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Derigan Silver & Dan V. Kozlowski

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PRESERVING THE LAW'S COHERENCE: CITIZENS UNITED V. FEC AND STARE DECISIS

DERIGAN SILVER^{*}
DAN V. KOZLOWSKI^{**}

In addition to striking down the portions of the Bipartisan Campaign Reform Act that limited the amount of money corporations and unions could spend on independent expenditures, Citizens United v. FEC overturned two decisions of the Supreme Court of the United States, an action that stands in contrast to the principle of stare decisis. This article analyzes the discussions of stare decisis in the various Citizens United opinions and compares these discussions to existing scholarly debate on the proper role of stare decisis in constitutional law. It also examines citations and discussions of Citizens United in state supreme court and federal circuit court of appeals cases to analyze how the justices' discussions of stare decisis in Citizens United have influenced lower courts. The article concludes that the Citizens United opinions that discussed stare decisis — particularly Justice Anthony Kennedy's majority opinion and Chief Justice John Roberts' concurrence — are highly problematic for a number of reasons. The applications of stare decisis in the opinions were also flawed. Citizens United has thus made it even easier for lower courts to abandon stare decisis and overturn precedent.

“Abrogating the errant precedent, rather than reaffirming or extending it, might better preserve the law’s coherence and curtail the precedent’s disruptive effects.”¹

^{*}Associate Professor, Department of Media, Film and Journalism Studies, University of Denver

^{**}Associate Professor, Department of Communication, Saint Louis University

¹Citizens United v. FEC, 558 U.S. 310, 378-79 (2010) (Roberts, C.J., concurring).

“In the end, the Court’s rejection of *Austin* and *McConnell* comes down to nothing more than its disagreement with their results. . . . The only relevant thing that has changed . . . is the composition of this Court.”²

The landmark decision of the Supreme Court of the United States in *Citizens United v. Federal Elections Commission*³ has generated considerable debate in news media⁴ and in legal⁵ and political circles,⁶ including criticism from President Barack Obama during his 2010 State of the Union Address.⁷ Much of the debate about the decision has focused either on the majority’s so-called First Amendment “absolutist”⁸ approach that granted corporations the right to independently spend unlimited sums of money to support or oppose candidates for political office or the effect the decision would have on campaign finance law and

²*Id.* at 414 (Stevens, J., dissenting).

³*Id.* at 310.

⁴See, e.g., Jess Bravin, *Court Kills Limits on Corporate Politicking*, WALL ST. J., Jan. 22, 2010, at A1; Editorial, *The Court’s Blow to Democracy*, N.Y. TIMES, Jan. 22, 2010, at A30; Editorial, *A Free Speech Landmark: Campaign-Finance Reform Meets the Constitution*, WALL ST. J., Jan. 22, 2010, at A18; Adam Liptak, *Justices Overturn Key Campaign Limits*, N.Y. TIMES, Jan. 22, 2010, at A1.

⁵See, e.g., LAWRENCE LESSIG, *REPUBLIC LOST: THE CORRUPTION OF EQUALITY AND THE STEPS TO END IT* (2015); ROBERT POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* (2014); Floyd Abrams, Symposium: *Address: Protecting the Heart of the First Amendment, Defending Citizens United*, 9 FIRST AMEND. L. REV. 193 (2011); James Bopp Jr., Joseph E. La Rue & Elizabeth M. Kosel, *The Game Changer: Citizens United’s Impact on Campaign Finance Law in General and Corporate Political Speech in Particular*, 9 FIRST AMEND. L. REV. 257 (2011); James Bopp Jr. & Kaylan Lytle Phillips, *The Limits of Citizens United v. Federal Election Commission: Analytical and Practical Reasons Why the Sky Is Not Falling*, 46 U.S.F. L. REV. 281 (2011); Saby Ghoshray, *Examining Citizens United’s Expansive Reach: Looking Through the Lens of Marketplace of Ideas and Corporate Personhood*, 57 WAYNE L. REV. 373 (2011); Larry Howell, *Once Upon a Time in the West: Citizens United, Caperton, and the War of the Copper Kings*, 73 MONT. L. REV. 25 (2012); Robert L. Kerr, *What Justice Powell and Adam Smith Could Have Told the Citizens United Majority About Other People’s Money*, 9 FIRST AMEND. L. REV. 211 (2011); Joanna M. Meyer, *The Real Error in Citizens United*, 69 WASH. & LEE L. REV. 2171 (2012); Joseph F. Morrissey, *A Contractarian Critique of Citizens United*, 15 U. PA. J. CONST. L. 765 (2013); Robert Sprague & Mary Ellen Wells, *The Supreme Court as Prometheus: Breathing Life into the Corporate Supercitizen*, 49 AM. BUS. L. J. 507 (2012).

⁶See, e.g., Liptak, *supra* note 4 (quoting Senate Minority Leader Mitch McConnell of Kentucky as supporting the opinion).

⁷President Barack Obama famously took the unusual step of criticizing the Supreme Court’s decision during his 2010 State of the Union Address while members of the Court were in attendance. See Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. TIMES, Jan. 28, 2010, at A12 (noting that while it “is not unusual for presidents to disagree publicly with Supreme Court decisions . . . they tend to do so at news conferences and in written statements, not to the justices’ faces”).

⁸See Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 582 (2011) (contending the Court’s opinion “trumpet[ed] an absolutist vision of the First Amendment”).

the democratic process.⁹ Less discussed is that in addition to striking down the portions of the Bipartisan Campaign Reform Act¹⁰ that limited the amount of money corporations and unions could spend on so-called “independent expenditures,” the *Citizens United* majority overturned two Supreme Court decisions, 1990’s *Austin v. Michigan Chamber of Commerce*¹¹ and 2003’s *McConnell v. FEC*.¹²

In *Austin*, a 6–3 majority upheld sections of the Michigan Campaign Finance Act that “prohibited corporations from using corporate treasury funds for independent expenditures.”¹³ *McConnell* extended the limits in question in *Austin* to labor unions and to a broader set of election-related television and radio broadcasts referred to as “electioneering communications.” In *McConnell*, a 5–4 majority of the Court upheld portions of the BCRA and reaffirmed *Austin*.¹⁴

Thus, in *Citizens United*, the Supreme Court overruled two constitutional precedents that blocked the majority’s desired policy preference with one fell swoop, an action that stands in contrast to the principle of *stare decisis*: “The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.”¹⁵ The Court’s action regarding *stare decisis* was important enough that three opinions in *Citizens United* — Justice Anthony Kennedy’s for the Court,¹⁶ Chief Justice John Roberts’ concurrence for himself and Justice Samuel Alito,¹⁷ and Justice John Paul Stephens’ dissent¹⁸ — all discussed the proper role of *stare decisis* in judicial decision-making. Despite the wealth of material that has been written about *Citizens United*, however, these passages and their influence on lower courts have “not been the subject of scholarly scrutiny.”¹⁹

⁹See, e.g., Ellen L. Weintraub & Alex Tausanovitch, *Reflections on Campaign Finance and the 2012 Election*, 49 WILLAMETTE L. REV. 541 (2013).

¹⁰Bipartisan Campaign Reform Act of 2002 § 101, 2 U.S.C. § 441i(a) (2000 & Supp. V 2005).

¹¹494 U.S. 652 (1990).

¹²540 U.S. 93 (2003).

¹³*Austin*, 494 U.S. at 654.

¹⁴540 U.S. at 233. As discussed below, enacted in 2002, the BCRA was designed to close loopholes in existing campaign finance law.

¹⁵BLACK’S LAW DICTIONARY 1441 (9th ed. 2009).

¹⁶*Citizens United v. FEC*, 558 U.S. 310, 362–66 (2010).

¹⁷*Id.* at 377–85 (Roberts, C.J., concurring).

¹⁸*Id.* at 408–14 (Stephens, J., dissenting).

¹⁹Steven J. Burton, Essay: *The Conflict Between Stare Decisis and Overruling in Constitutional Adjudication*, 35 CARDOZO L. REV. 1687, 1687–88 (2014). *But see*, Ilya Shapiro & Nicholas M. Mosvick, *Stare Decisis After Citizens United: When Should Courts Overturn Precedent*, 16 NEXUS J.L. & PUB. POLY 121 (2011). One of the few articles to discuss *Citizens United* and *stare decisis* is largely a summary of the case written by two scholars affiliated with the Cato Institute. The conclusion the authors come to is that because *Austin* was decided in error, it should have been overturned.

Lower courts have wrestled with how the Court's *Citizen United* decision changes campaign finance regulation, and academics have tackled that issue, too. In addition, however, lower courts have also pointed to a different consequence of *Citizens United* — how the Court's decision influences the judiciary's understanding of the legal doctrine of *stare decisis*. And that consequence has received scant scholarly attention.

The purpose of this article is twofold. First, it analyzes the justices' discussions of *stare decisis* in *Citizens United* and compares these discussions to existing scholarly debate on the proper role of *stare decisis* in constitutional law. Second, it examines citations and discussions of *Citizens United* in state supreme court and federal circuit court of appeals cases to analyze how the justices' discussions of *stare decisis* in *Citizens United* have influenced lower courts. Although many scholars predicted the case would have significant ramifications on campaign finance law in lower courts — for example, one scholar wrote that “the capacious rhetoric in *Citizens United* [would] lead lower courts astray, as they [took] the Court's reasoning and *dicta* . . . as directions for how to resolve other campaign finance cases”²⁰ — this article contends that *Citizens United's* impact on lower courts will reach far beyond campaign finance cases. Already a sizeable amount of discussion in non-campaign finance lower court opinions exists about the *Citizens United* Court's approach to *stare decisis*. The Supreme Court's campaign finance law jurisprudence also presents an especially good lens through which to examine the Court's approach to *stare decisis* because of the volatility of the Court's decisions in that area of law. As one scholar wrote, “Campaign finance jurisprudence has swung like a pendulum . . . as the Court personnel changed and Justices (occasionally) voted inconsistently.”²¹

The article concludes that the *Citizens United* opinions that discussed *stare decisis* — particularly Justice Kennedy's majority opinion and Chief Justice Roberts' concurrence — are problematic for a number of reasons. First, many of the arguments advanced in the two opinions are either relatively new additions to established *stare decisis* doctrine or are completely novel. While the Court, as the final arbiter of constitutional interpretation, certainly has the power to create additions to the

This is unsurprising as the Cato Institute filed an amicus brief with the Supreme Court arguing that *Austin* should be overturned because it was decided in error. See Supplemental Brief for Cato Institute as Amicus Curiae Supporting Appellant at 16-17, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-205) (“[B]oth [*Austin* and *McConnell*] have had a chilling effect on the exercise of the constitutional right to freedom of speech.”) (citation omitted).

²⁰Hasen, *supra* note 8 at 584–85.

²¹*Id.* at 586. Professor Hasen notes that Justice Sandra Day O'Connor changed her position on spending limits imposed on corporations three times while on the Court. *Id.* at 586 n.24.

already copious considerations that are part of the *stare decisis* calculus, this article contends that new additions simply weaken the doctrine more and risk rendering it meaningless. While *stare decisis*, like most legal reasoning contained in Supreme Court opinions, is a tool that can be used by justices to justify their decisions *ex post facto*, *stare decisis* is a tool tasked with a dual purpose: It not only allows judges to reach their policy preferences, but it also does that while constraining judicial behavior and reinforcing the public's belief in an apolitical judiciary. *Stare decisis*, in theory, constrains judicial behavior by forcing judges to follow earlier decisions involving similar points of law. *Stare decisis*, in other words, limits the ability of judges to enact personal policy preferences *and* reinforces the illusion that judges are not simply putting their policy preferences into place. In this way, *stare decisis* is a special tool that both constrains the Court and helps to legitimize the Court and its decisions.

Second, when Justice Kennedy's majority opinion and Chief Justice Roberts' concurrence stuck to previously established criteria for "principally" overturning precedent,²² their reasoning was arguably flawed. Because of this, their "principled" calculations for overturning *Austin* and *McConnell* instead read as pretext intended to mask their fundamental motivation for overturning those cases: They did not like them. Such an approach is hardly principled.

Third, for multiple reasons *Citizens United* has made it even easier for lower courts to abandon *stare decisis* and overturn precedent. In sum, *Citizens United* did little to preserve the law's coherence and even less to preserve the public's faith in an apolitical judiciary that respects precedent. Because *stare decisis* contributes to stability, predictability, and, most importantly, constrains judicial behavior and reinforces the illusion of impartial judging, this article ultimately contends that the Court should be more cautious and mindful when overturning precedent than it was in *Citizens United* and should focus on legal factors other than simply whether a current majority agrees with a past decision.

The article begins with a discussion of *stare decisis*, examining the doctrine's history and role in constitutional adjudication and reviewing previous literature on the doctrine. The focus of this section of the article is on "horizontal" *stare decisis* — the respect one court gives its own precedents — in general and on constitutional horizontal *stare decisis*

²²See *infra* notes 65–86 and accompanying text. Scholars and jurists contend that while the Supreme Court technically has unlimited discretion to overrule its own opinions, it should consider listed factors when exercising this discretion to preserve the integrity of *stare decisis* and the institutional legitimacy of the Court itself. Because the Court has a special burden when overruling precedent, it should be done only when certain conditions are met. As discussed below, what these conditions are and how much each contributes to the calculation remains the subject of a great deal of debate.

in particular.²³ The article then provides a brief overview of campaign finance law and situates *Citizens United* in the Supreme Court's jurisprudence. It then examines the *Citizens United* decision, focusing on the discussion of *stare decisis* in the three opinions mentioned above. Next, it examines state supreme court and federal circuit court of appeals cases that have invoked *Citizens United* in discussions of *stare decisis*. Finally, the article concludes with a discussion of the proper role of *stare decisis* in constitutional adjudication.

