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MULTIFACTORAL FREE SPEECH

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ABSTRACT—This Article presents a multifactoral approach to free speech analysis. Difficult cases present a variety of challenges that require judges to weigh concerns for the protection of robust dialogue, especially about public issues, against concerns that sound in common law (such as reputation), statutory law (such as repose against harassment), and in constitutional law (such as copyright). Even when speech is implicated, the Court should aim to resolve other relevant individual and social issues arising from litigation. Focusing only on free speech categories is likely to discount substantial, and sometimes compelling, social concerns warranting reflection, analysis, and application. Examining the breadth of issues surrounding disputes with communicative components is meant to identify competing legal factors without rendering the First Amendment all-inclusive nor, on the flip side, irrelevant to broader ranges of activities. Coupling theoretical and practical considerations about a case best balances judicial deliberation. Rather than ad hoc balancing, judges should apply a rigorous multifactoral test that evaluates whether any relevant communications are likely to result in constitutional, statutory, or common law injuries; whether historical or traditional considerations indicate the speech is protected by the First Amendment; whether there are countervailing government interests; whether the regulation is tailored sufficiently for the government to achieve its stated aims; and whether there are any less restrictive means for achieving underlying policies.

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INTRODUCTION

Free speech is a meta-right without which representative democracy would ring hollow. It is invaluable for disseminating public and private views, spreading information, enriching culture, and associating together. Deliberation on public policy is essential to secure individual rights and to advance policies for the common good. Self-expression is linked to a multiplicity of other constitutional issues such as equal protection, political participation, and jury trials. For a pluralistic society such as the United States, whose Constitution provides safeguards for free speech, diverse perspectives are essential for self-expression, political deliberation, the quest for knowledge, and the revitalization of law. The exercise of free speech is also critical for safeguarding a variety of other constitutional values such as the free exercise of religion and the enjoyment of elective franchise.

The plain, textual, absolute wording of the First Amendment[1] cannot explain the many doctrines dealing with free expression. The function of free communication is systemic to representative democracy. It carries penumbral values exceeding the purely linguistic referents of expression: its constitutional function is related to the individual's right to autonomy and the public's interest in robust dialogue.[2] To paraphrase Justice Brandeis, speech is tied to our liberties, and courageous deliberation is key for ascertaining "the secret of happiness."[3] The need to safeguard public

[1] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").
[2] Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1020 (2015).
[3] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

welfare and safety allows for some restrictions,[4] but not when the limitations are based on arbitrary judicial holdings or ambiguous legislative aims unconnected to the pluralistic values of the Constitution.[5] The constitutional guarantee of free speech serves political and autonomous needs, empowering individuals to pursue their unique quests for happiness and their communal-, civic-, and political-mindedness.[6]

In some recent cases, the Court has failed to recognize that the Free Speech Clause is not a caged off provision but a statement of rights that draws on—and should be read in light of—the grander scheme of the Constitution. It provides one of the essential safeguards for the Constitution's overarching guarantee of liberty, equality, and the general welfare. Conflicting values are commonly at play in cases implicating the right to expression in contexts such as campaign financing, terrorist threats, and digital recordings of official conduct. Judicial evaluation of competing interests is necessary for the just resolution of these cases, which address the nation's thorniest problems. These pressing topics involve conflicts of politicking versus anti-corruption measures, catharsis versus safety, and transparency versus efficiency. In this Article, I propose a method for resolving conflicts between these values. Judges should apply a rigorous multifactoral test, evaluating whether any relevant communications are likely to result in constitutional, statutory, or common law injuries; whether historical or traditional considerations indicate the speech is protected by the First Amendment; whether there are countervailing government interests; whether the regulation is tailored sufficiently for the government to achieve its stated aims; and whether there are any less restrictive means for achieving underlying policies.[7] Such an analysis requires a balancing of private and public interests, an evaluation of pertinent legal texts and precedents, an examination of whether the law is tailored to the public aim, and a consideration of alternatives to restricting speech for achieving the stated goal.

Not all claims about free speech are convincing. Sometimes people and organizations turn to the First Amendment to advance concerns only tangentially related to its core values. Isolating analysis to that constitutional provision can cloud the broader stakes of a claim. The high

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[4] *See* Branzburg v. Hayes, 408 U.S. 665, 682 (1972); Gitlow v. New York, 268 U.S. 652, 667 (1925).

[5] *See* United States v. Stevens, 559 U.S. 460, 481 (2010).

[6] *See* Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring) ("The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression.").

[7] *See infra* Part II.

regard Americans have for the Amendment's principles often lends a gravitas to advocacy, where a deeper and broader reflection might yield countervailing concerns of similar or greater magnitude. Fred Schauer has conceptualized the manipulation of doctrine as "First Amendment opportunism," by which he means importation of precedent and doctrine into matters for which they are a poor fit.[8] The difficulty courts face is deciding how to give due weight to free speech values while not elevating them to a point where they eclipse other predicates that should be scrutinized before rendering a decision.

This Article presents a multifactoral approach to free speech analysis. Difficult cases present a variety of challenges that require judges to weigh legitimate concerns for the protection of robust dialogue, especially about public issues, against concerns that sound in common law (such as reputation or defamation),[9] statutory law (such as repose against harassment),[10] and constitutional law (such as copyright).[11] Even when speech is implicated, the Court should aim to resolve other relevant individual and social factors arising from litigation. Focusing only on free speech categories is likely to discount substantial, and sometimes compelling, social concerns warranting reflection, analysis, and application. Examining the breadth of issues surrounding disputes with communicative components is meant to identify competing legal factors without rendering the First Amendment all-inclusive or, on the flip side, irrelevant to broader ranges of activities. Coupling theoretical and practical

[8] *See* Frederick Schauer, *First Amendment Opportunism*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 174 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002). Schauer illustrates First Amendment opportunism through two examples of cases protecting linguistic activities—one claiming First Amendment protection for the depiction of animal cruelty and the other violent video games—that were not historically and traditionally thought to be at the core of the First Amendment. *See* Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1622–23, 1627–28 (2015).

[9] *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757–61 (1985) (plurality opinion) (finding that in those defamation cases involving private parties and private matters, the First Amendment does not require proof of a speaker's actual malice); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (stating that the "intentional lie . . . '[is] no essential part of any exposition of ideas'" (quoting Chaplinksy v. New Hampshire, 315 U.S. 568, 572 (1942))); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (holding that a showing of actual malice is required in defamation cases brought by public figures about public matters).

[10] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 409–10 (1992) (White, J., concurring in the judgment) (discussing the constitutional legitimacy of a sexual harassment law similar to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1) (2012)).

[11] *See* Golan v. Holder, 132 S. Ct. 873, 889 (2012) ("Concerning the First Amendment, we recognized that some restriction on expression is the inherent and intended effect of every grant of copyright.").

considerations about a case best balances judicial deliberation. I explore the contours of this theory and provide concrete examples of its implications.

Part I examines the historical background and penumbral principles of the First Amendment. The primary focus is on the structural value of free speech for individuals living in a representative democracy. Part II discusses the relevance of understanding speech in a broader constitutional framework. Much of that discussion is doctrinal and intertextual. Part III of the Article applies my proposed multifactoral analysis to three contemporary issues: corporate political speech, aggregate political contributions, and commercial communications. The upshot of the discussion is that contextual and sophisticated balancing is essential for the resolution of the difficult questions without the arbitrariness of judicial bias. Explicit analysis of government authority, conflicting private and public interests, pertinent constitutional and statutory values, legislative fit with stated policy aims, and potential alternatives is a transparent method for evaluating the impartiality of First Amendment decisions.

I. THE DIFFUSE RIGHT TO FREE SPEECH

The Supreme Court has never understood the First Amendment literally.[12] On its face the Amendment applies to Congress alone and prohibits the making of any law affecting speech. Yet, it is inconceivable that the executive or judicial branches could repress speech—or for that matter, religion.[13] Neither has the Court ever understood the First Amendment to prohibit all forms of regulations affecting communications.[14]

A. The Circumscription of Historical Inquiry

The Supreme Court has recently suggested that the constitutional meaning of speech must be predicated on its historical and traditional meaning at the time of the Bill of Rights' ratification.[15] But just as text by

[12] For a discussion on the nonliteral interpretation of the First Amendment, see Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 500 (2009).

[13] *See, e.g.*, Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2332 (2013) (applying the First Amendment to an executive agency regulation); N.Y. Times Co. v. United States, 403 U.S. 713, 714–15 (1971) (Black, J., concurring) (applying the First Amendment to a federal court injunction).

[14] The only absolutist in Supreme Court history was Justice Black. *See* Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 553 (1962).

[15] *See* United States v. Stevens, 559 U.S. 460, 468 (2010) ("'From 1791 to the present,' however, the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and

itself offers a necessary but insufficient picture of First Amendment values, so too its original meaning will not do for exhausting contemporary interpretations and constructions. The first step in identifying the relevant factors of free speech analysis is to take a look at the Amendment's historical roots.

