the *Wheaton College* issue squarely in front of the Court. Justice Scalia died roughly a month before oral argument, and the change in the ideological balance of the Court foreclosed the possibility that the Court would grant the objecting non-profit employers the radical holding they sought. Instead, the Court took an extraordinary measure one would more typically associate with trial judges. Rather than issue a 4-4 divided opinion, the Court suggested a method through which HHS could route contraceptive coverage to employees without requiring the employers to name their insurance providers on the HHS form.[257] The Court then requested that the parties file supplemental briefs to determine whether the Court's suggested compromise would meet both parties' concerns.[258]

The contraceptive controversy represents a small corner of the law, and it is not even First Amendment law as a formal matter. But the First Amendment resonates strongly through it, and the theories that found an audience in *Hobby Lobby* carry the four tenets to their bleeding edge.

1. Tenet 2: Doctrinal Susterity

First, *Hobby Lobby* and *Wheaton College* once again demonstrate the Court's hostility to *sui generis* balancing tests. The natural criticism of those opinions has rested on an argument that religious liberty claims should not prevail at the expense of third parties' own rights.[259] If one disagrees with the result in those cases, this

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254. Complaint at *2–3, Wheaton Coll. V. Sebelius, No. 1:13–cv–08910.

255. Wheaton Coll. v. Burwell, 50 F. Supp. 3d 939, 944 (N.D. Ill. 2014), *aff'd*, 791 F.3d 792 (7th Cir. 2015).

256. *Wheaton Coll.,* 134 S. Ct. at 2807 (2014).

257. Zubik v. Burwell, 136 S. Ct. 1557, 1560–61 (2016) (citation omitted).

258. *Id*.

259. *See Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting) ("In the Court's view, RFRA demands accommodation of a for-profit corporation's religious

argument is the intuitive one, and it captures well the problem with the *Hobby Lobby* and *Wheaton College* holdings as a matter of policy. But it was nevertheless fundamentally out of sync with the style of argument at a Court that vastly preferred means-ends tests over balance-of-interests tests. The *Hobby Lobby* Court's First Amendment method was concerned only with the abstract magnitude of governmental interests and the efficiency of the government's means for achieving them. Within that framework, the matter of a third party's rights may help to make the governmental interest more or less compelling, but they would not set a case such as *Hobby Lobby* into a distinct doctrinal category of the sort the case's critics envision. If, as in *Hobby Lobby*, the Court is focused on tailoring rather than the magnitude of the governmental interest, then the question of third-party rights is reduced to a red herring.

2. Tenet 1: Speech is Speech

Second, *Hobby Lobby*, and to a greater extent, *Wheaton College* and *Zubik* make utterly clear that there is no such thing as *de minimis* when it comes to religious burdens. This point is consistent with the Court's more general refusal to say that some forms of expression are more constitutionally significant than others. Consider the many degrees of attenuation it takes for the owners of Hobby Lobby to implicate themselves in an abortion. First, the ACA never required coverage for actual abortion procedures, but instead, for contraceptives. Second, Hobby Lobby's belief that the objected-to contraceptives bring about the termination of a pregnancy depends on an idiosyncratic definition of "pregnancy," and even on that definition is speculative.[260] Third, Hobby Lobby is merely buying an umbrella insurance plan, not funding the purchase of the forbidden contraceptives directly. Fourth, there appears to be no difference in cost between plans that incorporate contraceptive coverage and those that do not. It is imaginable that the company's owners might feel unsettled by the operation of the contraceptive mandate, but their belief that it implicates them in an abortion—however sincere—is unreasonable and weird. In *Wheaton College* and *Zubik*, whose

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beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ.").

260. Jen Gunter, *The Medical Facts About Birth Control and Hobby Lobby—From an OB/GYN*, THE NEW REPUBLIC (July 6, 2014), https://newrepublic.com/article/118547/facts-about-birth-control-and-hobby-lobby-ob-gyn.

hypersensitive plaintiffs object to the exemption process itself, the fuss is fully ridiculous.