STARE DECISIS

Studies suggest that precedent is the "primary justification [Supreme Court] justices provide for decisions they reach."²⁴ For example, a 1991 study found that more than 80% of constitutional arguments raised in majority opinions written by Justices William Brennan and William Rehnquist were based on precedent.²⁵ Additionally, justices are typically reluctant to overturn previous Supreme Court decisions. Between 1953 and 2000, the Supreme Court of the United States expressly overruled its own precedents only 128 times.²⁶ Long before *Citizens United*, however, it was clear that *stare decisis* did not always win the day.

A court's duty to rely on precedent inherently challenges the law's ability to respond to social change. Thus, scholars agree that *stare decisis* is a guide, not a rule, especially when considering constitutional law. Professor Philip P. Frickly wrote:

It is well established that, both because constitutional law is thought to be a living instrument of public policy adaptable to changing circumstances

²³Statutory *stare decisis* is generally treated differently from constitutional *stare decisis* and has its own scholarly corpus. See, e.g., William N. Eskridge Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988); Lawrence C. Marshall, *Contempt of Congress: A Reply to the Critics of an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 2467 (1990).

²⁴Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 AMERICAN J. OF POL. SCI. 971, 972 (1996).

²⁵Glenn A. Phelps & John B. Gates, *The Myth of Jurisprudence*, 31 SANTA CLARA L. REV. 597, 594 (1991).

²⁶JEFFERY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 83 (2002). While the Supreme Court has been reluctant to expressly overrule prior decisions, in a great many instances an overruling can be deduced from the principles of related cases. Obviously, this leaves some ambiguity as to what constitutes an "overruling," and there is a chance for a difference of opinion. Any listing of overrulings will reflect this. For example, the U.S. Government Publishing Office lists 210 examples of the Supreme Court overruling a precedent either expressly or otherwise between 1810 and 1992. See *Supreme Court Decisions Overruled by Subsequent Decisions*, <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-13.pdf> (last visited June 2, 2015).

and because no practical method other than judicial overruling exists to modify erroneous or obsolete constitutional decisions, *stare decisis* is not a strict command in constitutional cases.²⁷

Thus, the duty to follow precedent sometimes gives way to a court's power to overrule. As one scholar noted, however, "When this should happen . . . is a mystery."²⁸ Critics contend the doctrine is "merely one of convenience."²⁹ Perhaps because of this, there is a great deal of scholarship focusing on *stare decisis* and the Supreme Court's incoherent philosophy when it comes to applying the doctrine.

Stare decisis has a long tradition in common law courts. The maxim *stare decisis et non quieta movere*³⁰ emerged in the early development of English common law.³¹ In the eighteenth century, English courts began to develop a "qualified obligation" to follow previous decisions following an era in which previous decisions were not considered binding.³² Common law judges, although not bound by previous decisions, were expected to at least articulate justifications for setting aside previous decisions. William Blackstone, the famed English jurist, was one of the earliest authorities to discuss the role of precedents.³³ In his influential *Commentaries*, Blackstone wrote, "For it is an established rule to abide by former precedents, where the same points come again in litigation."³⁴ Blackstone's reasons to support the policy are similar to arguments frequently used by modern courts. Blackstone wrote that adherence to precedent preserves the integrity of the courts and provides stability when new judges consider similar cases.³⁵ Blackstone, however, also advocated against blind adherence to precedent. Framing it in the positivist language of the time, Blackstone wrote that because judges "discovered law," it was possible that "it sometimes may happen that the

²⁷Philip P. Frickey, *Stare Decisis in Constitutional Cases: Reconsidering National League of Cities*, 2 CONST. COMMENT. 123, 127 (1985).

²⁸Burton, *supra* note 19, at 1687–88.

²⁹Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402 (1988).

³⁰See Stanley Forman Reed, *Stare Decisis and Constitutional Law*, 35 PA. B. A. Q. 132, 132 (1938) (defining *stare decisis* as "stand by the precedent and do not disturb the calm.")

³¹*Id.*

³²Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 661 (1999). In the early Eighteenth Century, under the "declaratory theory" of law, "ideal" law existed before any judicial decision and judges simply "declared" what the law was. Therefore, if a previous decision was wrong, there was no reason to overrule it since it was not "the law." *Id.* at 660.

³³*Id.* at 661.

³⁴1 WILLIAM BLACKSTONE, COMMENTARIES 69.

³⁵*Id.*

judge may mistake the law.”³⁶ By the end of the eighteenth century, then, English courts had firmly established the doctrine of *stare decisis*,³⁷ and there is evidence the framers of the U.S. Constitution believed federal courts would also be bound by the doctrine.

In *Federalist No. 78*, for instance, Alexander Hamilton argued that courts should be bound by strict rules and precedents to define their duty “in every particular case that comes before them” in order to “avoid arbitrary discretion in the courts.”³⁸ However, this apparent absolute support for *stare decisis* must be taken in context. *Federalist No. 78* was not primarily a discussion of the doctrine and, as other authors have noted, it is not clear if Hamilton was addressing horizontal or vertical *stare decisis*³⁹ or if he thought the Supreme Court would have the power to overrule its own precedents.⁴⁰ James Madison advocated for a *stare decisis* doctrine with limits that was “tempered by countervailing policies and exceptions.”⁴¹ According to Professor William S. Consovoy, Madison believed that when a past precedent contained a clear error, it should be overruled.⁴² Unfortunately, as Professor Thomas R. Lee noted, while Madison’s discussion of *stare decisis* was deeper than Hamilton’s, he failed to articulate his understanding of proper exceptions to the rule.⁴³ In addition, some authors have argued that it was not clear from the framers if *stare decisis* would be applied to constitutional law.⁴⁴ Regardless, most scholars agree that while there was a certain degree of difference among the framers as to the extent to which *stare decisis* should be

³⁶*Id.* at 71. As one author wrote, Blackstone’s conceptualization “seems to chart a compromise course between the classic adoption of the declaratory theory and a strict notion of *stare decisis*.” Lee, *supra* note 32, at 662. As a believer in the declaratory theory of law, Blackstone said precedent should be overturned when it was determined the law was contrary to reason or divine law. In his own words, such a precedent “was not bad law . . . it was not law; that it is not the established custom of the realm, as had been erroneously determined.” Blackstone, *supra* note 34, at 70. Professor Thomas R. Lee has accurately described this as a “relatively straightforward” yet “rule-swallowing” exception to following precedent. Lee, *supra* note 32, at 662.

³⁷See Robert A. Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which it Should be Followed*, 31 A.B.A. J. 501, 502 (1945).

³⁸THE FEDERALIST NO. 78 407 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

³⁹See William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson, and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 68 (2002).

⁴⁰See Lee, *supra* note 32, at 663–64.

⁴¹*Id.* (citing Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), reprinted in THE MIND OF THE FOUNDER: SOURCES OF POLITICAL THOUGHT OF JAMES MADISON 391 (Marvin Myers ed., revised ed. 1981)).

⁴²Consovy, *supra* note 39, at 68. According to Professor Consovoy, it is possible no theory of *stare decisis* has ever been absolute and all have contained a “clear error” exception.

⁴³Lee, *supra* note 32, at 665.

⁴⁴See BENJAMIN N. CARDOZA, THE NATURE OF THE JUDICIAL PROCESS 15–16 (1928).

binding on a court's decision, all agreed it was necessary to some degree and that it should be abandoned under some circumstances.⁴⁵

The Supreme Court first began to discuss the proper role of precedent during the Marshall Court.⁴⁶ Scholars generally agree that the Marshall Court overturned precedent in three decisions: *Hudson v. Gustier*,⁴⁷ *Gordon v. Ogden*,⁴⁸ and *Green v. Neal's Lessee*⁴⁹—none of which dealt with a constitutional issue. The Court did not begin to grapple with constitutional *stare decisis* until the post-Civil War era in a series of cases dealing with the federal government's power to issue legal tender.⁵⁰ In *Hepburn v. Griswold*,⁵¹ the Court ruled that a statute authorizing the federal government to issue note money was unconstitutional. The Court held the statute exceeded the power of Congress under Article I of the Constitution.⁵² After two new justices were appointed,⁵³ the Court heard *Knox v. Lee* and *Parker v. Davis* in 1871. Known as the "Legal Tender Cases,"⁵⁴ *Knox* and *Parker* dealt with the same issue as *Hepburn*. And in *Knox* and *Parker*, the Court overruled *Hepburn* and held that the Legal Tender Act did not violate Article I of the Constitution. Rather than offer a lengthy discussion explaining its overruling of the case, the Court in the "Legal Tender Cases" simply reasoned the *Hepburn* Court was wrong.⁵⁵ Of course the most famous example of the Supreme Court overruling a constitutional precedent is undoubtedly *Brown v. Board of Education*,⁵⁶ which overturned *Plessy v. Ferguson's*⁵⁷ separate but equal rule. These few cases were the exception rather than the rule,

⁴⁵See Consovoy, *supra* note 39, at 67. See also, Lee, *supra* note 32, at 662-66 for a discussion of early American understanding of the role of precedent.

⁴⁶Prior to the Marshall Court, no Supreme Court opinion overturned precedent or had a serious discussion of *stare decisis*. See Lee, *supra* note 32, at 666. See also, Christopher P. Banks, *The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends*, 75 JUDICATURE 262, 263 (1992) (table showing Supreme Court cases that overturned precedents). During the Marshall Court, discussion of precedent largely happened in *dicta*. See Lee, *supra* note 32, at 666-81 for a lengthy discussion of Chief Justice Marshall's views on precedent.

⁴⁷10 U.S. (6 Cranch) 281 (1810). *Hudson* is the first time the Supreme Court overruled one of its own precedents.

⁴⁸28 U.S. (3 Pet.) 33 (1830).

⁴⁹31 U.S. (6 Pet.) 291 (1832).

⁵⁰See Robert Barnhart, *Note: Principled Pragmatic Stare Decisis in Constitutional Cases*, 80 NOTRE DAME L. REV. 1911, 1914 (2004).

⁵¹75 U.S. (8 Wall) 603 (1869).

⁵²*Id.* at 617-18.

⁵³Justice William Strong and Justice Joseph T. Bradley were appointed in 1870 by President Ulysses S. Grant.

⁵⁴79 U.S. (12 Wall.) 457 (1871).

⁵⁵See Consovoy, *supra* note 39, at 72.

⁵⁶347 U.S. 483 (1954).

⁵⁷163 U.S. 537 (1896).

however. Prior to 1930, the Court rarely overturned precedent.⁵⁸ In the latter half of the twentieth century, however, the Burger, Warren and Rehnquist Courts began to overturn precedent with greater frequency, leading more scholars to comment on the doctrine, its purpose and its proper limitations.

Modern authors typically agree that the major functions of *stare decisis* are to protect the Court's legitimacy by reinforcing the public's opinion of an apolitical judiciary,⁵⁹ to promote important values of the rule of law – fairness, stability, predictability or similar goals⁶⁰ — and to increase judicial efficiency.⁶¹ A recurring argument in the literature is that overruling precedent jeopardizes public support for the Court and the institution's legitimacy. The Supreme Court has praised the doctrine, contending that *stare decisis* is of “fundamental importance to the rule of law”⁶² and promotes “the evenhanded, predictable, and consistent development of legal principles.”⁶³ The Court has also found that *stare decisis* contributes to the “actual and perceived integrity of the judicial process.”⁶⁴

Both jurists and commentators have suggested that the Court's legitimacy can be protected even when overturning precedent, if the Court's decision is “principled,” “pragmatic” or “prudential.”⁶⁵ This approach suggests that while the Supreme Court legally has “unbridled discretion to overrule, [it] should consider listed factors when exercising this discretion.”⁶⁶ While opinions about the correct limits of precedent vary, there are some general points of agreement.⁶⁷ First, some authors suggest that cases that do not themselves follow precedent have fewer claims to protection under *stare decisis*.⁶⁸ Second, older precedents are

⁵⁸See Banks, *supra* note 46, at 264.

⁵⁹See Frickey, *supra* note 27, at 127. See also, Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 334 (1944) (discussing the important role *stare decisis* plays in legitimizing judicial review).

⁶⁰See, Burton, *supra* note 19, at 1688 (writing, “*Stare decisis* fosters unity, stability, and equality over time”); James C. Rehnquist, *The Power that Shall be Vested in Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B. U. L. REV. 345, 348 (1986).

⁶¹See Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63 (1989).

⁶²Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 494 (1987).

⁶³Payne v. Tennessee, 501 U.S. 808, 827 (1991).

⁶⁴*Id.*

⁶⁵Because the Court has a “special burden” when overruling precedent, it should be done only when certain conditions are met. *Planned Parenthood of SE. Pa. v. Casey*, 505 U.S. 833, 854-55 (1992) (plurality opinion).

⁶⁶Burton, *supra* note 19, at 1693.

⁶⁷Numerous reasons have been put forward as to why a precedent should be overturned. Scholars and courts cannot agree on the correct number of factors in the *stare decisis* calculus much less how those factors should be applied or weighted.