The Framers of the Constitution and its first ten amendments had a rudimentary understanding of constitutionally valuable speech. They regarded free speech in significantly narrower terms than twenty-first century citizens, scholars, and courts. Nowhere was this clearer than the Fifth Congress's passage of the Alien and Sedition Acts of 1798.[16] One of the first Justices of the Supreme Court, while serving as a Circuit Justice, determined the Sedition Act to be constitutional.[17] Even though one of the two major parties of the day, the Democratic-Republican Party, strongly opposed the Sedition Act, they agreed with the Federalists that sedition laws were legitimate.[18] The two parties split about whether the federal or state governments should enforce them.[19] Only in 1964, when, in *New York Times Co. v. Sullivan*, the Court decided that the First Amendment applies to statements about public speakers on public matters, did the Court officially recognize the long-presumed invalidity of the Sedition Act.[20]

In postcolonial America there were few signs of today's free speech doctrines. The most auspicious indication of free speech aspirations approaching contemporary tolerance for dissent was the 1776 Pennsylvania

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has never 'include[d] a freedom to disregard these traditional limitations.'" (quoting *R.A.V.*, 505 U.S. at 382–83) (alteration in original)).

[16] Alien Act, ch. 58, 1 Stat. 570 (1798); Sedition Act, ch. 74, 1 Stat. 596 (1798). One section of the Sedition Act created a criminal offense against any person who

> shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States.

Sedition Act, ch. 74, § 2, 1 Stat. 596 (1798).

[17] United States v. Fries, 3 U.S. (3 Dall.) 515, 9 F. Cas. 826, 836–40 (C.C.D. Pa. 1799) (No. 5126) (opinion of Iredell, J.).

[18] For a discussion of Jefferson's claim that state governments had the power to suppress libel and slander even though the federal government lacked the authority to do the same, see SUSAN DUNN, JEFFERSON'S SECOND REVOLUTION 235 (2004); BERNARD H. SIEGAN, THE SUPREME COURT'S CONSTITUTION 170 (1987); Alan J. Farber, *Reflections on the Sedition Act of 1798*, 62 A.B.A. J. 324, 327 (1976).

[19] *See* Michael P. Downey, *The Jeffersonian Myth in Supreme Court Sedition Jurisprudence*, 76 WASH. U. L.Q. 683, 695–97 (1998); Farber, *supra* note 18, at 327.

[20] 376 U.S. 254, 273–74, 276 (1964).

Declaration of Rights, first adopted just eleven days after the Continental Congress passed the Declaration of Independence and thirteen years before ratification of the Bill of Rights. Pennsylvania created a prototype of the First Amendment.[21] The following year, on the eighth of July, the Vermont Constitution set out in relevant part: "That the people have a right to freedom of speech, and of writing and publishing their sentiments; therefore, the freedom of the press ought not to be restrained."[22] Yet the historical record indicates that for the Framers the guarantee of free speech did not preclude the legal suppression of dissent. By 1790, Pennsylvania's updated constitution both protected "one of the invaluable rights of man" to communicate "thoughts and opinions" and added that each citizen was "responsible for the abuse of that liberty."[23] Another indication of the postcolonial limited understanding of free speech is demonstrated by Congressman Matthew Lyon's conviction in 1798 by a Vermont jury under the Sedition Act; Lyon's constituents were "enraged at the imprisonment" and "threatened to free him forcibly."[24] Vermonters signed thousands of petitions in Lyon's support,[25] showing an early propinquity to popular sovereignty. Lyon was reelected from jail and assumed congressional responsibilities after serving his sentence.[26] Notwithstanding the instructive value of studying nascent American ideas of free speech, today's expansive reading of the First Amendment was a product of an extensive parsing of values catalyzed during the twentieth century by an evaluation of constitutional values and government practices, not an attempt to be true to the First Amendment's founding meaning.

Despite the revolutionaries' willingness to prosecute sedition, their views on speech seem to have been a more sophisticated groping for broader understanding than the widely accepted view of the eighteenth century that government was only prohibited from enforcing prior restraints

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[21] A Declaration of the Rights of the Inhabitants of the State of Pennsylvania, *in* MINUTES OF THE PROCEEDINGS OF THE CONVENTION OF THE STATE OF PENNSYLVANIA, HELD AT PHILADELPHIA, THE FIFTEENTH DAY OF JULY, 1776, 25, 26 (1776) [hereinafter MINUTES] ("That the People have a Right to Freedom of Speech, and of Writing, and Publishing their Sentiments; therefore the Freedom of the Press ought not to be restrained."). The Declaration of Rights was then made part of the state's September 28, 1776 constitution. The Constitution of Pennsylvania, *in* MINUTES, *supra*, at 58–59.

[22] VT. CONST. of 1777, ch. 1, cl. 14.

[23] PA. CONST. of 1790, art. IX, § 7.

[24] Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1143 (1973).

[25] Alan V. Briceland, *The Philadelphia Aurora, the New England Illuminati, and the Election of 1800*, 100 PA. MAG. HIST. & BIOGRAPHY 3, 6 (1976).

[26] *See* MICHAEL LINFIELD, FREEDOM UNDER FIRE 18 (1990); H. JOURNAL, 5th Cong., 3d Sess. 497 (1799).

on publications.[27] Even before the Revolution, while still trying to drum up support against perceived British encroachments against colonial rights, the First Continental Congress proclaimed that freedom of the press consists in the "advancement of truth, science, morality, and arts in general" as well as the "diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them."[28] This statement comes as no surprise because colonists' opposition to the Stamp Act of 1765, which sparked the concerted intercolonial effort for independence, was a protest against imposts on newspapers and pamphlets.[29] Many early Americans regarded the suppression of truthful papers and articles about public injustices to be "the most atrocious oppression that can be exercised by Government."[30] It took more than a century of litigation, social development, and political thought to extend similar protection to false statements in *Sullivan*.[31] As a positive matter, we do not currently have an originalist First Amendment; rather than being bogged down by historical understandings, it is more fruitful to address the values at the heart of modern constitutional protections for free speech.

B. Penumbral Balance

The persistent values attributed to speech and their evolution into robust doctrines checking government intrusions are attributable to the diffuse relevance of expression to the entire constitutional scheme. The multiple factors of representative democracy connected to speech are better teased out by analysis than solely by historical description. The substantive

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[27] In LEONARD W. LEVY, LEGACY OF SUPPRESSION (1960), Levy argued that free press largely meant merely an "absence of prior restraints," but that claim has been largely discredited. LEONARD W. LEVY, EMERGENCE OF A FREE PRESS, at xi (1985). In fact Levy later admitted that his earlier views were wrong and too narrow. *Id.* at x. He came to the new conclusion that "[b]y freedom of the press, the Framers meant a right to engage in rasping, corrosive, and offensive discussions on all topics of public interest." LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 212 (1988). For a critique of Levy's earlier position and a recognition of his altered thinking, see David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 534–37 (1983); David A. Anderson, *Levy vs. Levy*, 84 MICH. L. REV. 777, 777–78 (1986) (book review); David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795, 799 (1985) (book review).

[28] Cassius, An Address to the Freemen of the State of South-Carolina 2 (1783) (quoting the September 5, 1774 Address of the American Congress at Philadelphia).

[29] *See*, *e.g.*, *New-York, March 19, Extract of a Letter from Albany, Dated March 10, 1770*, NEW-YORK GAZETTE, Mar. 19, 1770. On the Stamp Act, see DAVID A. COPELAND, DEBATING THE ISSUES IN COLONIAL NEWSPAPERS: PRIMARY DOCUMENTS ON EVENTS OF THE PERIOD 193 (2000).

[30] TUNIS WORTMAN, A TREATISE CONCERNING POLITICAL ENQUIRY, AND THE LIBERTY OF THE PRESS 252 (The Law Book Exchange, Ltd. 2003) (1800).

[31] 376 U.S. 254, 279 (1964).

and procedural functions of government under the Constitution imply the right of the people to openly express their ideas without viewpoint censorship.

The national commitment to representative government, deliberation, and political accountability, which are encompassed by the Guarantee Clause,[32] becomes meaningless without an enforceable right to freely communicate political ideas. While self-government is only one aspect of expression the First Amendment protects, this example is indicative of the broad-ranging, core interests speech implicates.[33] Several jurisprudential strands demonstrate the First Amendment's place in a larger constitutional project. These cases empower the people through national guarantees designed to preserve their right to voice opinions and participate in open debates. For instance, if any state fails to safeguard republican institutions, Congress may intervene with legislation to secure political engagement. The Voting Rights Act of 1965 is a good example of a measure against state encroachments.[34] The Supreme Court has identified political participation to be a First Amendment interest,[35] but it should go one step further and connect that factor to the Constitution's other political protections. Taken to its logical conclusion, the legislative power to guarantee a representative government[36] is related to a number of activities necessary for the general welfare of the polity. Accordingly, Congress can pass legislation to prosecute violent efforts to undermine elections or intimidate political dissidents.[37] I do not mean here to address the Court's

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[32] U.S. CONST. art. IV, § 4.

[33] I am basing my argument on Justice Douglas's famous formulation of the term "penumbra" to describe unenumerated constitutional protections of human dignity to enjoy First Amendment values, such as self-expression, association, and political participation. *See* Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

[34] The Court grounded congressional authority to pass the Act pursuant to Section 5 of the Fourteenth Amendment. Katzenbach v. Morgan, 384 U.S. 641, 646 (1966). The Court has not relied on the Guarantee Clause, which it has unfortunately classified to be non-justiciable, as a source of congressional authority to pass the Voting Rights Act of 1965. City of Rome v. United States, 446 U.S. 156, 182 n.17 (1980). For scholarship examining whether the preclearance provision of the Voting Rights Act could be passed under the Guarantee Clause, see Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 OHIO ST. L.J. 177, 204–06 (2005).