3. Tenet 4: Lochnerism

A third parallel arises in the Court's tendency to treat all kinds of mundane economic or organizational relationships as "expressive" or as matters of conscience. The recent public-sector union cases, decided over the same approximate period of time, provide a mirror-image in the speech clause. The non-union employees are required under their employment contracts to take a payroll deduction. The union is forbidden to use deducted funds for ideological purposes; they may only be used for collective bargaining. On the theory of *Harris v. Quinn*, even this much is an indignity of constitutional dimensions. The nonunion employee is not merely unhappy with her employment arrangement; she is an objector whom an overweening government has forced to swear fealty to an ideology she abhors.

Knox v. SEIU even incorporates the *Wheaton College* maneuver of characterizing participation in an exemption scheme as a form of compelled speech. It would not have been enough in *Knox* for the union to give nonmembers an opportunity to opt out of assessments that would be used to pay for ideological speech; instead, they should be required to opt *in*.[261]

Even if one concedes that these points are not *de minimis*, one might expect them to be treated in some way as minor First Amendment controversies. But in keeping with its usual style, the Court treats the whole universe of First Amendment claims—including those based on purely economic activity—as flat. Neither the corporate identity of the plaintiffs in *Hobby Lobby* nor the basically economic character of their employee health insurance arrangements offsets in any way the degree of judicial scrutiny.

III. ACROSS THE IDEOLOGICAL BORDER: THE MINORITY BLOC

In Part I, I outlined four tenets of First Amendment decision-making at the Roberts and Rehnquist Courts and argued that they are so firmly embedded that most lawyers who are versed in the relevant case law would hardly notice them. In Part II, I showed that those four tenets were indispensable to a set of thin conservative victories in three sharply contested areas. This Part is about the flip

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261. *See supra* note 245.

side: *liberal* victories in those same sharply contested areas would require the Court to depart from the four tenets.

A. A Revealing Hypothetical

Suppose for a moment that Hillary Clinton had won the presidency in 2016 and successfully appointed a fifth liberal Justice to the Court, or alternatively, that the Republican-controlled Senate had allowed President Obama to make his own appointment. The remade Court would almost certainly have issued opinions resembling the following:

On campaign finance: *A new state statute imposes a relatively generous ceiling on independent expenditures by corporations relative to a campaign for political office within thirty days of an election. The law is struck down in the lower courts, but upheld at the Supreme Court.*

On public sector unions: *In a case resembling* Friedrichs, *the Court reaffirms the* Abood *doctrine that public sector unions may collect fair share fees so long as they are used exclusively for collective bargaining purposes.*

On contraceptives: *A religiously-affiliated employer with a "self-insured" health benefits package—i.e., an arrangement in which the employer itself as opposed to an insurance company pays medical claims—argues that filing religious-objector paperwork with the government would implicate the employer in the provision of religiously-forbidden contraceptives.*[262] *A "compromise" similar to the one proposed in* Zubik *is available, and it would relieve the employer of any obligation to fill out the forbidden religious-objector paperwork. But the "compromise" is only logistically possible if the employer is willing to switch to an "insured" plan in which an insurance company rather than the employer pays out medical claims. The employer therefore has three choices: a) file religious-objector paperwork; b) pay a fine; c) purchase insurance rather than paying medical claims itself. The employer argues each of these amounts to a substantial burden on religious practice. A circuit court agrees, and the Supreme Court does not.*

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262. Marty Lederman breaks down the differences between between "insured" and "self-insured" plans and the ways the *Zubik* compromise would address them in an extremely comprehensive blog post. Marty Lederman, *Making Sense of the Supplemental Filings in Zubik*, BALKINIZATION (Apr. 14, 2016), https://balkin.blogspot.com/2016/04/the-zubik-supplemental-reply-briefs.html.