⁶⁸See, e.g., Frickey, *supra* note 27, at 129 (writing *National League of Cities v. Usery*, 426 U.S. 833 (1976) “has little claim to the protection of *stare decisis* having itself given

entitled to more protection than newer ones.⁶⁹ Third, overruling precedent, some argue, is appropriate when lower courts have demonstrated difficulties in applying the precedent.⁷⁰ Fourth, overruling is appropriate when there is inconsistency between the challenged precedent and subsequent rulings⁷¹ or when changes in the law have left “the old rule no more than a remnant of abandoned doctrine.”⁷² Fifth, overruling is not appropriate when the precedent is subject to a reliance that would create a “special hardship” to those who do rely upon it,⁷³ but overruling is principled when conditions have changed so that individuals no longer rely upon the precedent.⁷⁴

Finally, and perhaps most amorphously, scholars and judges contend that overruling a precedent is appropriate when the challenged decision was simply “wrong” from the start.⁷⁵ Unsurprisingly, this factor has received the greatest criticism and there is disagreement over whether it is even proper to consider it a factor. Professor Randy J. Kozel, for example, has contended that the “badly or poorly reasoned” argument is the trigger that begins a *stare decisis* analysis rather than a factor that should be considered when overturning a precedent.⁷⁶ Professor Steven J. Burton correctly contends that the ability to overrule a “mistake” grants courts the greatest leeway to overrule a precedent. As Professor Burton noted, it simply requires that a majority of the current court dislikes the precedent in question.⁷⁷ According to Professor Kozell, this was clearly the approach Justice Kennedy and Chief Justice Roberts took in *Citizens United*.⁷⁸ There is also debate about whether the “degree of wrongness” should enter the equation. Under this theory, while some precedents are merely debatable, others are “flat-out wrong.”⁷⁹

little respect to precedent”); Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 440 (2010) (“If a precedent represents a break from the cases that came before it, it tends to receive diminished *stare decisis* effect.”).

⁶⁹See Kozel, *supra* note 68, at 430.

⁷⁰See *id.* at 421–25. See also Burton, *supra* note 19, at 1693–94; Frickey, *supra* note 27, at 70.

⁷¹See Frickey, *supra* note 27, at 70. Professor Kozel has described a similar approach as “evolving understandings.” He writes, “A common feature of *stare decisis* debates is an assessment of the world *now* versus the time the precedent was *decided*.” Kozel, *supra* note 68, at 426.

⁷²Burton, *supra* note 19, at 1694. See also Kozel, *supra* note 68, at 433.

⁷³Burton, *supra* note 19, at 1694.

⁷⁴See Frickey, *supra* note 27, at 70.

⁷⁵See *id.*

⁷⁶Kozel, *supra* note 68, at 418.

⁷⁷Burton, *supra* note 19, at 1690.

⁷⁸Kozel, *supra* note 68, at 417.

⁷⁹*Id.* at 418–21 (discussing the “degree of wrongness theory” and inherent problems in using this theory to determine when a precedent should be overturned).

In addition to these general principles, the Supreme Court has stated that precedent carries less weight in constitutional cases than in statutory cases or cases dealing with property and contract rights.⁸⁰ In a frequently cited passage found in a dissenting opinion in *Burnet Colorado Oil and Gas Co.*,⁸¹ Justice Louis Brandeis articulated why *stare decisis* should be relaxed in constitutional adjudication. Justice Brandeis reasoned that because the Supreme Court is the ultimate arbiter of the Constitution, Congress is unable to statutorily overrule the Court's decisions. Without this backstop of legislative action, and absent a constitutional amendment, incorrect doctrine could never be changed if the Court strictly followed *stare decisis* in constitutional cases. Justice Brandeis wrote:

Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution where correction through legislative action is practically impossible, this Court has often overruled its previous decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.⁸²

While other authors have argued that the difficulty of responding to Supreme Court action is exaggerated,⁸³ most agree that constitutional *stare decisis* should be treated differently. Some authors, however, have suggested that some constitutional precedents have reached the status of "superprecedent" or even "super-duper precedent" and deserve

⁸⁰*Id.* at 445; Rehnquist, *supra* note 60, at 346.

⁸¹285 U.S. 393 (1931).

⁸²*Id.* at 406–10 (footnotes and citations omitted).

⁸³See, e.g., Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 468-72 (1980). Professor Maltz contends that Justice Brandeis's view is oversimplified. Situations, like *Citizens United*, where the Court prohibits a legislative action are very difficult to respond to. However, in cases like *Branzburg v. Hayes*, 408 U.S. 665 (1972), where the Court does not recognize a right, legislatures are free to act to grant that right. In other situations, an amendment to the Constitution is required to "overrule" a Supreme Court decision. There have only been four examples of this happening in the history of the United States: The Eleventh Amendment nullified *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (accepting jurisdiction over suit against a state by a citizen of another state); the Fourteenth Amendment nullified *Scott v. Stanford*, 60 U.S. (19 How.) 393 (1857) (denying states the ability to confer citizenship on blacks); the Sixteenth Amendment nullified *Pollock v. Farmer's Loan and Trust Co.*, 148 U.S. 601 (1895) (invalidating federal income tax); and the Twenty-Sixth Amendment nullified *Oregon v. Mitchell*, 400 U.S. 112 (1970) (holding unconstitutional a federal statute to lower the voting age to eighteen).

extremely deferential treatment by the Court.⁸⁴ Perhaps the greatest example of a superprecedent is *Brown v. Board of Education*.⁸⁵ Even authors who counsel against relying on precedents that they say go against an original understanding of the Constitution hold that *Brown* should not be overturned.⁸⁶

Obviously, there is a great deal of disagreement over what constitutes a principled decision to overturn a precedent. Professor Kozel noted:

[T]he catalog of factors that inform the *stare decisis* inquiry is lengthy and uncertain. . . . The sheer number of these considerations, combined with the fact that the Court often selects a few items from the catalog without explaining how much work is being done by each, makes it difficult even to find a starting point for thinking critically about *stare decisis* as a judicial doctrine.⁸⁷

Perhaps because there is no agreement over the proper list of exceptions to *stare decisis*, much less hard and fast rules about when judges should follow *stare decisis* in constitutional cases, some authors have overtly suggested that the use of precedent is largely subjective and really motivated by political concerns or the desire to see preferred policy outcomes. As Professor Frickey noted, “Every overruling opinion [by the Court] demonstrates the subjective elements of judicial review to some extent.”⁸⁸ Professor Kozel concluded, “[T]he modern doctrine of *stare decisis* is essentially indeterminate. The various factors that drive the doctrine are largely devoid of independent meaning or predictive force.”⁸⁹ Professor Michael Stokes Paulson contended that the Supreme Court’s approach to *stare decisis* is so inconsistent that applying that approach would indicate that the Court did not have to follow its previous cases.⁹⁰ Because the Court incoherently follows some precedents

⁸⁴See Randy E. Barnett, *It’s a Bird, It’s a Plane, No, It’s Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232 (2006); Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 (2006). Superprecedents have also been referred to as “bed rock precedents.” Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173 (2006). The term “superprecedent” first appeared at the confirmation hearings of Chief Justice Roberts. Senator Arlen Specter asked then Judge Roberts if he agreed that some precedents, such as *Roe v. Wade*, 410 U.S. 113 (1973), had become “superprecedents” or “super-duper precedents.” Jeffrey Rosen, *So, Do You Believe in “Superprecedent”?*, N.Y. TIMES, Oct. 30, 2005, at A1.

⁸⁵347 U.S. 483 (1954).

⁸⁶See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

⁸⁷Kozel, *supra* note 68, at 414.

⁸⁸Frickey, *supra* note 27, at 128.

⁸⁹Kozel, *supra* note 68, at 414.

⁹⁰Michael Stokes Paulsen, *Does the Supreme Court’s Current Doctrine of Stare Decisis Require Adherence to the Supreme Court’s Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165 (2008).

while ignoring others, Professor Paulson said that respecting historical *stare decisis* cases only makes sense when the current court agrees with those earlier decisions. Under this analysis, the Court's approach to *stare decisis* does not command the Court to follow its own approach to *stare decisis*. Obviously, these criticisms are only amplified when a recent precedent is overruled only after a change in Court membership. As Professor Christopher P. Banks rather bluntly wrote, "Where to draw the judicial line between whimsical and principled behavior is less than clear if one acknowledges the inherent tendency of judges to manipulate [*stare decisis*] politically."⁹¹

Statistical evidence suggests recent Courts have been overruling precedents at a greater rate than previous Courts.⁹² Both the Warren and Burger Courts were criticized for a willingness to overturn cases that were "wrongly decided."⁹³ In addition, many authors agree that the Rehnquist Court was radical in its approach to *stare decisis*. After the Rehnquist Court overruled a case, one author stated quite simply — and dramatically — "[T]he current Supreme Court does not feel bound by precedent."⁹⁴ Other authors, however, contend this criticism is overblown, and history indicates the Court has frequently reversed precedent when changing majorities reassess old law in new cases.⁹⁵ Thus, from this perspective the Rehnquist Court propensity to overturn precedent had less to do with any inherent respect or lack thereof for *stare decisis* than it did with an emerging conservative block of justices. Professor Banks demonstrated in 1992 that "when the Court's composition changes dramatically in relatively short time spans, periods of increased reversals of prior rulings are likely to result."⁹⁶ While this has led various authors to bemoan a particular Court's lack of respect for precedent, it has led others to criticize the doctrine of *stare decisis* itself.

The doctrine has come under such criticism that some authors suggest abandoning it altogether, particularly in constitutional cases. James

⁹¹Christopher P. Banks, *Reversals of Precedent and Judicial Policy-Making: How Judicial Concepts of Stare Decisis in the U.S. Supreme Court Influence Social Change*, 32 AKRON L. REV. 233, 235 (1999).

⁹²See generally Banks, *supra* note 46 (presenting data and analysis on the frequency with which various Supreme Courts have overturned precedent).

⁹³See Kozell, *supra* note 68, at 445; Maltz, *supra* note 83, at 467 ("It seems fair to say that if a majority of the Warren or Burger Court has considered a case wrongly decided, no constitutional precedent—new or old—has been safe.")

⁹⁴Rehnquist, *supra* note 60, at 345 (contending the opinions in *Garcia v. San Antonio Metropolitan Transit Authority*, which overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), "[C]learly reveal that the current Supreme Court does not feel bound by precedent").

⁹⁵See Banks, *supra* note 46, at 263.

⁹⁶*Id.*

C. Rehnquist wrote that while *stare decisis* had traditionally been viewed as a restraint upon judicial fiat, rejecting the doctrine would not threaten constitutional adjudication because there are other forces that restrain the behavior of the justices.⁹⁷ According to Rehnquist, because justices are rarely replaced more than one at a time, dramatic changes in the Court's personnel — and therefore constitutional doctrine — are infrequent.⁹⁸ In addition, Rehnquist contended that written opinions both put justices “under a critical microscope”⁹⁹ and require them to write for the present and the future.¹⁰⁰ Finally, Rehnquist wrote the Court is not immune to public opinion, which prohibits rule by judicial fiat.¹⁰¹

Many originalist¹⁰² judges and scholars have also taken the position that *stare decisis* is deeply flawed.¹⁰³ Professor Paulson has called *stare decisis* unconstitutional.¹⁰⁴ Professor Gary Lawson argued that “the reasoning of *Marbury v. Madison* [v. *Madison*] thoroughly de-legitimizes precedent,”¹⁰⁵

⁹⁷Rehnquist, *supra* note 60, at 372.

⁹⁸*Id.* Rehnquist noted that most presidents make few appointments to the Supreme Court. George Washington, as the first president, appointed eleven. Franklin Roosevelt appointed seven. Only five other presidents—Andrew Jackson, Abraham Lincoln, William Howard Taft and Dwight D. Eisenhower — had more than four appointments.

⁹⁹*Id.*

¹⁰⁰*Id.* at 373.

¹⁰¹*Id.* For further discussions of the ways public opinion and the other branches of government constrain the Supreme Court, see LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); Robert Lowry Clinton, *Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of Marbury v. Madison*, 38 AM. J. POLI. SCI. 285 (1994); Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437 (2001); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018 (2004).

¹⁰²Originalism holds that judges should interpret the Constitution according to the preference and understanding of those who originally drafted it. Originalists contend that “original intent” or “original meaning” is authoritative and that when interpreting the constitution judges are obligated to follow the intent of the framers. See DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* 2 (2005).

¹⁰³See Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1438-39 (2007) (“Although all theories of constitutional interpretation must confront the issue of *stare decisis*, originalism has generated particular attention given the potential for radical discontinuity between original meaning and current constitutional jurisprudence.”). See also Barnett, *supra* note 84, at 1233 (listing reasons “fearless” originalists reject *stare decisis*); Burton, *supra* note 19, at 1690-93 for a criticism of originalists’ criticism of *stare decisis*.

¹⁰⁴Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2731-34 (2003) (arguing that the doctrine of *stare decisis* is unconstitutional to the extent it has true substantive effect, under the reasoning of *Marbury v. Madison*). See also, Michael Stokes Paulsen, *The Intrinsicly Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2006).

¹⁰⁵Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POLY 23, 28 (1994).

although he later reconsidered his opinion somewhat.¹⁰⁶ The chief complaint of many of these critics appears to be that a precedent that departs from the original meaning of the Constitution is not a correct interpretation of the document itself and therefore was “wrongly decided.”¹⁰⁷ Justice Clarence Thomas, one of the two avowed originalists currently on the Court,¹⁰⁸ however, has contended that precedents interpreting the Twenty-First Amendment are entitled to heightened deference if justices who lived through the ratification process wrote them.¹⁰⁹

Perhaps some of the most critical scholarship on *stare decisis* has originated with attitudinal scholars like Professors Jeffrey A. Segal and Harold J. Spaeth.¹¹⁰ In addition to criticizing the ease with which justices can differentiate a case from a precedent based on fact patterns, Professors Segal and Spaeth contend that justices are overwhelmingly not influenced by landmark precedents with which they disagree.¹¹¹ Using a systematic content analysis of votes and opinions of dissenting Supreme Court justices in landmark cases and their progeny from the Warren Court to 1995, the researchers found that only Justices Potter Stewart and Lewis Powell voted systematically to support *stare decisis* against their desired policy preferences.¹¹² Based on this analysis, they concluded that the vast majority of justices only follow *stare decisis* when it suits their desired policy outcomes—or, put another way, only when they agreed with the original precedent in the first place.