[35] *See* Doe v. Reed, 561 U.S. 186, 194–96 (2010).

[36] *See* Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849) (providing the principle that "as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not"); Texas v. White, 74 U.S. 700, 730 (1868) (finding the *Luther* principle applies "with even more propriety, to the case of a State deprived of all rightful government, by revolutionary violence").

[37] *See* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1807 (2010).

conclusion that the Guarantee Clause is nonjusticiable[38] but to point out that free speech is not solely connected with the First Amendment or judicial review of state violations, but also the structural guarantees of representative governance.[39] Disputes over speech will, inevitably, raise concerns extending well beyond doctrine relevant to a communicative case and controversy. In the area of campaign financing, for example, speech will often clash with other concerns such as the need to maintain electoral integrity against corrupt practices—for instance, bribery—that threaten the electorate's ability to influence public officials.

The assertion that First Amendment safeguards for speech are connected to other constitutional factors is not new, but is under-analyzed. In a case dealing with the substantive right of privacy, *Griswold v. Connecticut*, the Court recognized that "the First Amendment has a penumbra" as do other "specific guarantees in the Bill of Rights."[40] While later cases connected those rights with the substantive due process doctrine,[41] the penumbral schema resonates with free speech analysis because speech is so intrinsic to the Constitution as a whole. Without vociferous and vehement debate, democratic institutions—judicial, legislative, or executive—cannot function. Dialogue is at the core of a variety of First Amendment values: first and foremost politics, autonomy, and the search for truth. Establishing protections for the expression of ideas safeguards individuals and empowers the populace.[42] Democracies place great emphasis on speech because they recognize that its value is not isolated to only some scenarios—as is the case with other clauses, such as the Cruel and Unusual Punishments, Confrontation, and Self-Incrimination Clauses—but to virtually all we do in our social, cultural, and civic lives. The complexity of First Amendment jurisprudence, as Fred Schauer has pointed out, is to determine what modes of conduct and communication are covered by the First Amendment.[43] It should be added that the values of that Amendment do not stand apart. Their judicial identification requires

[38] *See* Reynolds v. Sims, 377 U.S. 533, 582 (1964) ("[S]ome questions raised under the Guaranty Clause are nonjusticiable."); *Luther*, 48 U.S. (7 How.) at 42.

[39] *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 18–19 (1971).

[40] 381 U.S. 479, 483–84 (1965).

[41] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003); Roe v. Wade, 410 U.S. 113, 164 (1973).

[42] This synthetic purpose is connected to the dual function of government that I identify in Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 TEX. L. REV. 1609 (2013).

[43] *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769 (2004).

not simply looking at the text of the Amendment but also the substantive and structural factors of representative constitutionalism.

A holistic analysis would require judges adjudicating cases involving First Amendment issues to undertake historical, doctrinal, normative, and structural analyses. For example, historical facts make clear that although ink is not speech, placing a tax on ink and paper used by publishers is a violation of the First Amendment when the effect of the tax creates a disproportionate burden on a newspaper.[44] The imposition of such a tax smacked of the Stamp Act of 1765, which the colonists rejected because of their inability to engage in parliamentary deliberations leading up to its passage and for its impact on the dissemination of knowledge by newspapers and printers.[45] Ratifying the First Amendment provided a normative anchor to a structure of sovereignty, where the state would not be able to abuse its authority to censure the people.[46] And a tax on printed materials, the Court has found, threatened to chill the press.[47]

Public access to criminal trials is another area of law derived, not directly from the First Amendment, but from the fundamental values for speech that permeate the Constitution. In *Globe Newspaper Co. v. Superior Court*, the Supreme Court stated this clearly in its constitutional examination of a state statute requiring judges to exclude the general public from trials involving charges of sexual offenses against minors.[48] A newspaper brought a challenge, seeking an injunction against a trial judge's order excluding the press from the courtroom throughout the trial.[49] The Supreme Court found the state failed to meet its strict scrutiny burden of proof and therefore struck the statute for violating the First Amendment.[50]

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[44] Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 593 (1983). *See also* Arcara v. Cloud Books, Inc., 478 U.S. 697, 704 (1986) (expostulating the *Minneapolis Star & Tribune Co.* holding). The recognition that taxing publications is a "tax on knowledge" has a long pedigree. *Postage on Newspapers*, R.I. AMERICAN AND GAZETTE, Dec. 11, 1832.

[45] *The Stamp Act*, N.H. GAZETTE AND HIST. CHRON., May 17, 1765; *Philadelphia, December 12*, NEW-LONDON GAZETTE, Dec. 27, 1765.

[46] *See* Alison L. LaCroix, *The New Wheel in the Federal Machine: From Sovereignty to Jurisdiction in the Early Republic*, 2007 Sup. Ct. Rev. 345, 349 (2007) (discussing how controversies between colonists and Great Britain during the 1760s and 1770s, such as the one about the Stamp Act, informed developing constitutional structure).

[47] *See, e.g.*, *Minneapolis Star & Tribune Co.*, 460 U.S. at 585.

[48] 457 U.S. 596 (1982).

[49] *Id.* at 599.

[50] *Id.* at 607–08, 610–11. *See also* Press-Enter. Co. v. Superior Court, 478 U.S. 1, 9 (1986) (explaining that "the trial court must determine whether the situation is such that the rights of the accused override the qualified First Amendment right of access"); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) (plurality opinion) (asserting that the "presumption of openness inheres in the very nature of a criminal trial under our system of justice").

As part of its reasoning, the Court examined the implications of a far-reaching theory of the First Amendment. The Framers of the Constitution, the majority in *Globe Newspaper* found, "were concerned with broad principles" that encompassed "those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights."[51] Access to trials is connected to the public's right to engage in discussions and deliberations of governmental functions.[52] Thereby, citizens can participate in what we have found is broadly connected to the Guarantee Clause and, we may add, certainly the Preamble's mandate for government to be accountable to the people for maintaining the general welfare: "[T]he First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government."[53] The First Amendment is thus part of a broader constitutional value—engaging in the workings of government—that requires access to open information.

While the analysis in *Globe Newspaper* is certainly on target, the Court might have deepened its reasoning. The majority began by finding that access to state courtrooms is covered by the First Amendment through the Fourteenth Amendment's doctrine of incorporation.[54] The Court would have done even better by beginning with the wider umbrella value shared by both principles of speech and access. Nothing in the text of the First Amendment indicates it applies specifically to trials. The Press Clause, which the Court has neglected as an independent statement of constitutional protections,[55] makes clear that publications enjoy a special

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[51] 457 U.S. at 604.

[52] *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2674–75 (2015) (drawing on the Declaration of Independence and Preamble for the premise that the people retain the "ultimate sovereignty").

[53] *Globe Newspaper*, 457 U.S. at 604.

[54] *Id.* at 603.

[55] *Compare* Citizens United v. FEC, 558 U.S. 310, 352 (2010) ("We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting)), *with id.* at 431 n.57 (Stevens, J., dissenting) ("The text and history [of separate Free Speech and Free Press Clauses] suggests why one type of corporation, those that are part of the press, might be able to claim special First Amendment status, and therefore why some kinds of 'identity'-based distinctions might be permissible after all. Once one accepts that much, the intellectual edifice of the majority opinion crumbles."). Academic debate on the subject includes: PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 154, 169 (2013) ("An openly institutional treatment of the press would lead to more doctrinal coherence for the Press Clause and more stability and predictability for the press. . . . It would be a mistake to simply characterize blogs as 'a new form of journalism,' and extend to them the same institutional protections we give the traditional press." (footnote omitted)); Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 514 (2012) (arguing that "the Court considers the same rules to apply interchangeably

right, so the First Amendment is no doubt implicated by the case. But there is more to it. The Court has also recognized that the right to publicly access criminal trials is connected to the Sixth Amendment right to a "public trial."[56] The importance of balancing the values of both amendments is evident in *Gannett Co. v. DePasquale*, where the Court found that the Sixth Amendment right is personal and only applies to the defendant.[57] To this proposition must be added the First Amendment right to access trials except under certain circumstances where the defendant has a compelling interest against being prejudiced by public presence or where the post-trial sealing of the transcript would not provide sufficient protection.[58] The Court is explicit that what is involved in determining whether the value of speech should govern in a balancing of constitutional interests: "Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness."[59]

Holistic balancing of free speech and other constitutional factors is not only relevant to open criminal proceedings but also pertinent to other free speech-related matters. For example, in a recent case the Court upheld a statute prohibiting providing material support to foreign terrorist organizations against a First Amendment challenge.[60] Its decision was partly based on the finding that, "in effectuating its stated intent not to abridge First Amendment rights Congress has also displayed a careful balancing of interests in creating limited exceptions to the ban on material support."[61] That is not to say that war powers "remove constitutional limitations safeguarding essential liberties," including free speech.[62] Rather, balancing requires an assessment of whether government interests to preserve safety against terrorism are indeed pressing and the means used are narrowly tailored.

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under both the Free Speech Clause and the Free Press Clause"); Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1048–49 (2011) ("I contend that in order for the Press Clause to have the independent weight it merits, the courts must give the term 'press' a meaningfully narrow definition."); Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2443–44 (2014) (stating that "press speakers are those who fulfill the unique constitutional functions of the press, functions the Supreme Court has identified—often in dicta—as gathering newsworthy information, disseminating it to the public, and serving as a check on the government and powerful people").

[56] U.S. CONST. amend. VI.