None of these opinions would have raised serious questions of *stare decisis*, and each would have tracked the preferences that members of the Court's liberal bloc have expressed in past dissents. None would have been a particularly aggressive move. None would have required any new jurisprudential construct to be created. In short, these opinions would have represented the minimum that a liberal majority bloc could do while still showing signs of life. Even these small movements would have signaled a dramatic change of direction.

Today, of course, none of those opinions are going to come through. But as hypotheticals, they reveal sharp differences over each of the four methodological tenets. Those differences persist.

1. Tenet 1: Speech is speech

First, the Justices of the liberal bloc do not insist on treating all communicative activity as equally significant for constitutional purposes. Both the public-sector union and contraceptive mandate claims rest on aggressive theories that arcane administrative procedures have serious expressive value. No one in either the conservative or the liberal bloc of the Court has taken up the position that the expression is totally valueless, but the liberal bloc in each area views the expressive stakes as too low to justify relief. This is not a new technique–both *Abood* and *Buckley* depend on it—but it is one that has been dormant for decades.

2. Tenet 2: Doctrinal Austerity

Second, a change in direction in the campaign-finance and public-sector union cases would indicate that the Court is less determined to unify First Amendment doctrine generally under a formal rubric of content discrimination. Upholding *Abood* would mean recommitting to a *sui generis* balancing test designed for a single topical area. Upholding *Buckley v. Valeo* against further deregulatory efforts would have the same effect. There is good reason to believe that First Amendment doctrine in the hands of the liberal bloc would look more eclectic and flexible and less determined by the all-purpose content neutrality rule, which Justices Breyer, Ginsburg, and Kagan would treat as a rule of reason.[263]

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263. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2233 (2015) (Breyer, J., concurring in the judgment) ("In my view, the category 'content discrimination' is better considered in many contexts, including here, as a rule of thumb, rather than

3. Tenet 4: Lochnerism

Third, pro-regulatory decisions in the campaign finance, public sector union, and contraceptive mandate cases would evidence a more skeptical approach to theories that frame money, employment, and the business environment in general in First Amendment terms. If, as discussed above, the Court becomes more comfortable with the concept that some speech is either *de minimis* or just not fully important, then the traditional lines between business-related speech and higher-value speech are likely to recover some of the prominence they have lost in recent years.

4. Tenet 3: Laissez-faire

Finally, these opinions show the Court backing away from the strictly laissez-faire vision of speech markets. In broad terms, the liberal position on campaign finance and public-sector unions alike envisions the government intervening to avoid market failure. In the public-sector union area, the government imposes fair-share fees to solve a speech-related collective action problem: if individual employees are not made to support the exclusive bargaining representative, then they will be unable to bargain effectively. If labor-management negotiations are viewed as constitutionally expressive, then the point of the government's intervention is to promote the expressive exchange, not to inhibit it.

This theme runs through the campaign finance area as well. The most intuitive justification for campaign finance regulation is that it creates a more efficient and competitive "market" by "leveling the playing field." Of course, the Court in *Buckley* held that "leveling the playing field" was not a legitimate governmental purpose. The truth is that the "leveling the playing field" rationale has never been far from the surface in the liberal bloc's opinions on campaign finance—*Austin v. Michigan Chamber of Commerce*'s "anti-distortion" rationale for corporate expenditure limits, in particular, comes across as a strained attempt to "level the playing field" without uttering the precise phrase.[264] It would be surprising if the liberal bloc did not move back in that direction in future campaign finance cases. An

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as an automatic 'strict scrutiny' trigger, leading to almost certain legal condemnation."); *id*. at 2238 (Kagan, J. concurring in the judgment) ("[W]e may do well to relax our guard so that entirely reasonable laws imperiled by strict scrutiny can survive.") (quotation omitted).

264. *See* discussion *supra* note 162.

unapologetic embrace of the "leveling" rationale would upset the long-held assumption that speech values always counsel for less regulation and not for more of it.

B. The Divide Still Matters

Viewing the Court's five-to-four ideological divide on First Amendment issues through the four-tenets framework reveals that some major non-ideological features of the Court's First Amendment profile stand surprisingly close to being remade. Yet there is no five-Justice liberal majority on the near horizon, so what does it matter?