Legal realists similarly contend that when judges include legal rules, theories, and concepts such as *stare decisis* in their decisions, these concepts and rules are used to rationalize decisions, not create them. Legal realism holds that the law is vague, internally inconsistent, and

¹⁰⁶Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007).

¹⁰⁷See, e.g., *Planned Parenthood of SE. Pa. v. Casey*, 505 U.S. 833, 955 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (“It is . . . our duty to reconsider constitutional interpretations that ‘depart from a proper understanding’ of the Constitution.” (citations omitted)).

¹⁰⁸See Antonin Scalia, *Foreword*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 44–45 (Steven G. Calabresi ed., 2007) (writing that Justices Scalia and Thomas are the only two originalists currently on the Supreme Court).

¹⁰⁹*Granholm v. Heald*, 544 U.S. 460, 522 (2005) (Thomas, J., dissenting).

¹¹⁰The attitudinal model of judicial decision-making holds that the personal policy preferences of Supreme Court justices can explain most, if not all, of their decisions. See generally SEGAL & SPAETH, *supra* note 26.

¹¹¹Segal & Spaeth, *supra* note 24, at 971.

¹¹²*Id.* at 984. Segal and Spaeth use the example of Justice Stewart’s votes in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), as examples of a justice changing his vote in response to a clearly established precedent. In *Griswold*, Justice Stewart voted against the creation of a right to privacy and its application to married individuals. In *Eisenstadt* he accepted the right to privacy created by *Griswold* and applied it to unmarried couples. *Id.* at 977.

revisable¹¹³ and rejects the idea of the law as a neutral application of unchanging principles.¹¹⁴ Under this understanding of the legal process, the adherence to precedent advocated by *stare decisis* is not a neutral, mechanical calculation. Justice Oliver Wendell Holmes, an early advocate of legal realism principles, wrote that law was a process of choosing among competing values rather than a neutral application of preexisting rules such as *stare decisis* factors.¹¹⁵ Professor Karl Llewellyn wrote that legal realism recognizes that “the law is in flux” and “moving” and that judges create law.¹¹⁶ Under this view, *stare decisis* does not direct a particular outcome in a case, but rather it is used to support a jurist’s desired outcome. To legal realists, what courts cite as the reason for a decision is actually only the result. Thus, legal realists contend that *stare decisis* is a meaningless doctrine for predicting or guiding judicial decisions.¹¹⁷ Like legal realists, critical legal studies scholars also challenge the idea that the law is an objective endeavor and that legal rules like *stare decisis* independently determine the outcome of cases. Instead, to critical legal scholars “all law is politics.”¹¹⁸

Other professors note that while there is a great deal of inconsistency in how the Court applies *stare decisis* in constitutional cases, the doctrine itself serves important democratic functions and promotes the rule of law and thus must be saved.¹¹⁹ Professor Kozell, for instance, proposes that the *stare decisis* calculus should focus solely on reliance interests.¹²⁰ Such a focus, according to Professor Kozell, would make

¹¹³See Howard Gillman, *What’s Law Got to Do With It? Judicial Behaviorists Test the “Legal Model” of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 468-69 (2001).

¹¹⁴Additionally, long before *Citizens United*, legal realism was concerned with corporate power. Legal realism emerged during the Progressive Era struggles over corporate power and influence in law. Although the movement has its origin in the writings of Justice Oliver Wendell Holmes in the late 1800s, it is more typically associated with the 1920s and the works of Professors Karl Llewellyn. See, e.g., Karl N. Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUMBIA L. REV. 431 (1930). See also JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

¹¹⁵Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457 (1897).

¹¹⁶Karl N. Llewellyn, *Some Realism About Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1237 (1931).

¹¹⁷See Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. OF CONST. L. 155, 156 (2006) (“[L]egal realism rejects the idea that precedent is a source of binding rules as part and parcel of a wholesale rejection of legal formalism.”).

¹¹⁸See, e.g., Peter Gabel, *What it Really Means to Say “Law is Politics”: Political History and Legal Argument in Bush v. Gore*, 67 BROOK. L. REV. 1141, 1143-44 (2002) (discussing *Bush v. Gore* as an example of the political nature of legal decisions); Frank Michelman, *Bringing the Law to Life: A Plea for Disenchantment*, 74 CORNELL L. REV. 256, 256-57 (1989) (advocating viewing law as a form of politics).

¹¹⁹See, e.g., Burton, *supra* note 19, at 1695-98 (discussing problems with unbridled discretion to overrule); *id.* at 1698-1712 (proposing new legal standards for overruling precedent).

¹²⁰Kozell, *supra* note 68, at 452-65.

stare decisis “more predictable, meaningful, and theoretically coherent.”¹²¹ He wrote that the Court should first clear the ground of the existing litany of *stare decisis* considerations in order to construct a new “rigorous and systematic analysis” of reliance issues at stake in a constitutional case.¹²²

After explaining the incoherence of the current approach to *stare decisis*, Professor Paulsen argued in favor of a looser interpretation. While he acknowledged that it would be difficult “to imagine a doctrine of *stare decisis* much looser”¹²³ than the current doctrine, he suggested an approach that would be both simpler and “more honest.”¹²⁴ According to Professor Paulsen, all *stare decisis* boils down to — and should boil down to — is “whether a prior decision (or line of decisions) is right or wrong, on independent interpretive criteria one thinks are correct on grounds other than precedent.”¹²⁵ In other words, even if the Court is unwilling to admit it, Professor Paulsen believes the only factor that truly matters in the *stare decisis* equation is agreement.

These debates about when and how to apply *stare decisis* came to a head in *Citizens United*, when a divided Court overturned two of its precedents and dramatically reshaped the role of corporations in political life.

CAMPAIGN FINANCE LAW PRIOR TO *CITIZENS UNITED*

Modern Supreme Court campaign finance jurisprudence began its twisting road with the Court’s 1976 decision in *Buckley v. Valeo*.¹²⁶ In *Buckley*, the Court considered various¹²⁷ constitutional challenges to the

¹²¹*Id.* at 414.

¹²²*Id.* at 415.

¹²³Paulsen, *supra* note 90, at 1210.

¹²⁴*Id.*

¹²⁵*Id.*

¹²⁶424 U.S. 1 (1976). See Robert L. Kerr, *Naturalizing the Artificial Citizen: Repeating Lochner’s Error in Citizens United v. Federal Election Commission*, 15 COMM. L. & POLY 311, 316-23 (2010) for a broader discussion of campaign finance law and the larger issue of “corporate political media spending” including cases dealing with spending in referendum votes or other ballot measures, such as *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and cases dealing with limits on contributions to or independent expenditures by political action committees.

¹²⁷The plaintiffs included a candidate for President of the United States, a United States senator running for re-election, a potential contributor, the Committee for a Constitutional Presidency – McCarthy ‘76, the Conservative Party of the State of New York, the Mississippi Republican Party, the Libertarian Party, the New York Civil Liberties Union, Inc., the American Conservative Union, the Conservative Victory Fund, and Human Events, Inc. *Id.* at 7–8.

Federal Election Campaign Act of 1971.¹²⁸ In a per curiam opinion, the Court held that campaign contributions could be limited to prevent corruption or the appearance of corruption,¹²⁹ but that spending limits on independent expenditures violated the First Amendment because there was no evidence those limits lead to corruption or the appearance of corruption.¹³⁰ The Court differentiated contributions and expenditures, contending expenditures were more like pure speech. The Court wrote that limits on contributions only marginally restricted First Amendment rights.¹³¹

Then, in 1986, in *FEC v. Massachusetts Citizens for Life Inc.*,¹³² the Court made a distinction between nonprofit ideological corporations and business corporations that are created for the purpose of economic profit.¹³³ The Court ruled that nonprofit ideological corporations that were created for the express purpose of promoting political ideas and neither engage in business activities nor take corporate or labor union money could not be limited in spending their money in candidate elections.¹³⁴

The Court reaffirmed this approach in 1990 in *Austin v. Michigan Chamber of Commerce*.¹³⁵ In that case, the Court considered a Michigan state law that banned business corporations from using general treasury funds for independent expenditures in candidate elections. In a 6-3 decision, the Court upheld the law as constitutional.¹³⁶ Writing for the majority, Justice Thurgood Marshall argued that corporate treasuries represented a threat to candidate elections. He wrote that the law preventing for-profit corporations from participating in candidate elections was justified by “the corrosive and distorting effects of the immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”¹³⁷ Justice Marshall wrote

¹²⁸The act prohibited individuals from contributing more than \$25,000 in a single year or more than \$1,000 to any one candidate for an election campaign or from spending more than \$1,000 a year in favor of or against a clearly identified candidate. *Id.* at 13.

¹²⁹*Id.* at 28–29.

¹³⁰*Id.* at 47–48.

¹³¹*Id.* at 20–21 (“A limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor’s ability to engage in free communication.”).

¹³²479 U.S. 238 (1986).

¹³³*Id.* at 263.

¹³⁴*Id.* The Court created a three-part test to distinguish between ideological nonprofit corporations and business corporations created for economic purposes. *Id.* at 263–64.

¹³⁵494 U.S. 652 (1990).

¹³⁶*Id.* at 656.

¹³⁷*Id.* at 660. These “state-created advantages” included “limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets.” These advantages, according to Justice Thurgood Marshall, allow for-profit corporations to

that the law was thus a narrowly tailored restriction that served the compelling government interest of aiming to root out “corruption in the political arena.”¹³⁸ He wrote, “Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions.”¹³⁹

The Court revisited candidate campaign contributions and expenditures again in 2000, when it decided *Nixon v. Shrink Missouri Government PAC*,¹⁴⁰ a case involving a First Amendment challenge to a \$1,075 contribution limit in Missouri state elections for governor, lieutenant governor, secretary of state, state treasurer, state auditor, or attorney general.¹⁴¹ The Shrink Missouri Government PAC contended that the \$1,075 limit was too low for challengers to mount effective campaigns against incumbents,¹⁴² but the Court upheld the limits as constitutional. Although the limit in *Nixon* was much lower than the one at issue in *Buckley* when considering inflation, the Court ruled limits would only be constitutionally suspect if the “limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless.”¹⁴³

In the 2003 case *McConnell v. FEC*,¹⁴⁴ the Court followed the approach it established in *Austin* in a case involving Congress’s response to concerns about the growth of soft-money contributions,¹⁴⁵ candidate advocacy masquerading as issue advertising, and other practices that had developed to skirt federal election regulations. In addition to limiting soft-money contributions, the Bipartisan Campaign Reform Act of 2002¹⁴⁶ established limits on “electioneering communications.” Under *Buckley*, the Federal Election Campaign Act was interpreted as only applying to “express advocacy,” such as the phrase “Vote for Williams.”¹⁴⁷

“enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders’ investments.” *Id.* at 658–59.

¹³⁸*Id.* at 660.

¹³⁹*Id.*

¹⁴⁰528 U.S. 377 (2000).

¹⁴¹The initial limit set by the statute was \$1,000. However, the statute allowed for inflation. *Id.* at 382–83 (“The statutory dollar amounts are baselines for an adjustment each even-numbered year, to be made ‘by multiplying the base year amount by the cumulative consumer price index . . . and rounded to the nearest twenty-five-dollar amount, for all years since January 1, 1995.’”) (citations omitted).

¹⁴²*Id.* at 383.

¹⁴³*Id.* at 397.

¹⁴⁴540 U.S. 93 (2003).

¹⁴⁵Soft money donations are funds donated directly to political parties for activities other than direct campaign spending.

¹⁴⁶Bipartisan Campaign Reform Act of 2002 § 101, 2 U.S.C. § 441i(a) (2000 & Supp. V 2005).

¹⁴⁷*Buckley v. Valeo*, 424 U.S. 1, 43 n.51 (1976). For a fuller discussion of express advocacy and electioneering communications, see Robert L. Kerr, *Considering the Meaning of*

Issues ads, on the other hand, are communications that appear to be aimed at a particular issue, but in reality are attempts to influence candidate elections. For example, an ad that stated “Call Governor Williams and tell him to support the Second Amendment and not gun control regulation” was not regulated by FECA – even though the organization running the advertisement wants to defeat Governor Williams – because it did not contain the so-called magic words “vote against Governor Williams.” Ads such as these paid for by corporations, labor unions, and wealthy individuals first appeared in the 1990s,¹⁴⁸ and spending on such ads rapidly increased.¹⁴⁹

The BCRA responded to these ads by creating the “electioneering communications” provision. Under the provision, electioneering communications were television or radio advertisements that feature candidates for federal election and were capable of reaching 50,000 people in the relevant electorate thirty days before a primary or sixty days before a general election. Under BCRA, anyone making an electioneering communication had to disclose contributions funding the ads and spending related to the ads to the FEC,¹⁵⁰ and corporations and unions could only fund such ads through their Political Action Committees and not from general treasury funds.¹⁵¹ In *McConnell*, a majority of the Court upheld most of the BCRA provisions.¹⁵² Following *Austin*, the Court ruled that electioneering communications were the “functional equivalent of express advocacy.”¹⁵³ *McConnell*, though, was a highly fractured opinion. While the vote to uphold the disclosure provision in the law was 8-1,¹⁵⁴ the vote to uphold the ban on corporations and labor unions funding electioneering communications was 5-4.¹⁵⁵

In 2006, the Court found the threshold it had discussed in *Nixon*. In *Randall v. Sorrell*,¹⁵⁶ the Court held that Vermont’s expenditures limits were unconstitutional under *Buckley* and its campaign contributions

Wisconsin Right to Life for the Corporate Free-Speech Movement, 14 COMM. L. & POL’Y 1 (2009).