[57] 443 U.S. 368, 379–80 (1979).

[58] *See* Press-Enter. Co. v. Superior Court, 464 U.S. 501, 510–11 (1984).

[59] *Id.* at 509.

[60] Holder v. Humanitarian Law Project, 561 U.S. 1, 7–8 (2010).

[61] *Id.* at 36 (citation omitted).

[62] United States v. Robel, 389 U.S. 258, 264 (1967) (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934)).

The weighing of private and public factors is also manifest in public employee cases. Since 1968, the Court has consistently maintained that the protection of free speech "depends on a careful balance 'between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"[63] The most recent case decided in this area, *Lane v. Franks*, relied on this test. The specific holding vindicated a community college director's right to give sworn court testimony in a public corruption trial.[64] Writing for the Court, Justice Sotomayor rigorously scrutinized the type of speech involved, the speaker, and the government's interest: "A public employee's sworn testimony is not categorically entitled to First Amendment protection simply because it is speech as a citizen on a matter of public concern."[65] The need for "[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth."[66] But there is further reason, which Justice Sotomayor's opinion did not mention. In *Lane*, the individual right to free speech was not all that was at issue; his obligation as a citizen was also tied to the public interest in fair trials secured by the Sixth and Seventh Amendments.

II. BALANCING OF INTERESTS

In cases where more than one constitutional value is at stake, each one that is relevant must be reflected in the resolution of a legal dispute. When multiple values are implicated (for instance, free speech and privacy or vigorous political debate and reputation),[67] a judge's role and obligation is to identify each and reason through them—sifting through relevant facts, arguments, and doctrines—to reach a final decision. In order to limit the risk that judges will manipulate this contextual adjudication in a manner

[63] Lane v. Franks, 134 S. Ct. 2369, 2374 (2014) (alteration in original) (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).

[64] *Id.* at 2374–75.

[65] *Id.* at 2380.

[66] *Id.* at 2379.

[67] For a discussion of competing speech and other social values, see Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974). The European Convention on Human Rights accepts a similar balancing of free speech against other fundamental values. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, 213 U.N.T.S. 221. Future work on the weighing of multiple factors would benefit from interpretation of that provision. I have begun such an analysis elsewhere and intend to return to it in a future book. *See* Alexander Tsesis, *The Right to Erasure: Privacy, Data Brokers, and the Indefinite Retention of Data*, 49 WAKE FOREST L. REV. 433, 484 (2014).

calculated to reproduce their normative preferences, an anchoring constitutional mandate tethers decisionmaking to a national ethos. American constitutionalism—in its structural and substantive features—manifests a balanced commitment to individual entitlements and competing public concerns for matters such as order and safety.[68] Any law that discounts either of these features is illegitimate; although there is no set hierarchy, the resolution of conflicts between individuals, or states and individuals, must be decided by gradations of scrutiny that reflect the relative importance of government and private concerns. Strictly speaking, in a society of equals all cases implicate some set of people who compose the polity and the operations of offices and institutions. Even a simple contract case—which includes communication about terms and expectations but raises no First Amendment issues—involves private agreement and social norms (defined by common law, statute, or industrial practices) of offer, consideration, reasonable expectation, and performance.

Like all constitutional principles, free speech is intrinsic to the synthetic purpose of government, but the Court has never understood it to be a license for absolute freedom. Resolution of constitutional conflicts should only be accomplished by contextual analyses of relevant principles and facts giving rise to the dispute and implicated in its resolution. Sometimes, as when equal citizens engage in ideological or political speech, courts favor the freedom of self-expression; in other circumstances, such as when the government seeks to prohibit terrorist recruitment or organizing, judges are likely to defer to legislative decisionmakers.[69] A stable foundation—built on constitutional values and stare decisis—is essential to avoid the ever-present risk that balancing interests will veer off into arbitrary, results-oriented decisionmaking. The background maxim of representative government requires the protection of individuals and the maintenance of the common good. In a pluralistic society, the preferences

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[68] *See* Alexander Tsesis, *Principled Governance: The American Creed and Congressional Authority*, 41 CONN. L. REV. 679, 682–83 (2009).

[69] *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1448 (2014) (plurality opinion) (asserting that in the context of campaign financing legislation "the First Amendment safeguards an individual's right to participate in the public debate through political expression and political association"); Holder v. Humanitarian Law Project, 561 U.S. 1, 25–26 (2010) (distinguishing between "pure political speech," which is protected under the First Amendment, and material support for foreign terrorist organizations, which is not so protected); Virginia v. Black, 538 U.S. 343, 365 (2003) (plurality opinion) (asserting that "lawful political speech [is] at the core of what the First Amendment is designed to protect"). Terrorist recruitment under the auspices and control of a designated terrorist organization is criminal conduct rather than protected free expression of ideas. *Humanitarian Law Project*, 561 U.S. at 28–33 (recognizing the constitutionality of criminally prohibiting persons from providing foreign terrorist organizations with material support that can be used to fund recruitment efforts). *See also* Alexander Tsesis, *Terrorist Communications on Social Media*, 70 VAND. L. REV. (forthcoming Mar. 2017).

of individuals cannot always be accommodated and must give way to broader policy.

Identifying the appropriate standards of review, the pertinent constitutional issues, and the hierarchies or material interests requires judges to evaluate whether a case arises from conflicts involving expressive claims and divergent legal stakes. These scenarios arise in a variety of cases, such as when the state prohibits the display of symbols historically linked to terrorist organizations that are communicated with the intent of threatening others.[70] Sometimes the conflict to be resolved is between a desire for more speech and a public need to allocate available resources, which is at its most contentious in places explicitly linked to the dissemination of knowledge, such as libraries.[71] At other times, challenges are brought against a patriotic policy, such as protection of the U.S. flag against desecration, prohibiting symbolic protest.[72] In these types of complex cases, categorical judicial statements only obfuscate the multiple factors that should play into fair resolution of controversies.

Free speech issues are particularly complex because they involve so many strands of private and public concern. Take fraud as an example. Fraud is a form of communication that is not covered by the First Amendment because the fraudfeasor violates public and private confidences.[73] The deception of others may well give the speaker an advantage, thereby promoting his or her liberty, but fair dealings require government to provide a remedy against misleading business transactions. It is interesting to note here that the laws against fraud are acutely needed where the malfeasance itself threatens constitutional institutions. This is especially the case when it comes to voter fraud, wherein compelling state concern empowers the exercise of legal authority to preserve democratic institutions against political corruptions.[74] Recognition of the very real damage that can result justifies the use of resources to combat such wrongs

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[70] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 380, 391 (1992) (striking a municipal cross burning ordinance).

[71] *See, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853, 869–71 (1982) (plurality opinion) (recognizing that under certain circumstances a school board can winnow library collections).

[72] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 415–18 (1989) (holding unconstitutional a statute prohibiting flag burning).

[73] *See* Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 612 (2003). The Court's recent claim that all content-based regulation should be judged by the strict scrutiny standard, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015), is belied by criminal sanctions against certain communications, such as fraud or criminal conspiracy, that can *only* be defined by reference to their content.

[74] Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam) ("A State indisputably has a compelling interest in preserving the integrity of its election process." (quoting Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 231 (1989))).

as ballot stuffing, absentee ballot abuse, or in-person impersonation. Of course, the public interest in preventing fraud is not limited to these core constitutional matters. In commercial speech, the private right to advertise is protected through the intermediate scrutiny test.[75] When advertisement is true, any government scheme to suppress content, such as advertisement for legal gambling, will likely fail to overcome the required showing of substantial interest and narrow tailoring.[76]

Whether a court engages in strict or intermediate scrutiny analysis, a risk remains that a judge will arbitrarily favor the public or private interest. Precedents, as well as normative tradition and history, provide obvious sources of guidance.[77] But neither doctrinal categorization nor reference to past practices is enough by itself. Both can be overruled if they violate some broader constitutional principle. Even when it comes to communication there is no definitive way to rely on free speech as a trump: when strict scrutiny applies, the government must provide a compelling reason, such as maintaining national security against terrorism, that outweighs the desire to communicate information.[78] This is easy to recognize in the hypothetical situation of one party wanting to teach a terrorist mastermind to create a bomb; in that circumstance the isolation of speech will not gainsay the need to maintain public safety. Indeed, even if the proffered instruction involves no conspiracy to commit an attack but is coordinated with a recognized terrorist organization, the communication may be actionable.[79] The desire to deliver information and the audience's wishes to receive it must be balanced against each other. Especially where the listener is already a member of a terrorist group, it is likely the Court will find suppression of the communication to be compelling and the least restrictive means of achieving the goal. Speech is not an absolute but must be weighed against other pressing civic needs. What remains stable through this contextual analysis is the public duty to protect the individual for the common good. At play is a twofold dynamic of private parties living in a civic society, where they retain their liberties but are legally bound by social rules and values.

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[75] Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2667–68 (2011); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

[76] *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 510–12 (1996) (plurality opinion).

[77] For statements to this effect in diverse areas, see Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 285 (2008); Roper v. Simmons, 543 U.S. 551, 560 (2005).

[78] *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 36 (2010).

[79] *Id.* at 31 (clarifying that "only material support coordinated with or under the direction of a designated foreign terrorist organization" is actionable).