First, it is still possible that the Court could flip after the 2020 presidential election, where Democrats appear to hold the electoral advantage in spite of President Trump's narrow technical win in 2016. If that occurs, then a turn away from the four tenets would enable a broader change of course in First Amendment law.

Most notably, perhaps, the First Amendment would begin to play a diminished role in the commercial sphere. Today's Court has gradually intensified the level of scrutiny applied to regulations of commercial speech. A post-2020 liberal majority, on the other hand, would probably dial the level of scrutiny back to the more deferential intermediate-scrutiny review established by the Burger Court. All four of the tenets are in play here. If you are comfortable saying that some speech is lower-value, that not all speech needs to be subject to the same one-size-fits-all test, that special rules apply to the business environment, and that government has a hand to play in promoting effective exchanges of information, then you are more likely to be comfortable with a deferential approach toward advertising regulation.

There are frontier issues, too, where a liberal-majority Court could make an enormous difference. Suppose, for instance, that a future Congress passed a package of reforms to deal with internet-age problems in the news media—speculation that I admit seems remote today. Suppose that the reforms included a subsidy program for investigative journalism, and that they imposed new obligations on social media platforms not to discriminate on the basis of ideological viewpoint. Today's Court would incinerate these kinds of reforms, and a liberal Court might as well. But without the straitjacket of the four tenets, a liberal majority might also find the flexibility to uphold these reforms under some new doctrinal construct.

But even if the Court does not flip—and in the next four years, it will not—the fact that there is a strong contingent of Justices who

approach the four tenets skeptically could still matter quite a bit. Some free speech issues that put the four tenets under a heavy strain are fairly ideologically neutral, and on these issues, there is a high potential for cross-ideological coalition building. States are beginning to experiment, for instance, with laws prohibiting the online distribution of "revenge pornography"—sexually explicit photos or videos of unconsenting women by disappointed ex-boyfriends.[265] It is easy to imagine liberals and conservatives converging on an approach that treated these materials as a new form of low-value speech, but hard to see how that happens consistently with the four tenets of today's conservative bloc. A single conservative defector, perhaps Justice Alito,[266] could be all that it takes to make it happen.

Another area to consider is the First Amendment status of software. Lower courts today adhere, or claim to adhere, to a theory that software code—and by implication essentially everything having to do with computers or the Internet—is "speech" for constitutional purposes. The theory rests on a dubious foundation: namely, that computer code is a language, and that anything written in a language is "speech" of the sort that the First Amendment protects.[267] But a long series of cases over the past twenty years has held to this line unanimously.[268] The Supreme Court has not weighed in directly, but Justice Kennedy's majority opinion in *IMS Health v. Sorrell* rests on what Kennedy called "the rule that information is speech."[269] The same opinion approvingly cites software cases in the lower courts in support of this "rule," and full speech protections for software code would be generally consistent with the four-tenets framework.[270]

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265. *See* Adrienne N. Kitchen, *The Need to Criminalize Revenge Porn: How A Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 CHI.-KENT L. REV. 247 (2015) (discussing possible legislative solutions to revenge porn and issues therewith).

266. Wayne Batchis observes that "Justice Alito finds himself in a distinct minority among his conservative brethren. Just a few decades earlier his brand of moralistic and commonsense conservatism on the First Amendment was the norm. Under this view, when the Court is in the position of balancing law enforcement and individual rights, the benefit of the doubt should be given to those responsible for maintaining law and order. This is true even where, and perhaps especially where, the 'individual rights at stake are the rights of actors seeking commercial gain.'"

267. Kyle Langvardt, *The Doctrinal Toll of "Information As Speech"*, 47 LOY. U. CHI. L.J. 761, 768–73 (2016).

268. *Id.*

269. *Id.* at 762.