¹⁴⁸See Hasen, *supra* note 8, at 589.

¹⁴⁹*McConnell*, 540 U.S. at 126-27.

¹⁵⁰2 U.S.C. § 434(f)(1) (2000 & Supp. V 2005).

¹⁵¹2 U.S.C. § 441b(b)(2) (2000 & Supp. V 2005).

¹⁵²The Court upheld all the provisions related to soft money and electioneering communications. See *McConnell*, 540 U.S. at 161-85 for the Court’s discussion of soft-money regulations. See also *id.* at 190-203 for the Court’s discussion of electioneering communication provisions.

¹⁵³*Id.* at 206.

¹⁵⁴*Id.* at 202.

¹⁵⁵*Id.* at 206.

¹⁵⁶548 U.S. 230 (2006).

limits were so low that they violated the First Amendment.¹⁵⁷ The Court held the contribution limits were so low they did not give challengers enough resources to meaningfully contest competitive elections¹⁵⁸ and they “failed to satisfy the First Amendment’s requirement of careful tailoring.”¹⁵⁹

After Chief Justice Roberts replaced Chief Justice William Rehnquist and Justice Samuel Alito replaced the retiring Justice Sandra Day O’Connor, the Court’s approach to campaign finance law changed as the Court now had a majority of justices who supported boarder corporate participation in federal elections. In 2007, in *FEC v. Wisconsin Right to Life*,¹⁶⁰ the Court considered an as-applied challenge to BCRA.¹⁶¹ Wisconsin Right to Life argued that its electioneering communications discussing Wisconsin senators’ position on judicial nominations were not the “functional equivalent of express advocacy” and should be allowed to run during Senator Russ Feingold’s reelection campaign. In another 5–4 vote, the Court agreed with Wisconsin Right to Life.

Three justices — Kennedy, Antonin Scalia and Clarence Thomas — reiterated the positions they had taken in dissents in *McConnell*, where they had argued that the limits in the BCRA were unconstitutional. They argued, in fact, that *McConnell* and *Austin* should be overruled.¹⁶² Chief Justice Roberts and Justice Alito, however, took a narrower position in *WRTL* that did not reach the question of overruling *McConnell* and *Austin*. Instead, Chief Justice Roberts’ majority opinion held that electioneering communications could be considered the “functional equivalent of express advocacy . . . only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote

¹⁵⁷Vermont had enacted a law limiting expenditures during a “two-year general election cycle” to \$300,000 for governor, \$100,000 for lieutenant governor, \$45,000 for other statewide offices, \$4,000 for state senators, \$3,000 for state representatives from districts with two seats, and \$2,000 for state representatives from districts with one seat. Incumbents for state senator and representative were limited to 90% of these amounts while other incumbents were limited to 85% of these amounts. Vermont limited contributions in “two-year general election cycles” to \$400 for governor, lieutenant governor, and other statewide offices, \$300 for state senators, and \$200 for state representatives. *Id.* at 237–38.

¹⁵⁸*Id.* at 262.

¹⁵⁹*Id.*

¹⁶⁰551 U.S. 449 (2007). The case is sometimes referred to as *WRTL II* to distinguish it from the 2006 case in which the Court ruled that *McConnell* did not prevent a corporation or union from bringing an as-applied challenge to BCRA on the basis that its ads were not the “functional equivalent of express advocacy.” *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006).

¹⁶¹*WRTL*, 551 U.S. at 457.

¹⁶²*Id.* at 483–504 (Scalia, J., concurring in part and concurring in judgement).

for or against a specific candidate.”¹⁶³ Using this new test, the majority opinion held that the WRTL advertisements were not the functional equivalent of expressed advocacy.¹⁶⁴ Chief Justice Roberts was adamant that his opinion was a narrow ruling that did not address *McConnell* or the broader question of BCRA’s constitutionality.¹⁶⁵ Three years later, however, the same five-justice majority revisited the question and came to a different conclusion that overturned *Austin* and *McConnell*. *Citizens United* thus serves as an important window into the concept of *stare decisis*.

CITIZENS UNITED V. FEC AND STARE DECISIS

At issue in *Citizens United* was federal law that prohibited corporations and unions from using general treasury funds to make independent expenditures for “electioneering communication.”¹⁶⁶ As noted, in *McConnell v. FEC*,¹⁶⁷ the Court had upheld limits on electioneering communications, basing that holding to a large extent on its 1990 decision in *Austin*.¹⁶⁸ In *Austin*, remember, the Court upheld a Michigan law that barred corporations from using treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office.¹⁶⁹

The *Citizens United* case began when Citizens United, a non-profit ideological corporation that took money from for-profit corporations,¹⁷⁰ produced a ninety-minute documentary entitled *Hillary: The Movie*, which focused on then-Senator Hillary Clinton, a candidate for the 2008 Democratic presidential nomination.¹⁷¹ Although the film contained no express advocacy of any candidate, it depicted interviews with political commentators, most of whom were critical of Senator Clinton.¹⁷² As the Court wrote, the movie was, “[I]n essence . . . a feature-length negative advertisement that urge[d] viewers to vote against Senator Clinton for President.”¹⁷³ Citizens United wanted to use \$1.2 million from its general treasury funds to make the documentary available to viewers for

¹⁶³*Id.* at 469–70.

¹⁶⁴*Id.* at 470, 480–81.

¹⁶⁵*Id.* at 476.

¹⁶⁶558 U.S. 310, 318 (2010).

¹⁶⁷540 U.S. 93 (2003).

¹⁶⁸494 U.S. 652 (1990).

¹⁶⁹*Id.* at 654.

¹⁷⁰By taking money from for-profit corporations, Citizens United was ineligible for a *MCFL* exemption.

¹⁷¹*Citizens United*, 558 U.S. at 319.

¹⁷²*Id.* at 320.

¹⁷³*Id.* at 325.

free *via* a video-on-demand service.¹⁷⁴ After hearing oral arguments in the case in March 2009, the Court announced a rehearing and asked for supplemental briefs specifically addressing whether the Court should overrule *Austin* and the relevant parts of *McConnell*.¹⁷⁵

Citizens United was a fractured 5-4 decision, producing five opinions.¹⁷⁶ As noted, three of the opinions included considerable discussion of the ways in which *stare decisis* governed the Court's holding. After summarizing the procedural history of the case, Justice Kennedy's majority opinion rejected the argument that the case could be resolved on narrow grounds that would leave *Austin* and *McConnell* intact.¹⁷⁷ He rejected *Citizens United's* claims that video-on-demand services were not covered by the BCRA¹⁷⁸ and the argument that the documentary was not the functional equivalent of express advocacy.¹⁷⁹ Finally, Justice Kennedy rejected extending the exemption created in *Massachusetts Citizens for Life Inc.* to non-profit corporations that take some funding from for-profit corporations if the majority of their funding came from individuals.¹⁸⁰

Based on this analysis, Justice Kennedy concluded: "[T]he Court cannot resolve this case on narrower ground without chilling political speech that is central to the meaning and purpose of the First Amendment."¹⁸¹ Turning to the constitutional question, Justice Kennedy decisively wrote for the Court that the "prohibition on corporate independent expenditures is . . . a ban on speech."¹⁸² He continued:

¹⁷⁴*Id.* at 320.

¹⁷⁵*Id.* at 322.

¹⁷⁶Justice Kennedy wrote for five justices on the question of the constitutionality of spending limits imposed by BCRA. Chief Justice Roberts, joined by Justice Alito, wrote a concurring opinion. Justice Scalia, joined by Justices Alito and Thomas, wrote a second concurring opinion. The portion of Justice Kennedy's opinion upholding the BCRA disclosure provisions was joined by all of the justices but Thomas. Justice Stevens, joined by Justices Ginsburg, Breyer and Sotomayor, wrote an opinion arguing the case should have been decided on narrower grounds and contending the Court should have affirmed *Austin* based on the principle of *stare decisis*. Justice Thomas dissented for himself alone on the constitutionality of the disclosure provisions based on his support for anonymous political speech.

¹⁷⁷558 U.S. at 322–24.

¹⁷⁸*Id.* at 323. *Citizens United* claimed that because a single video-on-demand transmission is sent only to the specific household requesting the video, the service did not meet the requirement that an electioneering communication be seen by 50,000 or more persons. It also argued that video-on-demand services should not be regulated because the system had a lower risk of distorting the political process than television ads. *Id.* at 326–27. Justice Kennedy's majority opinion rejected both arguments.

¹⁷⁹*Id.* at 324–25.

¹⁸⁰*Id.* at 327–29.

¹⁸¹*Id.* at 329.

¹⁸²*Id.* at 338.

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.¹⁸³

Regulations that privilege some speakers over others, Justice Kennedy wrote, “deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.”¹⁸⁴ Thus, “[T]he First Amendment protects speech and speaker.”¹⁸⁵

Justice Kennedy then turned his attention to *Austin* and the role of *stare decisis*. He summarized *Austin* as holding “that political speech may be banned based on the speaker’s corporate identity.”¹⁸⁶ And the Court, Justice Kennedy wrote, had reconsidered that holding. “[S]tare decisis does not compel the continued acceptance of *Austin*,” he wrote.¹⁸⁷ Justice Kennedy noted that the Court’s “precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.”¹⁸⁸ The majority concluded, “[T]he most convincing of reasons” existed here. Summarized succinctly: The Court said *Austin* “was not well reasoned.”¹⁸⁹ Justice Kennedy wrote that *Austin* actually had contravened¹⁹⁰ earlier precedents in *Buckley v. Valeo*¹⁹¹ and *First National Bank of Boston v. Bellotti*,¹⁹² cases that, according to Justice Kennedy, had made it clear that government “lacks the power to ban corporations from speaking.”¹⁹³ Also, Justice Kennedy wrote, *Austin* had been “undermined by experience”¹⁹⁴ since the Court announced the decision. Political speech is so ingrained in our culture, Justice Kennedy wrote, speakers discover ways to evade campaign finance laws.¹⁹⁵ But “informative voices should not have to circumvent onerous restrictions”¹⁹⁶ in order to enter the speech marketplace, he

¹⁸³*Id.* at 340. (citations omitted).

¹⁸⁴*Id.*

¹⁸⁵*Id.* at 341.

¹⁸⁶*Id.* at 319.

¹⁸⁷*Id.*

¹⁸⁸*Id.* at 362.

¹⁸⁹*Id.* at 363.

¹⁹⁰*Id.*

¹⁹¹424 U.S. 1 (1976).

¹⁹²435 U.S. 765 (1978).

¹⁹³558 U.S. at 347.

¹⁹⁴*Id.* at 364.

¹⁹⁵*Id.*

¹⁹⁶*Id.*

reasoned. “On certain topics,” he wrote, “corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.”¹⁹⁷

The Court seemed to find it especially persuasive that the government defended *Austin* in *Citizens United* by relying on rationales other than the antidistortion rationale that the Court said had undergirded the *Austin* holding.¹⁹⁸ “When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished,” Justice Kennedy wrote.¹⁹⁹ Finally, the Court also determined that no serious reliance interests were at stake that would compel adherence to *stare decisis* in the case. Although legislatures had enacted bans on corporate expenditures in response to earlier Court decisions that ruled those types of bans were constitutional, the majority wrote that was not a “compelling interest for *stare decisis*”²⁰⁰ because legislative acts should not interfere with the Court’s duty “to say what the law is.”²⁰¹ The Court thus overruled *Austin*, concluding that “no sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”²⁰² Once it concluded *Austin* must be overruled, the Court also overruled the part of *McConnell* that had upheld BCRA’s limits on independent expenditures.²⁰³

Chief Justice Roberts wrote a concurring opinion, joined by Justice Alito, devoted entirely to defending the majority’s decision against criticism that it had overreached in deciding the case. Chief Justice Roberts wrote separately, “[T]o address the important principles of judicial restraint and *stare decisis* implicated in this case.”²⁰⁴ One article has

¹⁹⁷*Id.*

¹⁹⁸In *Austin*, the Court said the state law it upheld was targeted at preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.” 494 U.S. 652, 660 (1990). But Justice Kennedy wrote that, in defending *Austin* before the Court in *Citizens United*, the government had “all but abandon[ed] reliance” on that antidistortion rationale and had instead relied on an anticorruption interest and a shareholder-protector interest to defend *Austin*’s holding and continued viability. 558 U.S. at 348.

¹⁹⁹*Id.* at 363.

²⁰⁰*Id.* at 365.

²⁰¹*Id.* (quoting *Marbury v. Madison*, 5 U.S. 137, 137 (1803)).

²⁰²*Id.*

²⁰³*Id.* at 365-66. (“Given our conclusion [regarding *Austin*] we are further required to overrule the part of *McConnell* that upheld BCRA § 203’s extension of § 441b’s restrictions on corporate independent expenditures. The *McConnell* Court relied on the antidistortion interest recognized in *Austin* to uphold a greater restriction on speech than the restriction upheld in *Austin*, and we have found this interest unconvincing and insufficient” (citations omitted).).