In some of its free speech jurisprudence, the Supreme Court has failed to give adequate consideration to other relevant values. For example in a recent case, *United States v. Alvarez*, the Court reviewed the constitutionality of a statute that prohibited false representation of military awards, especially the Medal of Honor.[80] A plurality of the Court narrowly characterized Congress's purpose for passing the Act as "creating and awarding the Medal."[81] This was an inadequate reason to suppress speech on the basis of "sometimes inconvenient principles of the First Amendment."[82] Rejecting the government's claim, Justice Kennedy's plurality opinion explained that "[w]hen content-based speech regulation is in question . . . exacting scrutiny is required."[83] This is contrasted from "false claims [that] are made to effect a fraud or secure moneys or other valuable considerations," which the government can restrict without being subject to First Amendment scrutiny.[84] That conclusion is convincing from an as-applied basis because the defendant did not seek to defraud the government but only to elevate his community reputation.[85] The opinion is unsatisfactory, however, because the plurality failed to take seriously all the values at stake in striking the statute on its face.[86] In the latter posture, the plurality gave short shrift to the government's argument that false claims of military honors can be exploited to gain "lucrative contracts and government benefits."[87]

Concurring in the judgment, Justice Breyer did take seriously that the statute was passed to safeguard the integrity of those who had received medals. There he elaborated a meaty balancing test:

> In determining whether a statute violates the First Amendment, this Court has often found it appropriate to examine the fit between statutory ends and means. In doing so, it has examined speech-related harms, justifications, and potential alternatives. In particular, it has taken account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are

[80] 132 S. Ct. 2537, 2542 (2012) (plurality opinion).

[81] *Id.* at 2543.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 2547.

[85] *Id.* at 2542.

[86] The Supreme Court might have upheld the statute on its face while striking it as applied to Alvarez because he raised both claims alternatively at the trial court level. Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss Indictment at 3, United States v. Alvarez, No. CR 07–1035–ER, (C.D. Cal. Dec. 21, 2007). Both issues had also been preserved at the circuit court level. United States v. Alvarez, 617 F.3d 1198, 1201 (9th Cir. 2010), *aff'd*, 132 S. Ct. 2537 (2012).

[87] *Alvarez*, 132 S. Ct. at 2558 (Alito, J., dissenting).

> other, less restrictive ways of doing so. Ultimately the Court has had to determine whether the statute works speech-related harm that is out of proportion to its justifications.[88]

This test provides extensive guidance for weighing various legal factors of a case. Inevitably those considerations, especially if we add concerns for the general welfare to this formulation, require an assessment of multiple factors along with speech.

At play was the government's obligation to safeguard valuable resources against fraudulent claims of valor. Professor Kate Stith has articulated a principle she calls the "Principle of the Public Fisc" providing that: "All monies of the federal government must be claimed as public revenues, subject to public control through constitutional processes."[89] This is an unenumerated constitutional directive that government is to act for the "general Welfare," in the words of the Preamble.[90] In Stith's view, the government has an obligation to protect the public fisc by responsibly controlling public expenditures. Funds cannot be allocated in violation of Bill of Rights norms, such as free speech, but public agents must also be cognizant of Spending Clause values to fund benefits programs in furtherance of the general welfare and common defense, which is an enumerated responsibility located in Article I, § 8, cl. 1.[91] The *Alvarez* Court should have carefully weighed free speech rights against the system's integrity interests and the general welfare concerns for preserving the public fisc from false claims to military awards. That was not at issue in *Alvarez*, but as a general rule the Court struck a statute that was narrowly tailored for that legitimate purpose. The outcome of the case may well have been the same because the statute applied to an overbroad case of misstatements, but the alternative, multifactoral reasoning would have been more convincing and made the record more complete. Moreover, the government's discretion to safeguard public funds would have been left intact, rendering the opinion an easier sell to the public and of greater value to lower courts.

Balancing analysis requires identifying competing constitutional interests; their relative weights, inferred or directly gleaned from doctrine and history; and a careful consideration of how best to protect the rights of litigants and the separate interests of the public. The conclusions will

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[88] *Id.* at 2551 (Breyer, J., concurring in the judgment).

[89] Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1364 (1988).

[90] U.S. CONST. pmbl.

[91] *See* United States v. Comstock, 560 U.S. 126, 152–53 (2010) (Kennedy, J., concurring in the judgment).

remain contestable but will provide guidance to lower courts and enrich existing doctrine.

In more elaborate terms, with the additional requirement that judges review how legislation affects socially recognized general welfare rather than solely government interests, I propose the following framework for multifactoral analysis: (1) whether the expression at issue is likely to implicate specific constitutional, statutory, or common law harms; (2) whether the restriction on speech is based on a historical or traditional doctrine; (3) whether any government policies benefitting the general welfare weigh in favor of the regulation; (4) whether the regulation on speech closely fits the public ends that are sought; and (5) whether there are any less restrictive alternatives to achieving them.

This five-part test recognizes that speech is a liberty that can conflict with other constitutionally protected interests. It provides a framework against both underestimating expression when self-expression or political statements are involved, and overestimating the value of speech to a point where even de minimis communication with content trumps weighty considerations of constitutional values like due process, privacy, or equality.[92] Which values a court should give greater weight in resolving a dispute will depend on the factual, substantive, and procedural record of each case.[93] Because judges are human, there will often be differing opinions and appellate review needed for some resolution. A case-by-case analysis is required to identify relevant private and public concerns. Despite the pertinence of history and tradition, evolution in law is inevitable and necessary to meet fresh realities like digital communication.

Legislative and adjudicative mistakes will undoubtedly be made, but the broad mandate of the Constitution provides the deliberative means of building on and correcting statutes, regulations, and precedents. As Mark Rosen has pointed out, the continuation of political communities will expose the "patterned, predictable harmonizations of competing commitments."[94] Our tripartite system of government often relies on broad judicial powers for defining free speech principles. That is, for instance, the case with the "most exacting scrutiny" standard for reviewing communicative conduct such as flag burning[95] or the "more demanding"

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[92] *But see* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015) (suggesting all content-based regulations on speech should be subject to strict scrutiny).

[93] *See* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 50–54 (Julian Rivers trans., Oxford Univ. Press Inc. 2002) (1986) (discussing the balancing of principles).

[94] Mark D. Rosen, *When Are Constitutional Rights Non-Absolute?* McCutcheon*, Conflicts, and the Sufficiency Question*, 56 WM. & MARY L. REV. 1535, 1586 (2015).

[95] Texas v. Johnson, 491 U.S. 397, 412 (1989) (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).

than intermediate standard of review for material support for terror statutes,[96] both of which are flexible enough for judges to evaluate the full public, private, and constitutional content of the case. Moreover, courts have proven capable of administering multistep tests, as in the incidental speech area.[97] History and tradition are indeed important factors—for example, the historical terror associated with burning crosses was critical in the Court's decision finding it legitimate for a state to pass a criminal statute "outlaw[ing] cross burnings done with the intent to intimidate."[98]

Contrary to the Court's recent claim that all content-based regulations must be subject to strict scrutiny,[99] some regulations, such as antitrust or criminal solicitation litigation, involve communications that lack constitutional status precisely because of their content.[100] Neither the text of the First Amendment nor any meta-principle growing out of it permits monopolistic or criminal agreements, nor does the Constitution prohibit laws against fraudulent and defamatory content. At other times, two conflicting constitutional clauses will be involved, as in cases presenting speech and copyright concerns, which I deal with below. And in other cases, such as emotive speech, the core purposes of speech—personal expression, political debate, and information—are likely to weigh on the side of speakers. For example, the First Amendment shields commercial actors against an antitrust complaint when they jointly partake in a publicity campaign designed to influence legislators to favor their sector of the industry over competitors.[101] Even when a message might be construed by the audience to be offensive, government may not silence it to enforce a "heckler's veto."[102] The presence of political speech shifts the interest in favor of speech over the enforcement of laws protecting competition. But simple labels of expression or content-based legislation do not provide the needed depth for careful judicial scrutiny.

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[96] Holder v. Humanitarian Law Project, 561 U.S. 1, 8, 28 (2010) (quoting *Texas*, 491 U.S. at 403).

[97] *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 377 (1968).

[98] Virginia v. Black, 538 U.S. 343, 363 (2003) (plurality opinion).

[99] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015) ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993))).

[100] *See* United States v. Williams, 553 U.S. 285, 297 (2008) ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection."); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market . . . .").

[101] *See* E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961).

[102] Bachellar v. Maryland, 397 U.S. 564, 567 (1970); Brown v. Louisiana, 383 U.S. 131, 133 n.1 (1966) (plurality opinion).

The most complex cases are those where two constitutional interests are at stake, such as when resolution is needed between opposing litigants' claims involving intellectual property and free speech factors. In such circumstances, courts should not shy away from a full airing, comparing, and distinguishing of separate strands of doctrines that might indicate different outcomes and issue-specific levels of scrutiny. Without engaging in this thorough judicial assessment, courts neglect relevant constitutional factors. As free speech is protected by the First Amendment, the Copyright Clause safeguards a wide variety of creative and artistic forms of expression.[103] In its most recent cases, rather than taking equal account of both constitutional values, which would require the government to defend its position based on a heightened level of scrutiny, the Court separated the two forms of analyses. In *Golan v. Holder*, the majority upheld the constitutionality of Section 514 of the Uruguay Round Agreements Act.[104] Instead of invoking the pure-speech strict scrutiny analysis—indicated by content restrictions on artistic speech—or even the intermediate scrutiny analysis for free speech—which the Court would have used if it had regarded copyright to be a time, place, and manner restriction—the Court reasoned that copyright doctrines of fair use and idea–expression dichotomy were by themselves sufficient to protect free speech interests.[105] This left unexplored relevant First Amendment factors. This mode of analysis separates rather than contextualizes a case that raises underlying values of speech and implicates more than one constitutional clause.