270. *Id.*

The Court's general insistence on treating every speech-related molehill as a mountain leaves it troublingly vulnerable to opportunistic arguments in this area. In *Defense Distributed v. U.S. Department of State,* for example, the Fifth Circuit is considering a claim that digital blueprint files used to 3D-print handguns are "speech about guns," and that online distribution of them is immune from regulation.[271] Any attempt to regulate a 3D-printable file, of course, will discriminate on the basis of the file's "content," thereby triggering strict scrutiny under *Reed*.[272]

Attorneys representing the digital currency platform Bitcoin have made similar arguments. Bitcoin trading depends on a brilliant technology known as the "blockchain," which is broadly similar to a ledger of transactions. During the notice-and-comment period on a New York law regulating Bitcoin purchases in the state, the Electronic Frontier Foundation asserted that the blockchain was First Amendment speech and that restrictions on the transactions recorded there were content-discriminatory.[273]

It is only a matter of time before these arguments make it to the Supreme Court. Cybersecurity concerns, if nothing else, will eventually move the government to regulate technology more closely than it does today—for example, by "safety testing" newly-written code before software products go to market.[274] Needless to say, it would be impossible to regulate effectively under a regime of unrelenting strict judicial scrutiny. The situation cries out for a doctrinal modification—either a *de minimis* exception, or perhaps a new low-value speech category for computer code, or even a rejection of First Amendment claims in this area as frivolous. But again, it is hard to see how the Court gets there without violating the conservative bloc's four tenets. It is relatively easy, on the other hand, to picture the liberal bloc adopting a more flexible posture, and

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271. *Id*. at 766–67.

272. *Id*. at 808–09.

273. Comments from Marcia Hoffman, Special Counsel, Elec. Frontier Found., to New York Dep't of Fin. Services, on BitLicense, the Proposed Virtual Currency Regulatory Framework, 12–13, 16 (Oct. 21, 2014) (quoting City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 759 (1988)), https://www.eff.org/document/bitlicense-comments-eff-internet-archive-and-reddit; *see also* Rainey Reitman, *Electronic Frontier Foundation , EFF, Internet Archive, and Reddit Oppose New York' s BitLicense Proposa*l, ELECTRONIC FRONTIER FOUNDATION (Oct. 21, 2014), https://www.eff.org/press/releases/eff-internet-archive-and-reddit-oppose-new-yorks-bitlicense-proposal; Langvardt, *supra* note 268, at 796–801.

274. *See* Bruce Schneier, *Click Here to Kill Everyone*, NEW YORK MAGAZINE (Jan. 27, 2017), http://nymag.com/selectall/2017/01/the-internet-of-things-dangerous-future-bruce-schneier.html.

from there it is at least imaginable that one conservative might cross over to join them.

These coalitions are still easier to imagine when one takes into account a phenomenon that, after decades, is still not fully intuitive: namely, that it is the conservative wing of the Court that tends to push more aggressively for deregulation under the First Amendment, and the liberals who wind up arguing for restraint. The conservatives' adoption of the four tenets, and the liberals' flight from them, effects a reversal of positions—albeit in the context of a Court-wide shift in the libertarian direction. What this means is that contemporary liberals on the court are often the repository for habits of thought that were once associated with conservatism. The liberal Justice Breyer, for instance, with his embrace of pragmatism and equities-weighing and his skepticism of the most marginal claims to speech protection, comes across more as the spiritual successor to the conservative Byron White or Felix Frankfurter than to the liberal William Brennan or Thurgood Marshall.[275] And to complete the picture, many have argued that the conservative Anthony Kennedy, in his libertarianism, is today's First Amendment heir to the liberal William Brennan.[276] These transformations show that is a mistake to believe that anything in this area is permanent, least of all the four tenets of free speech libertarianism that have defined the Court during Anthony Kennedy's time there.

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275. Wayne Batchis, *The Right's First Amendment* 9 (1st ed. 2016).

276. Howard M. Wasserman, *Holmes and Brennan*, 67 ALA. L. REV. 797, 825 (2016) ("Appropriately, Kennedy has emerged as Brennan's speech-protective heir on the Court.").