²⁰⁴*Id.* at 373 (Roberts, C.J., concurring).

described Chief Justice Roberts' opinion as a "concise restatement" of *stare decisis* doctrine.²⁰⁵

Near the outset of his opinion, Chief Justice Roberts emphasized that "fidelity to precedent . . . is vital to the proper exercise of the judicial function."²⁰⁶ Because *stare decisis* is the "preferred course," he wrote, the Court has "long recognized that departures from precedent are inappropriate in the absence of a special justification."²⁰⁷ At the same time, Chief Justice Roberts wrote, *stare decisis*, especially in constitutional cases, is not an "inexorable command, nor a mechanical formula of adherence to the latest decision."²⁰⁸ *Stare decisis* also, he wrote, is not absolute,²⁰⁹ and it is not "an end in itself."²¹⁰ It is, instead, a "principle of policy."²¹¹ He wrote,

It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage [the rule of law] than to advance it, we must be more willing to depart from that precedent. . . . Abrogating the errant precedent, rather than reaffirming or extending it, might better preserve the law's coherence and curtail the precedent's disruptive effects.²¹²

Similarly, he wrote, if adhering to errant precedent "actually impedes the stable and orderly adjudication of future cases,"²¹³ the importance of *stare decisis* diminishes as well. According to the chief justice, this could happen in a number of circumstances, "[S]uch as when its rationale threatens to upend our settled jurisprudence in related areas of law, and when the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake."²¹⁴

Chief Justice Roberts found all those considerations weighed against upholding *Austin*, and he then enumerated the specific reasons why he believed *Austin* should be overruled. First, agreeing with the majority, Chief Justice Roberts said *Austin* was an aberration because it

²⁰⁵Shapiro & Mosvick, *supra* note 19, at 135 .

²⁰⁶558 U.S. at 377 (Roberts, J., concurring).

²⁰⁷*Id.* (Roberts, C.J., concurring) (internal citations and quotations omitted).

²⁰⁸*Id.* (Roberts, C.J., concurring) (internal citations and quotations omitted).

²⁰⁹*Id.* at 378 (Roberts, C.J., concurring).

²¹⁰*Id.* (Roberts, C.J., concurring). Justice Roberts wrote, "If it were, segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants." *Id.* at 377 (Roberts, C.J., concurring).

²¹¹*Id.* at 378 (Roberts, C.J., concurring) (internal citations and quotations omitted).

²¹²*Id.* at 378-79 (Roberts, C.J., concurring).

²¹³*Id.* at 379 (Roberts, C.J., concurring).

²¹⁴*Id.* (Roberts, C.J., concurring).

“departed from the robust protections we had granted political speech in our earlier cases.”²¹⁵ *Austin* was errant, he wrote, because it contradicted *Buckley’s* rejection of the equalization rationale and *Bellotti’s* rejection of limits on free speech rights of corporations. Second, he wrote it was significant that *Austin’s* rationale “has proved to be the consistent subject of dispute”²¹⁶ among justices on the Court since the decision was handed down. Chief Justice Roberts noted that *Austin* was adopted over “two ‘spirited dissents.’”²¹⁷ This seemed to be a jarring revelation from the chief justice: that disagreement on the Court permits abandoning *stare decisis*. Chief Justice Roberts wrote that a decision should not be overruled simply because it is controversial among the justices, but he said continuing controversy and disagreement “does undermine the precedent’s ability to contribute to the stable and orderly development of the law.”²¹⁸

Third, *Austin* should be overruled, Chief Justice Roberts wrote, because the case was “uniquely destabilizing” in that it threatened to subvert the Court’s decisions outside the context of corporate express advocacy.²¹⁹ Because the decision’s underlying theory was “extraordinarily broad,” he wrote, it would authorize “government prohibition of political speech by a category of speakers in the name of equality.”²²⁰ Chief Justice Roberts contended that the *Austin* decision had already been used by members of the Court to justify speech restrictions outside of express candidate advocacy by corporations. To support this contention, the chief justice cited a concurring opinion by Justice Stevens in *Davis v. FEC*,²²¹ also a campaign finance case, and the majority’s opinion in *McConnell*.²²² While this would seem to suggest the spread of *Austin* had in fact been limited, the chief justice worried this indicated Congress could one day also use the logic of *Austin* to perhaps censor media corporations.²²³

Finally, and most importantly, according to Chief Justice Roberts, *Austin* should be overruled because the government’s defense of *Austin*

²¹⁵*Id.* (Roberts, C.J., concurring).

²¹⁶*Id.* at 380 (Roberts, C.J., concurring).

²¹⁷*Id.* (Roberts, C.J., concurring) (citations omitted).

²¹⁸*Id.* (Roberts, C.J., concurring).

²¹⁹*Id.* at 380 (Roberts, C.J., concurring).

²²⁰*Id.* at 381 (Roberts, C.J., concurring).

²²¹554 U.S. 724 (2008).

²²²558 U.S. at 382 (Roberts, C.J., concurring) (citing *Davis v. FEC*, 554 U.S. 724, 756 (2008) (Stevens, J., concurring in part and dissenting in part) (relying on *Austin* to justify regulations on campaign spending by individual candidates) and *McConnell v. FEC*, 540 U.S. 93, 203–209 (2003)).

²²³*Id.* (Roberts, C.J., concurring). The chief justice contended that although BCRA did not apply to media corporations, this was “a matter of legislative grace.” *Id.* (Roberts, C.J., concurring).

in *Citizens United* “never once even mentions the compelling government interest”²²⁴ the *Austin* Court relied upon to reach its conclusion. Like Justice Kennedy, Chief Justice Roberts argued it was especially important that the government defended *Austin* in *Citizens United* by relying on new rationales, namely the need to prevent corruption and the interest of corporate shareholders.²²⁵ Chief Justice Roberts noted that the only opinion in *Austin* endorsing the government’s corruption rationale was Justice Stevens’ concurrence,²²⁶ and no opinion in *Austin* stated that shareholder protection was a compelling government interest.²²⁷

Since the government was arguing that *Austin* should be upheld based on different principles than that case was originally decided upon, Chief Justice Roberts wrote that undercut the argument that *stare decisis* dictated adhering to *Austin*. He wrote:

Stare decisis is a doctrine of preservation, not transformation. It counsels deference to past mistakes, but provides no justification for making new ones. There is therefore no basis for the Court to give precedential sway to reasoning that it has never accepted, simply because that reasoning happens to support a conclusion reached on different grounds that have since been abandoned or discredited. Doing so would undermine the rule-of-law values that justify *stare decisis*.²²⁸

Based on this reasoning, Chief Justice Roberts wrote that the government’s new arguments would have to “stand or fall on their own.”²²⁹ Because the arguments had not been present in *Austin*, they were “not entitled to receive the special deference we accord to precedent.”²³⁰ They were, in fact, “unprecedented,”²³¹ the Chief Justice concluded.

Justice Stevens wrote a lengthy²³² and spirited²³³ opinion for the four dissenters. After beginning with a discussion of why the case should be

²²⁴*Id.* at 383 (Roberts, C.J., concurring) (emphasis in the original).

²²⁵*Id.* (Roberts, C.J., concurring).

²²⁶*Id.* at 384 (Roberts, C.J., concurring) (citing *Austin*, 494 U.S. 652, 678 (1990) (Stevens, C.J., concurring)).

²²⁷*Id.* (Roberts, C.J., concurring).

²²⁸*Id.* (Roberts, C.J., concurring).

²²⁹*Id.* at 385 (Roberts, C.J., concurring).

²³⁰*Id.* (Roberts, C.J., concurring).

²³¹*Id.* (Roberts, C.J., concurring) (emphasis in the original).

²³²Justice Stevens’ opinion is fifty pages, and the justice apologized for its length. *Id.* at 395 (Stevens, J., dissenting) (“I regret the length of what follows, but the importance and novelty of the Court’s opinion require a full response.”)

²³³Although the chief justice was unclear in his concurring opinion what constituted a “spirited” dissent, it is likely Justice Stevens’ dissenting opinion would qualify.

decided on narrower grounds,²³⁴ Justice Stevens turned his attention to *stare decisis*. He began with a strong condemnation of the majority's treatment of *stare decisis*, writing, "The final principle of judicial process that the majority violates is the most transparent: *stare decisis*."²³⁵ Although Justice Stevens admitted he was not a *stare decisis* absolutist, he wrote that if the principle was "to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preference of five Justices, for overturning settled doctrine."²³⁶ According to the dissent, there were no justifications for overturning *Austin* in *Citizens United* and there were "powerful prudential reasons to keep faith with our precedents."²³⁷

According to Justice Stevens, the majority's central argument was that the five justices did not like *Austin*.²³⁸ Justice Stevens questioned the argument that *Austin* had been undermined by experience. He said the Court lacked a developed record on that point, and the majority offered no empirical evidence to substantiate the claim.²³⁹ In a footnote, Justice Stevens addressed Chief Justice Roberts' assertions that subsequent reliance on *Austin* in *Davis* and *McConnell* weakened the force of *stare decisis*: "Under this view, it appears that the more times the Court stands by a precedent in the face of requests to overrule it, the weaker that precedent becomes. . . . [T]his theory seems to be that the more we utilize a precedent, the more we call it into question."²⁴⁰

Next, Justice Stevens wrote that the government failing to rely on *Austin's* rationale in *Citizens United* provided no reason for overturning *Austin* under *stare decisis*. According to Justice Stevens, the Court had never considered overruling a precedent because of the underlying arguments a party used before the Court. Justice Stevens wrote that a precedent might be defended on multiple grounds, only some of which might be used by a litigant, and legislatures and the public often only rely on the "bottom-line holdings" of the Court and not on underlying

²³⁴558 U.S. at 396-408 (Stevens, J., dissenting). Justice Stevens argued overruling *Austin* was not properly before the Court because the facial challenge had been abandoned in lower court. *Id.* at 396 (writing "Our colleagues' suggestion that 'we are asked to reconsider *Austin* and, in effect, *McConnell*,' would be more accurate if rephrased to state that 'we have asked ourselves' to reconsider those cases") (internal citations omitted). Next, he contended the case should have been decided as an as-applied challenge and not a facial challenge. *Id.* at 398-405. Finally, he presented three ways the Court could have decided the case on narrower grounds. *Id.* at 405-408.

²³⁵*Id.* at 408 (Stevens, J., dissenting).

²³⁶*Id.* (Stevens, J., dissenting) (citations and quotations omitted).

²³⁷*Id.* at 409 (Stevens, J., dissenting).

²³⁸*Id.* (Stevens, J., dissenting).

²³⁹*Id.* (Stevens, J., dissenting).

²⁴⁰*Id.* at 410 n.18 (Stevens, J., dissenting).

legal rationales.²⁴¹ Justice Stevens concluded that although “the majority spends several pages making these surprising arguments,”²⁴² the majority opinion did not address the standard considerations for upholding a precedent under *stare decisis*: the reliance interests at stake, the antiquity of the precedent, and the workability of its legal rule.²⁴³

Justice Stevens argued that the reliance interests at stake were significant. *Stare decisis*, he wrote, has “special force” when legislators or citizens have acted in reliance on a previous decision and overruling that decision would “dislodge settled rights and expectations or require an extensive legislative response.”²⁴⁴ Because *Citizens United* would take away a legislative power “long permitted,” it thus violated *stare decisis*, Justice Stevens reasoned.²⁴⁵ He wrote that *Citizens United* not only undermined previous Court decisions, but state legislatures had relied on the authority to regulate corporate electioneering for more than a century.²⁴⁶ Similarly, Justice Stevens wrote that considerations of antiquity also counseled that *Austin* should be upheld because the decision was two decades old and many of the statutes “called into question [by *Citizens United*] [had] been on the books for a half century or more.”²⁴⁷ Finally, Justice Stevens noted that *Austin*’s legal rule was not impractical. To the contrary, Justice Stevens wrote, “[L]eading groups representing the business community, organized labor, and the non-profit sector, together with more than half the States, urge we preserve *Austin*.”²⁴⁸

Justice Stevens concluded as he began:

In the end, the Court’s rejection of *Austin* and *McConnell* comes down to nothing more than its disagreement with their results. Virtually every one of its arguments was made and rejected in those cases, and the majority opinion is essentially an amalgamation of resuscitated dissents. The

²⁴¹*Id.* at 410 (Stevens, J., dissenting).

²⁴²*Id.* at 411 (Stevens, J., dissenting).

²⁴³*Id.* (Stevens, J., dissenting).

²⁴⁴*Id.* (Stevens, J., dissenting).

²⁴⁵*Id.* (Stevens, J., dissenting).

²⁴⁶*Id.* at 411 (Stevens, J., dissenting) (citing Brief for State of Montana et al. as Amici Curiae 5-13). It should be noted that a widely cited criticism of *Citizens United* is that it undermined a long tradition of legislation even if the First Amendment case law regarding corporate political spending is relatively young. For example, Professor Robert Kerr contended that although First Amendment case law addressing the regulation of corporate political spending “represents a relatively recent chapter,” efforts to restrict corporate political spending began in the late nineteenth and early twentieth century. Kerr, *supra* note 126 at 316. See also, NANCY LAMMERS, DOLLAR POLITICS (1982); ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO *CITIZENS UNITED* (2014).

²⁴⁷558 U.S. at 412 (Stevens, J., dissenting).

²⁴⁸*Id.* at 413 (Stevens, J., dissenting) (citations omitted).

only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court. Today's ruling thus strikes at the vitals of *stare decisis*.²⁴⁹

CITIZENS UNITED AND STARE DECISIS IN THE LOWER COURTS

To date, eighteen state supreme court and federal circuit court of appeals cases contain citations to those *Citizens United* discussions of *stare decisis*.²⁵⁰ Six of these cases had multiple opinions that cited one or more of the three opinions from *Citizens United* in spirited debates over the proper contours of the doctrine. For example, one concurring opinion cited Justice Kennedy's majority opinion from *Citizens United* to argue *stare decisis* should be respected,²⁵¹ while the dissent in the very same case cited Chief Justice Roberts' opinion a variety of times to argue the precedent in question should be overruled.²⁵² When faced with battles over whether to overturn a precedent, Justice Kennedy's majority opinion, Chief Justice Roberts' concurrence and Justice Stevens' dissent have provided lower court judges additional ammunition. Of these cases, fifteen were from state supreme courts and three were from federal circuit courts. None of the cases identified was a campaign finance case, suggesting *Citizens United's* influence is spreading far beyond its subject area. In total, *Citizens United* was cited in twenty-three opinions in those eighteen cases. In twenty of those opinions (roughly 87%), lower court judges invoked *Citizens United* to support overturning precedent.