The reasoning in *Golan* was based on the Court's earlier decision in *Eldred v. Ashcroft*, which had upheld the constitutionality of the Copyright Term Extension Act's (CTEA) twenty-year retroactive extension of copyrighted works that would have otherwise entered the public domain.[106] In *Eldred*, the petitioner requested the Court to review the Act based on the Copyright Clause's "limited [t]imes" wording and the First Amendment's Free Speech Clause.[107] Here too, free speech analysis would have likely involved heightened scrutiny because the regulation of copyright requires an examination of a work's content; instead, the Supreme Court upheld the law as a rational exercise of congressional discretion.[108] The Court did not even inquire into whether the statute's extension of copyright term to life-

[103] U.S. CONST. art. I, § 8, cl. 8.

[104] 132 S. Ct. 873, 894 (2012).

[105] *Id.* at 890 (recognizing that the idea–expression dichotomy and fair use provisions are "built-in First Amendment accommodations" (quoting Eldred v. Ashcroft, 537 U.S. 186, 219 (2003))).

[106] 537 U.S. at 193–94.

[107] *Id.* at 193.

[108] *Id.* at 204.

plus-seventy-years (up from the former life-plus-fifty-years) was a form of content regulation, which should have implicated First Amendment doctrine. In the absence of that inquiry, requiring a balancing of interests and consideration of regulatory alternatives, *Eldred*'s rationale was incomplete. Because the case dealt with new statutory restrictions on the dissemination of expression,[109] the Court should have evaluated whether the statute restricted speech covered by the First Amendment. In this evaluation, the Court should have considered: whether the restriction was a historically countenanced limitation; whether any social goods accounted for the CTEA; whether the law fit the public end sought; and whether any less restrictive means could have achieved the desired end. Such holistic balancing would have recognized that speech is a penumbral value requiring multifactoral, rather than mono-focused, constitutional analysis.

III. ROBERTS COURT FORMALISM

My multifactoral model, calling for a consistent case-by-case balancing of free speech concerns against other constitutional values, runs counter to a recent formalistic turn of free speech jurisprudence. The trend was set in an opinion striking, in its entirety, 18 U.S.C. § 48, the Depiction of Animal Cruelty Act, which had criminalized "the commercial creation, sale, or possession of certain depictions of animal cruelty."[110] Congress passed the federal statute because of the difficulty establishing personal jurisdiction in state courts and determining the applicable statutes of limitations since the locations of video recordings were often unknowable.[111] In *United States v. Stevens*, Chief Justice Roberts vehemently rejected "ad hoc balancing of relative social costs and benefits."[112] Chief Justice Roberts then held the statute to be unconstitutional without any reflection on counter-factors, weighing on the side of regulation, because he found that violent declamations were not

[109] The *Golan* Court recognized that copyright law places "some restriction on expression." 132 S. Ct. at 889.

[110] United States v. Stevens, 559 U.S. 460, 464, 482 (2010). The Court held that the statute was "substantially overbroad," but limited its decision, noting that it did not need to determine "whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional." *Id.* at 482. In fact, Congress responded by passing the Animal Crush Video Prohibition Act of 2010—a revised, narrower version of 18 U.S.C. § 48—which made it illegal to create or distribute "animal crush videos," videos that depict the suffocation, drowning, or infliction of injuries to non-human animals. Pub. L. No. 111–294, § 48, 124 Stat. 3177, 3178 (2010).

[111] *Stevens*, 559 U.S. at 492 (Alito, J., dissenting).

[112] *Id.* at 470 (majority opinion).

among the historically and traditionally recognized categories of unprotected speech.[113]

Justice Alito, the lone dissenter in the case, was significantly more nuanced in his analysis of relevant legal factors, pointing out that the videos were the product of conduct that was illegal in all fifty states.[114] Accordingly, he believed the First Amendment did not cover videos of criminal conduct: "The Court strikes down in its entirety a valuable statute . . . that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty—in particular, the creation and commercial exploitation of 'crush videos,' a form of depraved entertainment that has no social value."[115] In balancing the personal interest of those who engaged in criminal conduct to create videos for consumers wanting to watch them against the social value of protecting defenseless animals and expressing public disapproval of animal cruelty through the criminal law, Justice Alito opted for the latter. The majority, on the other hand, oversimplified free speech analysis by setting out unprotected categories, narrowly classifying crush videos, rejecting the need to reflect on social concerns of statutory policy, and ignoring the fit between that policy and the means used to achieve it.

The Court next relied on its formalistic, categorical approach in *Brown v. Entertainment Merchants Ass'n*, which struck down a state statute that prohibited the sale or rental of violent video games to minors.[116] As with *Stevens*, a majority found visual depictions of violence, even when obtained by youths, to not be among the categories of speech historically excluded from First Amendment protections.[117] Instead of balancing the social interest in protecting children against the right to acquire and market expressive materials with violent content and considering less restrictive alternatives, the majority simply listed off categories of low-value speech, including defamation, fraud, obscenity, incitement, and fighting words.[118] Its rigid paradigm led the majority to the conclusion that the statute at bar targeted speech that was not among the "well-defined and narrowly limited classes of" per se unprotected speech.[119] Because the law was content-specific, the strict scrutiny standard applied, and the state failed to meet its

[113] *Id.* at 469.
[114] *Id.* at 491 (Alito, J. dissenting) (citing H.R. REP. No. 106–397, at 3 (1999)).
[115] *Id.* at 482 (citation omitted).
[116] 131 S. Ct. 2729, 2741–42 (2011).
[117] *See id.* at 2733–34; *Stevens*, 559 U.S. at 469.
[118] *Entm't Merchs. Ass'n*, 131 S. Ct. at 2733.
[119] *Id.* (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942)).

burden to show the law was warranted by a compelling state interest.[120] The categorical approach became further entrenched in *United States v. Alvarez*, where the plurality adopted the *Stevens* model of the First Amendment to find the Stolen Valor Act of 2005 to be unconstitutional.[121]

While in these three landmark cases the Justices were justified to resist arbitrary balancing, none of the lead opinions considered the multifactoral permeation of judicial deliberation. Nor did they attempt to parse the cases in light of the private and public interests involved. Fixation on First Amendment doctrine—rather than sophisticated analysis of facts, a real canvassing of history, pertinent values, and fit—led to reliance on past jurisprudence with inadequate reflection on other factors at play. For example, in *Entertainment Merchants* it was no doubt proper to look at historical categories of speech, but the Court latched onto the content neutral doctrine, giving insufficient weight to the centuries-old tradition of placing greater limitations on youths than adults. The Court is also dismissive about the state's parens patriae power and children's alternative means of obtaining the video games with their parents' permissions.[122] The *Stevens* Court also should have provided a more transparent rationale; this was especially the case with the historical method the majority championed without bothering to discuss policies punishing cruelty to animals nor engage in any serious historiography.[123] How the Court would have come down in these cases had it engaged in relevant balancing we cannot know, but the American people deserved a careful assessment of the legislative values they regarded to be important rather than the sole reliance on rigid judicial construction of free speech doctrine.

IV. MULTIFACTORAL NEEDS TODAY

Multifactoral balancing is relevant across the free speech landscape, even, as we saw, in areas of law typically not analyzed through First Amendment scrutiny, such as copyright law, criminal conspiracy, and voting. This Part of the Article demonstrates how the proposed balancing

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[120] *Id.* at 2738.

[121] *See supra* text accompanying notes 80–85.

[122] The Court only makes a passing allusion to that state power. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2736 ("No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed." (citations omitted)).

[123] For a historical background on animal anti-cruelty laws, see Joseph G. Sauder, *Enacting and Enforcing Felony Animal Cruelty Laws to Prevent Violence Against Humans*, 6 ANIMAL L. 1, 3–6 (2000); Benjamin Adams & Jean Larson, *Legislative History of the Animal Welfare Act: Introduction*, U.S. DEPT. OF AGRIC., http://awic.nal.usda.gov/legislative-history-animal-welfare-act/intro [http://perma.cc/9NDJ-Q3E5].

test applies to two timely issues. The test is applicable to many more topics, such as restrictions on commercial and political signs[124] or vanity license plates,[125] but because of prearranged space constraints, I must limit myself to only two examples. The Court has increasingly used a stilted understanding of campaign financing and commercial speech, basing its conclusions on a narrow set of First Amendment concerns instead of giving adequate consideration to all substantive issues they raise.

A. Campaign Financing

In recent years, the Court has chipped away at Congress's power to pass campaign finance legislation.[126] In *Citizens United v. FEC*, the Court relied on a rigid conception of the First Amendment rather than adopting an interpretation that would have required the Justices to engage in "case-by-case determinations" about whether corporations have the same political speech rights as natural persons.[127] The majority opinion, penned by Justice Kennedy, found section 441b of the Bipartisan Campaign Reform Act (BCRA), which prohibited the use of corporate funds for express advocacy, to be facially unconstitutional.[128] Rather than carefully scrutinizing whether the status of corporate entities should be treated the same as citizen voters, the Court fixed its attention on the category of campaign speech, rejecting the distinctions between corporate and natural persons.[129] Justice Kennedy provided neither a systematic study of campaigning in a representative democracy nor a close comparison and contrast between natural people and corporations, and he discounted bipartisan government explanations.

Nothing in Justice Kennedy's opinion hinted at the glaring and pertinent factor that corporations enjoy no right to participate in general elections.[130] His presumption of a debate-centered model of speech placed

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[124] Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).

[125] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015).

[126] For a debate about how much *Citizens United* affected an increase in campaign expenditures, see Richard L. Hasen, *Three Wrong Progressive Approaches (and One Right One) to Campaign Finance Reform*, 8 HARV. L. & POL'Y REV. 21, 21 (2014); Matt Bai, *How Did Political Money Get This Loud?*, N.Y. TIMES SUNDAY MAG., July 22, 2012, at MM14; Rick Hasen, *What Matt Bai's Missing in His Analysis of Whether* Citizens United *Is Responsible for the Big Money Explosion*, ELECTION L. BLOG (Jul. 18, 2012, 10:41 AM), http://electionlawblog.org/?p=37108 [http://perma.cc/QL44-RVUU]; Richard L. Hasen, *The Numbers Don't Lie: If You Aren't Sure* Citizens United *Gave Rise to the Super PACs, Just Follow the Money*, SLATE (Mar. 9, 2012, 2:56 PM), http://www.slate.com/articles/news_and_politics/politics/2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending_.html [https://perma.cc/DXP7-VSUB].

[127] 558 U.S. 310, 329, 343 (2010).

[128] *Id.* at 365.

[129] *Id.* at 343.

[130] Nor do for-profit corporations even have a potential franchise right, as do children. Neither are

the acquisition and dissemination of information at the center of the holding's rationale.[131] And, no doubt, concerns for the dissemination of ideas were critical to the resolution of the case, but the majority failed to give due weight to self-government factors, including the different franchise statuses of individuals and incorporated entities. Even communicative associations, like Citizens United, lack voting rights, which for natural people are intrinsic to political expressiveness, but the Court refused to differentiate First Amendment rights on the basis of the speakers' identities. Instead of giving any weight to fundamental concerns of self-government, the Court simply resorted to strict scrutiny analysis,[132] finding no compelling reason to prevent corporations and unions from funding campaigns,[133] but not subjecting the legislation to more systematic constitutional evaluation. The value of speech to audiences, to which the *Citizens United* majority gave the greatest weight, made too little of the manipulation of communication markets.[134] Corporations often manipulate communication markets not to inform, but to nudge consumers' opinions by drowning out the voices of ordinary citizens who lack the resources to produce movies and run advertisements.[135]

In this regard, the very structure of democratic government, in which natural people can vote and artificial business entities cannot, should be a weighty consideration for determining whether Congress can use its Necessary and Proper Clause authority to prevent corporate campaign corruption or the appearance of corruption.[136] Rather than addressing only the issue of speech, the Court should have considered Congress's broader authority. An earlier decision, *Buckley v. Valeo*, recognized that Congress can pass campaign financing laws, thereby "legislating for the 'general welfare'—to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising."[137]

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they incorporated for the express purpose of affecting politics, such as the American Civil Liberties Union or the American Center for Law and Justice.

[131] *See Citizens United*, 558 U.S. 310 at 339.

[132] *Id.* at 340.

[133] *Id.* at 339 ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.").

[134] *See* Tamara R. Piety, *Why Personhood Matters*, 30 CONST. COMMENT. 361, 379–80 (2015).

[135] *See* Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1062 (1998) (arguing that unregulated corporate lobbying for corporate privilege "distorts the political process by creating a self-reinforcing cycle: the more a corporation is permitted to modify the law to allow it to profit-maximize at the expense of others, the more money it will have with which to pursue more such modifications").

[136] *See* Buckley v. Valeo, 424 U.S. 1, 45, 90 (1976) (per curiam).

[137] *Id.* at 91.

Regarded in this way, Congress passes campaign finance laws "not to abridge, restrict, or censor speech" but "to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people," thereby advancing First Amendment values.[138]

In *Citizens United*, the issue was not simply the dissemination and acquisition of information. The majority overturned an earlier Supreme Court holding that demonstrated great depth to find Congress had a compelling reason to prevent "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form."[139] To the contrary, the *Citizens United* majority found that the government could not withstand strict scrutiny review of the "outright ban on corporate political speech during the critical preelection period."[140] Justice Kennedy's decision in *Citizens United* was formalistic, giving inadequate deference to the extensive congressional findings that corporate expenditures from general treasury funds harm eligible voters' abilities to influence the political process.[141] It would, after all, be impossible for ordinary citizens to match the political spending of multi-million and even multi-billion dollar corporations. The immense expenditures on airwaves, Internet, and television can muffle the political speech of ordinary voters. The Court adopted a simplistic equivocation between eligible voters and artificial corporations, without giving adequate weight to how campaign finance laws empower natural voters during the course of a political campaign. With the enormous pace of corporate spending algorithmically outrunning what all but a fraction of the richest voters can expend to be heard on the airwaves and Internet, Congress had a compelling reason to place limitations on the use of general corporate funds for advancing free speech factors associated with representative democracy.

A more unlikely claim to make would be that when an incorporated business is spending general treasury funds to advocate for the candidate of its choice, it is engaging in commercial speech, subject to intermediate rather than strict scrutiny.[142] Corporate officers would violate fiduciary duty

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[138] *Id.* at 92–93.

[139] *Citizens United*, 558 U.S. at 348 (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990)).

[140] *Id.* at 340, 361.

[141] *See id.* at 400 (Stevens, J., concurring in part and dissenting in part) ("Congress crafted BCRA in response to a virtual mountain of research on the corruption that previous legislation had failed to avert.").

[142] *Cf.* Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796 (1988) (asserting that in cases where commercial and noncommercial speech are "inextricably intertwined . . . what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon").

obligations by supporting political causes averse to business profits. The commercialization of political speech argument is unlikely to sway the current Court, which is increasingly leaning in favor of equalizing commercial and ordinary speech.[143] Indeed, company reputation is likely to benefit by supporting some political causes. Moreover, it is unpredictable whether the combination of political and commercial factors would receive compelling or intermediate scrutiny. The inquiry would need to focus on the primary impetus of the message, whether it was commercial or political.

The better method for elective franchise is to treat corporations as commercial entities, not possessing identical protections as persons eligible to cast ballots, and to treat their campaign speech as advertisements supporting candidates from whom they expect to curry favor for their for-profit interests.[144] This suggestion would evaluate the importance of regulations, their scope for addressing corporate advertisement issues, the effects of the speech and regulation on voting, alternative methods, and the fit between means and ends.

The reverse position, which requires courts to determine whether campaign financing restrictions were required to achieve a compelling public aim in the least restrictive way possible, allows for all manner of obfuscation. Such an end-around would render "political speech" a catchall for avoiding legitimate regulation.[145] It would be easy enough in advertisements to add visual depictions of a small national flag icon, a political party emblem, or a political candidate's photograph, and then for the corporation to claim strict scrutiny protection because the ad had mixed political and commercial aims.

The BCRA did not altogether prevent corporations from engaging in political speech but required that political advocacy be conducted from funds separate from the general treasury.[146] Under this scheme, shareholders and corporate officers were permitted to contribute money to

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[143] *See, e.g.*, Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2667 (2011); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 575 (2001) (Thomas, J., concurring in part and concurring in the judgment).

[144] *See* Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335, 383 (2015) ("Under conservative corporate theory, the only legitimate reason for a for-profit corporation to make political expenditures will be to elect or defeat candidates based on their support for policies that the corporation believes will produce the most profits.").

[145] A recent empirical study demonstrates the increased frequency of free speech litigation filed to "benefit business corporations and trade groups, rather than other kinds of organizations or individuals." John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 224 (2015).

[146] *See Citizens United*, 558 U.S. at 337–39 (finding the PAC exemption from § 441b was inadequate to save the statute from First Amendment scrutiny).

political action committees (PACs) in order to express their political views.[147] But the amount then available for the business to engage in political advocacy was only a fraction of its general budget.[148]

Isolating speech concerns from the many components of self-government—personal and public—that should go into reviews of campaign finance regulations have diminished federal power to address political corruption and preferential treatment. The most recent casualty of free speech exclusivity has been the BCRA's cumulative aggregation limit, which the Court ruled to be unconstitutional in *McCutcheon v. FEC*.[149] The statute contained limits on the total amount of money a donor could contribute to all candidates and to political action committees.[150] The legislation was meant to curb the potentially corrupting influence affluent contributors could wield on politicians, enabling them to curry special favors for pet projects in exchange for massive donations.[151] The plurality held to a narrow view of political corruption, only recognizing the constitutionality of regulations specifically targeting quid pro quo contributions in return for something specific in return.[152]

The *McCutcheon* plurality found unconstitutional congressional limits on the total aggregate amount an individual can contribute to all federal political campaigns.[153] The BCRA already set a high monetary limit: a person could contribute up to $123,200 each election cycle.[154] Even though the Court left untouched the monetary cap on the amount contributors could give each federal candidate,[155] the unhinging of total aggregate contributions is likely to have far-reaching consequences. Wealthy individuals are now able to use even more money to curry favor with politicians.