Seven lower court opinions cited Justice Kennedy's discussion of *stare decisis* to support overturning a precedent.²⁵³ One opinion concurring in part and dissenting in part,²⁵⁴ for instance, latched onto Justice Kennedy's assertion that the force of *stare decisis* is diminished when "neither party defends the reasoning of the precedent."²⁵⁵ One opinion

²⁴⁹*Id.* (Stevens, J., dissenting).

²⁵⁰Cases were identified by using a LexisNexis Academic Shepardize search to retrieve lower court cases that have cited *Citizens United*. This search returned 693 lower court decisions. The authors then searched state supreme court and circuit court of appeals opinions for references to *stare decisis*.

²⁵¹*Morrow v. Balaski*, 719 F.3d 160, 179 (3d Cir. Pa. 2013) (Smith, J., concurring).

²⁵²*Id.* at 189, 192 (Fuentes, J., dissenting).

²⁵³*Al-Sharif v. United States Citizenship & Immigration Servs.*, 734 F.3d 207 (3d Cir. N.J. 2013); *Morrow v. Balaski*, 719 F.3d 160, 189, 192 (3d Cir. Pa. 2013) (Fuentes, J., dissenting); *Jimenez v. Wood County*, 660 F.3d 841, 851 (5th Cir. Tex. 2011) (Smith, J., dissenting); *Miller v. Johnson*, 289 P.3d 1098, 1140 (Kan. 2012) (Beier, J., concurring in part and dissenting in part); *State v. Quintero*, 34 A.3d 612, 628 (N.H. 2011) (Lynn, J., concurring); *Freed v. Geisinger Med. Ctr.*, 5 A.3d 212, 215 (Pa. 2010); *Jamerson v. Coleman-Adams Constr., Inc.*, 699 S.E.2d 197, 204 (Va. 2010) (Mims, J., concurring).

²⁵⁴*Miller v. Johnson*, 289 P.3d at 1140.

²⁵⁵*Citizens United*, 558 U.S. 310, 363 (2010).

simply cited the opinion to lay out the proper *stare decisis* factors.²⁵⁶ Another cited the opinion as an example of the Supreme Court overturning precedent on grounds that were never argued in lower court.²⁵⁷ One concurring opinion cited the *Citizens United* majority opinion to argue that a precedent at issue should *not* be overturned.²⁵⁸

Chief Justice Roberts' *Citizens United* concurrence has been cited more frequently. Fifteen lower court opinions have cited it for a variety of reasons.²⁵⁹ Many of these opinions have quoted the chief justice for support that *stare decisis* is neither an "inexorable command" nor a "mechanical formula." Two opinions cited the chief justice's proposition that abrogating errant precedent might better preserve law's coherence.²⁶⁰ One opinion cited Chief Justice Roberts' opinion to argue why *stare decisis* should be followed and precedent should *not* be overturned.²⁶¹ Another cited the chief justice's *Citizens United* opinion for the proposition that *stare decisis* applies even in constitutional cases.²⁶² Only a single opinion cited Justice Stevens' discussion of *stare decisis*.²⁶³ That case, to be discussed below, quotes Justice Stevens' argument that "re-stating a merits argument with additional vigor does not give it extra weight in the *stare decisis* calculus."²⁶⁴

Some of the lower court cases simply cited *Citizens United* for support that the Supreme Court did not always follow its own opinions or to quickly note that *stare decisis* is not a command. Numerous opinions, though, contained detailed discussions of *stare decisis* and offer evidence

²⁵⁶*Morrow*, 719 F.3d at 179 (Smith, J., concurring).

²⁵⁷*Freed*, 5 A.3d at 215.

²⁵⁸*Morrow*, 719 F.3d at 179 (Smith, J., concurring).

²⁵⁹*Ex parte Capstone Bldg. Corp.*, 96 So. 3d 77 (Ala. 2012); *Christopher v. Christopher*, 145 So. 3d 60 (Ala. 2013); *State v. Jackson*, 697 S.E.2d 757 (Ga. 2010); *Smith v. Baptiste*, 694 S.E.2d 83 (Ga. 2010); *O'Neal v. St. John Hosp. & Med. Ctr.*, 791 N.W.2d 853 (Mich. 2010) (Weaver, J., concurring); *Bezeau v. Palace Sports & Entm't, Inc.*, 795 N.W.2d 797 (Mich. 2010) (Weaver, J., concurring); *Regents of the Univ. of Mich. v. Titan Ins. Co.*, 791 N.W.2d 897, 311 (Mich. 2010) (Weaver, J., concurring); *Regents of the Univ. of Mich. v. Titan Ins. Co.*, 791 N.W.2d 897, 909 (Mich. 2010) (Hathaway, J., concurring); *Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ.*, 792 N.W.2d 686 (Mich. 2010) (Weaver, J., concurring); *Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ.*, 792 N.W.2d 686, 704 (Mich. 2010) (Hathaway, J., concurring); *McCormick v. Carrier*, 795 N.W.2d 517, 542 (Mich. 2010) (Weaver, J., concurring); *State v. Quintero*, 34 A.3d 612, 627 (N.H. 2011) (Lynn, J., concurring); *State v. Bodyke*, 933 N.E.2d 753, 770 (Ohio 2010); *State v. Siers*, 174 Wn.2d 269 (Wash. 2012); *Morrow v. Balaski*, 719 F.3d 160, 189, 192 (3d Cir. Pa. 2013) (Fuentes, J., dissenting).

²⁶⁰*Ex parte Capstone Bldg. Corp.*, 96 So. 3d 77 (Ala. 2012); *Christopher v. Christopher*, 145 So. 3d 60 (Ala. 2013).

²⁶¹*State v. Siers*, 274 P.3d 358 (Wash. 2012).

²⁶²*State v. Bodyke*, 933 N.E.2d 753 (Ohio 2010) (O'Donnell, J., concurring in part and dissenting in part).

²⁶³*State v. Quintero*, 34 A.3d 612 (N.H. 2011) (Lynn, J., concurring).

²⁶⁴*Citizens United v. FEC*, 558 U.S. 310, 409 (2010) (Stevens, J., dissenting).

of how muddled and contentious the doctrine has become in lower courts. In perhaps the most interesting series of citations, in 2010 the Michigan Supreme Court cited *Citizens United* frequently in animated opinions. Written soon after a Democratic majority took over from a Republican majority on the court, the opinions demonstrate the highly contentious nature of *stare decisis*, particularly when issues arise after personnel changes on a court.

The first *Citizens United* citation in those Michigan cases appeared in a concurring opinion by Justice Elizabeth A. Weaver in *McCormick v. Carrier*,²⁶⁵ a case dealing with statutory *stare decisis*. Justice Weaver cited Chief Justice Roberts for the proposition that *stare decisis* was neither an “inexorable command” nor a “mechanical formula.”²⁶⁶ She was thus using the chief justice’s opinion in *Citizens United* to explain why courts – the Michigan Supreme Court in this instance – need not follow their own precedent. The Michigan court’s battle over *stare decisis* perhaps reached its height in *Regents of the University of Michigan v. Titan Insurance Co.*,²⁶⁷ in which the court overruled one of its own precedents, *Cameron v. Auto Club Insurance Association.*,²⁶⁸ a case dealing with statutory exemptions to statutes of limitations. The majority opinion in *Regents of the University of Michigan v. Titan Insurance Co.* discussed *stare decisis*, as did three separate concurring opinions, all of which were written primarily to address *stare decisis* doctrine.²⁶⁹

Although the majority stated that the correct process in *stare decisis* “always begins with a presumption that upholding precedent is the preferred course of action,”²⁷⁰ it listed “evaluation criteria” to determine if a compelling justification existed to overturn a precedent.²⁷¹ The majority

²⁶⁵795 N.W.2d 517, 542 (Mich. 2010) (Weaver, J., concurring) (with regard to the policy of *stare decisis*, my view is that past precedent should generally be followed but that to serve the rule of law, in deciding whether wrongly decided precedent should be overruled, each case should be looked at individually on its facts and merits through the lens of judicial restraint, common sense, and fairness. I agree with the sentiment recently expressed by Chief Justice Roberts of the United States Supreme Court in his concurrence to the decision in *Citizens United v. FEC.*).

²⁶⁶*Id.* (quoting and citing *Citizens United*, 558 U.S. at 377 (Roberts, J., concurring) (citations omitted)).

²⁶⁷791 N.W.2d 897 (Mich. 2010).

²⁶⁸718 N.W.2d 784 (Mich. 2006).

²⁶⁹While the opinions primarily dealt with the proper role of *stare decisis*, a great deal of the content could also be categorized as mean-spirited and as personal attacks. See *Regents of the University of Michigan v. Titan Insurance Co.*, 791 N.W.2d at 913 (Kelly, J., concurring) (“It is no secret that the philosophical divisions among the justices on this Court are deep. For some years now, our disagreements on legal questions have erupted in occasionally heated and unpleasant personal recriminations. This case is a perfect example.”).

²⁷⁰*Id.* at 904.

²⁷¹*Id.* at 904–05. These included: (1) whether the precedent has proved to be intolerable because it defies practical workability, (2) whether reliance on it is such that overruling

opinion simply stated that *Cameron* should be overruled because it was “erroneous” or “wrong,”²⁷² but the opinion later also listed a litany of reasons why the precedent should be overruled. According to the majority, the precedent at issue in the case should be overruled because it “defi[ed] practical workability,”²⁷³ the case had only been relied upon for four years,²⁷⁴ the precedent had resulted in “serious detriment prejudicial to public interests,”²⁷⁵ and it represented “an abrupt and largely unexplained departure”²⁷⁶ from previous precedents.

Justices Weaver, Diane M. Hathaway and Robert P. Young Jr. discussed *stare decisis* considerations in separate opinions. Justice Weaver wrote to respond to the dissent written in the case by Justice Young. According to Justice Weaver, Justice Young was attempting “to get people to believe I have changed my views of *stare decisis* since former Chief Justice [Clifford W.] Taylor was defeated.”²⁷⁷ Justice Weaver insisted her views on *stare decisis* were in line with the views articulated by Chief Justice Roberts in *Citizens United* – that *stare decisis* is a principle rather than a rule.²⁷⁸ Similarly, Justice Hathaway wrote that she supported the Supreme Court’s approach to *stare decisis*, highlighting Chief Justice Roberts’ opinion in *Citizens United*.²⁷⁹ In addition, Justice Hathaway wrote there was no objective test for overruling a precedent, noting that the U.S. Supreme Court had overruled its own cases without even discussing *stare decisis*, much less the proper factors courts should

it would cause a special hardship and inequity, (3) whether related principles of law have so far developed since the precedent was pronounced that no more than a remnant of it has survived, (4) whether facts and circumstances have so changed, or come to be seen so differently, as to have robbed the precedent of significant application or justification, (5) whether other jurisdictions have decided similar issues in a different manner, (6) whether upholding the precedent is likely to result in serious detriment prejudicial to public interests, and (7) whether the prior decision was an abrupt and largely unexplained departure from then existing precedent.

²⁷²*Id.* at 903 (writing the precedent erroneously reached its conclusion); *id.* at 904 (writing the precedent was “wrongly decided”).

²⁷³*Id.* at 905.

²⁷⁴*Id.*

²⁷⁵*Id.* at 906.

²⁷⁶*Id.* at 907.

²⁷⁷*Id.* at 908 (Weaver, J., concurring). Chief Justice Taylor was defeated in the 2008 election.

²⁷⁸*Id.* (Weaver, J., concurring) (“I agree with the sentiment recently expressed by Chief Justice Roberts of the United States Supreme Court in his concurrence to the decision in *Citizens United v. FEC.*”).

²⁷⁹*Id.* at 910 (Hathaway, J., concurring) (“Given the debate amongst the justices of this Court concerning what constitutes the proper *stare decisis* analysis, I find it insightful to review how our United States Supreme Court has treated the doctrine. *Stare decisis* is a principle of policy that commands judicial respect for a court’s earlier decisions and the rules of law that they embody.”)

consider when deciding if they should follow precedent.²⁸⁰ Justice Hathaway cited *Brown v. Board of Education*²⁸¹ and *Gideon v. Wainwright*²⁸² as cases that overturned precedent without even mentioning the phrase *stare decisis* once.

Justice Young's dissent was largely an attack on "the new majority" for abandoning its former "hawk-like" adherence to precedent.²⁸³ Justice Young wrote, "The new majority, being a majority, is now free to do as it pleases. And it pleases the new majority to honor the agenda to which our new Chief Justice pledged them."²⁸⁴ Although Justice Young was critical of what he called a "subjective approach" to *stare decisis* and instead demanded "an objective test"²⁸⁵ for overruling precedent, he offered no objective test of his own in his strongly worded dissent.

The Michigan Supreme Court's battle over *stare decisis* continued throughout the 2010 term, in *Lansing School Education Association v. Lansing Board of Education*,²⁸⁶ then in *Bezeau v. Palace Sports & Entertainment, Inc.*,²⁸⁷ and finally in *O'Neal v. St. John Hospital & Medical Center*.²⁸⁸ In every case, the new Democratic majority overturned a precedent set by the previous Republican majority. In *O'Neal* and *Bezeau*, Justice Weaver's concurring opinion again quoted Chief Justice Roberts' concurrence from *Citizens United* to respond to the dissent's criticism of overruling cases and to help articulate her views on *stare decisis*.²⁸⁹ In *O'Neal*, in addition to once again quoting Chief Justice Roberts' warning that *stare decisis* was not "an inexorable command" nor a "mechanical formula," she quoted additional passages of the opinion to explain her stance on *stare decisis* and take a dig at one of her Republican colleagues:

²⁸⁰*Id.* at 911 (Hathaway, J., concurring).