The *McCutcheon* plurality went even further in expanding the ability of wealthy parties to invest in candidates by narrowing the definition of the form of corruption that was sufficiently compelling for Congress to regulate to "only a specific type of corruption—'*quid pro quo*' corruption."[156] The decision greatly augments contributors' abilities to

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147 *Id.* at 321.
148 *See id.*
149 134 S. Ct. 1434, 1442 (2014) (plurality opinion).
150 2 U.S.C. § 441a(a)(3) (2012) (current version at 52 U.S.C. § 30116(a)(3) (2014)).
151 *McCutcheon*, 134 S. Ct. at 1442 (plurality opinion).
152 *Id.* at 1450.
153 *Id.* at 1442.
154 *Id.* at 1443.
155 *Id.* at 1442.
156 *Id.* at 1450.

advance their speech interests. Not adequately factored into the plurality's opinion, however, is the erosion in the ability of indigent and middle class citizens, who lack the means or interest, to make multi-candidate campaign contributions to influence elections and policies. Money provides donors with greater access to politicians and helps them solicit politicians for special favors. When money calls the political shots, the voices of ordinary people are muffled. People with less access to politicians have less influence on public actions. Persons able to reach such a high aggregate contribution limit have greater access to politicians than the average voter. They are thereby able to skew the marketplace of ideas. The readiness with which money can impact decisionmaking, even absent any bribery or quid pro quo agreements, has serious implications for the search for truth, the exercise of representative democracy, and the enjoyment of political equality.

While it is impossible for everyone to have identical access to politicians, legislation should be analyzed through rigorous multifactoral analysis. Although aggregate contributions do not directly affect individuals' voting rights, they make it more difficult for ordinary citizens living throughout the United States to be heard in the halls of power, the media, and public squares.[157] Citizenship and the guarantee of republican government include the ability to live in various states and be treated as political equals.[158] Meaningful participation is an indispensable part of citizenship, including the ability to support candidates and sway the electorate.

Political communications sway the public and help to influence elections—what other reasons would candidates have for high volume advertising, speechifying, and door-to-door stumping—and legitimate limits can be made to preserve the personal right of each voter to be an equal in the elective process. Rather than categorizing campaign contributions to be the principal value at stake, in *McCutcheon*, the Court should have evaluated whether statutory aggregation limits were narrowly designed to meet general, political, and expressive welfare; how close a fit the scheme was to that goal; whether equal representative governance

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[157] *See Dollars and Sense: How Undisclosed Money and Post-*McCutcheon *Campaign Finance Will Affect the 2014 Election and Beyond: Hearing Before the S. Comm. on Rules and Admin*., 113th Cong. 476–91 (2014) (statement of Liz Kennedy, Counsel, Demos); Robert Reich, *The Most Brazen Invitation to Oligarchy in Supreme Court History*, BERKELEY BLOG: POL. & L. (Apr. 2, 2014), http://blogs.berkeley.edu/2014/04/02/robert-reich-the-most-brazen-invitation-to-oligarchy-in-supreme-court-history/comment-page-1/ [http://perma.cc/UFU4-CC66].

[158] *See* Mobile v. Bolden, 446 U.S. 55, 77 (1980) (plurality opinion) ("[T]he Equal Protection Clause confers a substantive right to participate in elections on an equal basis with other qualified voters.").

offered competing, systemic, electoral interests that were of countervailing importance; and whether it was possible to achieve that end with a more narrow piece of legislation, such as one only barring quid pro quo contributions.

Justice Breyer, writing for the dissent, asserted a broader perspective on campaign financing reforms and their emanation from the First Amendment. Corruption, he explained, was anything that "cuts the link between political thought and political action."[159] Rather than picking and choosing from various strands of past Supreme Court cases, in the manner of the plurality, the dissent averred to the broad interest of ending any form of corruption against "the integrity of our public governmental institutions."[160] This is a far more multidimensional framework than the plurality's. The dissent relied on a balancing test along the lines proposed in Part II of this Article. Justice Breyer demonstrated historical, structural, and normative concerns about corruption and the appearance of corruption, which "are more than ordinary factors to be weighed against the constitutional right to political speech."[161]

Justice Breyer's dissent might have been even more robust had he examined the diffuse, penumbral principle against corruption, which strengthens a variety of other constitutional values—such as fairness, equality, administration of law, republicanism, and departmental responsibility—which factor into the structure of the Constitution. Campaign finance laws are tied to the government's duty to preserve electoral integrity,[162] which is intrinsic to representative democracy.[163] Reasonable limits on aggregate contributions can advance effective participation in democracy by safeguarding the people's ability to engage in free political discussions and inform the government of their preferences.[164] Aggregation limits on total contributions to all candidates and action committees were designed to preserve the people's "opportunity for free political discussion,"[165] which is constitutionally essential for the multifactoral role of free speech in a republic of civic equals. Maintaining parity in the ability of people to influence politicians and fellow citizens

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[159] *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting).

[160] *Id.*

[161] *Id.* at 1468.

[162] *See* Reynolds v. Sims, 377 U.S. 533, 558 (1964) (discussing the government's obligation to ensure "one person, one vote" (quoting Gray v. Sanders, 372 U.S. 368, 381 (1963))).

[163] *See* ROBERT C. POST, CITIZENS DIVIDED 86–87 (2014).

[164] *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (asserting that free speech is essential to democracy).

[165] Stromberg v. California, 283 U.S. 359, 369 (1931).

advances the personal right to engage in public deliberations and the public's right to hold politicians accountable for the general welfare.

B. Commercial Speech

With the brief space I have remaining, I wish to demonstrate the applicability of the multifactoral approach to a different aspect of communication than political information: transactional commercial speech. I only briefly sketch the argument here and will return to it in future scholarship.

We have already seen in the context of campaign finance that the Court relies on intermediate scrutiny to analyze the constitutionality of limitations on commercial speech.[166] The Supreme Court established the commercial speech doctrine forty years ago.[167] That redirection was a departure from the Court's earlier decision from the World War II era.[168] After 1976, the Court began to apply First Amendment protections to commercial speech. The Court regarded the decision to apply First Amendment scrutiny to nonmisleading and legal commercial speech to be an anti-paternalistic turn that would enable consumers to benefit from the free exchange of ideas.[169] The four-part intermediate scrutiny test for evaluating commercial speech cases appeared in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[170] The test differs from the more rigorous strict scrutiny standard used in noncommercial content discrimination cases.[171] *Central Hudson* requires proof of an important, rather than a compelling government interest,[172] and even though both of those methods require narrow tailoring, the Court is more deferential in matters of commercial speech, requiring the regulation to have a "reasonable" and proportional fit with the government aims.[173] Several subsequent opinions have demonstrated an increasing skepticism about governmental rationalizations for regulating commercial speech.[174]

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[166] *See supra* note 75 and accompanying text.

[167] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumers Council, Inc., 425 U.S. 748, 761–70 (1976).

[168] *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

[169] *See Va. State Bd. of Pharmacy*, 425 U.S. at 770.

[170] 447 U.S. 557, 566 (1980).

[171] *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015) (discussing the strict scrutiny standard for content-based speech).

[172] *Central Hudson*, 447 U.S. at 564.

[173] Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989).

[174] *See, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 373–74 (2002); Rubin v. Coors Brewing Co., 514 U.S. 476, 490–91 (1995).

In its most recent pronouncement in this area, the Court signaled a willingness to at least consider moving toward a more rigorous test that would increasingly favor commercial advertisers. In *Sorrell v. IMS Health Inc.*, data miners and pharmaceutical manufacturers successfully challenged the constitutionality of a Vermont law prohibiting the nonconsensual "s[ale], license, or exchange for value" of pharmacy records to pharmaceutical manufacturers and marketers to be used for the promotion and marketing of prescription drugs.[175] The Court held that the marketing of such data was a form of free expression protected by a heightened standard of judicial scrutiny.[176] Justice Kennedy, writing for the majority, proclaimed the restriction to be based on content and viewpoint biases against those who promote brand name drugs.[177]

Like so many cases in the free speech field, *Sorrell* is filled with discussions of judicially created doctrines with short shrift given to any other constitutional factors. From the outside, it simply looks as if the Court picks and chooses precedents to justify its conclusion with little effort made to reflect on the multiple factors, besides the dissemination of information, involved in pharmaceutical companies' purchasing of private information to increase profits, improve products, and deliver a publicly beneficial service. There is no talk, for instance, of relying on federalism analysis to parse statutory reasoning and no credence given to the possibility that the people, through their representatives, might have used state legislative means to manage the balance between privacy and scientific advancement. While the Court speaks fervently against legislative overreaching, it consolidates its institutional power and stifles state efforts to represent the interests of the people through commercial regulation: it alone is the interpreter of the Constitution, empowered to strike state efforts to protect residents against cynical commercial efforts to manipulate physicians' prescription decisions. The majority wields the power of creating free speech doctrine, dismissively giving inadequate attention to the states' powers to regulate manipulative advertisement, public health, and private data.

CONCLUSION

Free speech is an indispensable right of representative democracy. It is essential for furthering self-government, individual autonomy, and the marketplace of ideas. Put more succinctly, the First Amendment protects

[175] 131 S. Ct. 2653, 2659–61 (2011).
[176] *Id.* at 2659.
[177] *Id.* at 2663.

the liberty rights of persons to express themselves as equals for the common, social benefit. However, it is not a value that stands alone and certainly not a norm that should be opportunistically harnessed in conformance to ideological judicial leanings. Cases testing the regulation of speech should more thoroughly balance competing values to determine the relevant factors for treating seriously the interests of litigants and public policies.