²⁸¹347 U.S. 483 (1954).

²⁸²372 U.S. 335 (1963).

²⁸³791 N.W.2d at 913-14 (Young, J., dissenting) ("After a decade of dissents in which Justices Cavanagh, Weaver, and Kelly played the recurrent theme that they were hawk-like adherents to *stare decisis*, attacking the then majority . . . for failing to preserve cases with whose results they agreed, today precedent is no longer an 'issue.' Nor is precedent now an issue for my newest colleague, Justice Hathaway, although her campaigns for election to the Court of Appeals and this Court featured prominently her position adamantly proclaiming an absolutist support for *stare decisis*.")

²⁸⁴*Id.* (Young, J., dissenting).

²⁸⁵*Id.* at 917 n.11 (Young, J., dissenting) ("My criticism of Justice Weaver's approach is not, as she alleges, that she has subscribed to a theory of *stare decisis* as an 'inexorable command' that she now rejects. In fact, it is precisely the opposite: *She often subscribes to no objective test whatsoever.*") (emphasis in original).

²⁸⁶792 N.W.2d 686 (Mich. 2010).

²⁸⁷795 N.W.2d 797 (Mich. 2010).

²⁸⁸791 N.W.2d 853 (Mich. 2010).

²⁸⁹*Id.* at 868 (Weaver, J., concurring); *Bezeau*, 795 N.W.2d at 808 n. 3 (Weaver, J., concurring).

Chief Justice Roberts further called *stare decisis* a ‘principle of policy’ and said that it ‘is not an end in itself.’ He explained that ‘[i]ts greatest purpose is to serve a constitutional ideal – the rule of law’. It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent. It appears that Justice Young does not agree with Chief Justice Roberts.²⁹⁰

Justice Weaver also quoted Chief Justice Roberts’ opinion in her concurring opinion in *Lansing School Education Association* to respond to the dissent’s criticism of overruling cases.²⁹¹ Justice Hathaway’s concurring opinion in *Lansing School Association* also quoted Chief Justice Roberts’ warning that if *stare decisis* were an inexorable command or a mechanical formula of adherence to the latest decision, “[S]egregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants.”²⁹²

Chief Justice Roberts’ *Citizens United* opinion has also influenced the Alabama Supreme Court. Twice that court has cited Chief Justice Roberts’ discussion of how “abrogating the errant precedent”²⁹³ might better advance stability and evenhandedness than following *stare decisis*. In 2012, in *Ex parte Capstone Bldg. Corp.*,²⁹⁴ the court considered the proper statute of limitations in a tort claim based on allegations of wanton misconduct.²⁹⁵ The court was asked to overrule a 2004 precedent, *McKenzie v. Killian*,²⁹⁶ that had established a six-year statute of limitations in such cases. Noting that cases both before and after *McKenzie* had applied a two-year statute of limitations, the court overruled *McKenzie*.²⁹⁷ In discussing the proper role of *stare decisis*, the court approvingly cited Supreme Court cases “such as” *Citizens United* that advocated “returning to ‘intrinsically sounder doctrine established by earlier cases’”²⁹⁸ and overturning precedent. The Alabama Supreme Court called these “well established principles concerning the operation of the doctrine of *stare decisis*.”²⁹⁹

²⁹⁰791 N.W.2d at 868 (Weaver, J., concurring) (citations omitted).

²⁹¹792 N.W.2d at 704 (Weaver, J., concurring).

²⁹²*Id.* at 704-05 (Hathaway, J., concurring) (quoting *Citizens United*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring) (emphasis added by Hathaway)).

²⁹³*Citizens United*, 558 U.S. 310, 378-79 (2010) (Roberts, C.J., concurring).

²⁹⁴96 So. 3d 77 (Ala. 2012).

²⁹⁵*Id.* at 79.

²⁹⁶887 So. 2d 861 (Ala. 2004).

²⁹⁷*Ex parte Capstone Bldg. Corp.*, 96 So. 3d at 83.

²⁹⁸*Id.* at 88 (citing and quoting *Citizens United*).

²⁹⁹*Id.* at 89.

In 2013, in *Christopher v. Christopher*,³⁰⁰ the Alabama Supreme Court again cited Chief Justice Roberts' *Citizens United* opinion, this time in a case involving a court order requiring a woman to pay post-minority education support on behalf of her child. Noting that precedent in question had expressly overturned eight previous cases, the court determined the best action was to overturn the "misapplication" and return to the previous line of cases.³⁰¹

Numerous other opinions cited *Citizens United* for Chief Justice Roberts' proposition that *stare decisis* is not "an inexorable command, nor a mechanical formula of adherence to the latest decision."³⁰² For example, in *State v. Jackson*,³⁰³ a murder case, the Georgia Supreme Court cited the phrase to support its decision to overturn a precedent. The court, however, did not list the same factors courts should consider in their *stare decisis* calculations as the chief justice had. The court explained the relevant factors were "the age of the precedent, the reliance interests at stake, the workability of the decision, and most importantly, the soundness of its reasoning."³⁰⁴ *Ex parte Capstone Bldg. Corp.*,³⁰⁵ discussed above, also cited *Citizens United* for this proposition in addition to citing it as support for "abrogating the errant precedent."

In an interesting 2010 concurring opinion in a Georgia Supreme Court case, Justice David Nahmias quoted Chief Justice Roberts' opinion at length when explaining the difference between *stare decisis* in statutory cases and constitutional cases. Like the chief justice had done in *Citizens United*, Justice Nahmias wrote separately to address *stare decisis*. Justice Nahmias wrote that while *stare decisis* was "always important," it was "less compelling" when the issue was the meaning of a constitutional provision.³⁰⁶ Justice Nahmias then quoted Chief Justice Roberts on the limits of *stare decisis* and listed the same *stare decisis* factors discussed in *State v. Jackson*: the age of the precedent, the reliance interests at stake, the workability of the decision, and "most importantly," the soundness of its reasoning.³⁰⁷ Because, according to Justice Nahmias, the court's earlier decisions had been "decided right," he said there was no reason to even invoke *stare decisis* in the present case.³⁰⁸

As mentioned above, Justice Stevens' dissenting opinion in *Citizens United* has been cited once in a case discussing *stare decisis*. In *State*

³⁰⁰145 So. 3d 60 (Ala. 2013)

³⁰¹*Id.* at 68.

³⁰²558 U.S. 310, 377 (2010) (Roberts, J., concurring) (citations omitted).

³⁰³697 S.E.2d 757 (Ga. 2010).

³⁰⁴*Id.* at 766.

³⁰⁵96 So. 3d 77, 89 (Ala. 2012).

³⁰⁶*Smith v. Baptiste*, 694 S.E.2d 83, 89 (Ga. 2010) (Nahmias, J., concurring).

³⁰⁷*Id.* at 90 (Nahmias, J., concurring).

³⁰⁸*Id.* (Nahmias, J., concurring).

v. Quintero, the New Hampshire Supreme Court considered whether to overturn a precedent that required the state to prove criminal acts occurred in the time frame alleged in the indictments in a criminal case.³⁰⁹ Although both the majority opinion and concurring opinion agreed the precedent should be overturned, they came to the conclusion for different reasons. The majority focused on a four-factor test,³¹⁰ concluding the precedent should be overruled because it was unworkable within the current legal framework, because developments in related principles of law undercut the precedent and robbed it of significant application or justification, and because the precedent did not lend itself to any general reliance that would create a special hardship were it overruled.³¹¹

The concurrence, written by Justice Robert J. Lynn, focused on the reasoning of the majority's decision, contending that what he referred to as the "four *Casey* factors"³¹² were not inclusive of all the reasons a court should consider when overturning a precedent. In addition to these reasons, Justice Lynn added another four,³¹³ citing Justice Kennedy's majority opinion in *Citizens United* for his eighth factor: "whether the precedent is well-reasoned."³¹⁴ Although Justice Lynn's seventh factor, whether the precedent was "joined by a strong majority of the court" or instead "decided by the narrowest of margins, over spirited dissents challenging [its] basic underpinnings,"³¹⁵ was similar to the point made by Chief Justice Roberts in *Citizens United*, Justice Lynn instead cited a New Hampshire Supreme Court decision, *Brannigan v. Usitalo*,³¹⁶

³⁰⁹34 A.3d 612, 613 (N.H. 2011) (discussing *State v. Williams*, 629 A.2d 83 (N.H. 1993)).

³¹⁰*Id.* at 616. The court wrote the proper four factors were (1) whether the precedent has proven to be practically unworkable; (2) whether the precedent is subject to "a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine;" and (4) whether facts have so changed that the old rule has been robbed of significant application or justification. *Id.*

³¹¹*Id.* at 620.

³¹²Although the majority cited a New Hampshire Supreme Court case as the source of the four factors, the concurrence attributed the factors to the U.S. Supreme Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

³¹³*Quintero*, 34 A.3d at 626-27 (Lynn, J., concurring) (citations omitted). ("In addition to the four *Casey* factors, among other considerations which both this court and the United States Supreme Court have regarded as important in determining whether to overrule a prior decision are the following: (5) the antiquity of the precedent; (6) whether it rested on constitutional, rather than statutory or common law, grounds; (7) whether the precedent was "joined by a strong majority of the court" or instead "decided by the narrowest of margins, over spirited dissents challenging [its] basic underpinnings"; and (8) whether the precedent is well-reasoned.")

³¹⁴*Id.* (Lynn, J., concurring).

³¹⁵*Id.* (Lynn, J., concurring) (citations omitted).

³¹⁶587 A.2d 1232 (N.H. 1991).

and the U.S. Supreme Court's decision in *Payne v. Tennessee*³¹⁷ for the proposition.

Then Justice Lynn's concurrence argued that the precedent at issue should be overturned based on his eighth factor. Although he cautioned that a precedent should not be overturned solely because it was poorly reasoned, he acknowledged this was a major reason for overruling most cases. Citing *Citizens United* for support, the concurrence stated: "[W]hether one characterizes poor reasoning as a prerequisite to *stare decisis* analysis or a factor in the analysis is largely a matter of semantics and of little practical importance. . . . Almost by definition, a poorly reasoned decision is apt to produce injustice."³¹⁸

The majority opinion took exception with the eighth factor – the “well-reasoned factor” – arguing the factor greatly and inappropriately expanded *stare decisis*. The court wrote that to state a precedent was poorly reasoned was simply a merits assessment.³¹⁹ The court then cited Justice Stevens' argument in his *Citizens United* dissent that “merely ‘restating a merits argument with additional vigor does not give it extra weight in the *stare decisis* calculus.’”³²⁰ The court then made arguably the strongest defense of *stare decisis* found in any case that has cited *Citizens United*. The court wrote:

Stare decisis is the essence of judicial self-restraint. Judges are not at liberty to follow prior decisions that are well-reasoned and discard those that are not. Indeed, principled application of *stare decisis* requires a court to adhere even to poorly reasoned precedent in the absence of ‘some special reason over and above the belief that a prior case was wrongly decided.’³²¹

The court then concluded that to allow judges to simply overrule precedents they deemed were “poorly reasoned” gave a court “expansive authority to overrule any prior decision it determines is poorly reasoned.”³²²

³¹⁷501 U.S. 808, 828–29 (1991).

³¹⁸*Quintero*, 34 A.3d at 627-28 (Lynn, J., concurring) (citing *Citizens United v. FEC*, 558 U.S. 310, 349 (2010) (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1999), based in part, on its “wholly foreign concept,” that the government has a legitimate interest in suppressing First Amendment rights in order to “equalize the relative ability of individuals and groups to influence the outcome of elections” (citations omitted)).

³¹⁹*Quintero*, 34 A.3d at 621.

³²⁰*Id.* (citation omitted).

³²¹*Id.* (citation omitted).

³²²*Id.* at 540.

DISCUSSION

The opinions in *Citizens United* have, thus, added fuel to the fire that is the debate surrounding *stare decisis*. While citing *Citizens United* for the proposition that *stare decisis* is not a mechanical formula is fairly innocuous — this is little more than *dicta* — there is evidence the case's discussions of *stare decisis* will have a lasting impact. When invoked in discussions of *stare decisis* in lower courts, *Citizens United* is being used overwhelming to justify overturning precedent. It has lent additional credence to the contention that the doctrine is largely political in nature and means little to the Supreme Court. In addition, Justice Kennedy's and Chief Justice Roberts' opinions in *Citizens United* have provided additional factors to the multitude already in play for courts to consider when attempting a principled approach to overturning precedent.³²³ *Citizens United* has also given lower courts an excuse to overturn precedent even when the argument to overturn a precedent is not introduced in lower court, opening the door to even more overturned precedents.³²⁴ To put it bluntly, the doctrine of *stare decisis* is largely a mess, and *Citizens United* has made it worse.

This is problematic because *stare decisis* does far more than provide justices and judges with a tool to achieve their desired policy outcomes. In addition to providing stability and predictability — important outcomes unto themselves — a major function of *stare decisis*, perhaps its most important function, is to protect the Court's legitimacy by reinforcing the public's opinion of an apolitical judiciary. The myth of legality, or the myth that the Court is at least partially guided and restrained by rules of law, is a source of institutional legitimacy for the Court.³²⁵ *Stare decisis* is an important aspect of this myth. When the Court adds new factors to *stare decisis* or inconsistently applies existing factors, it strengthens the idea that the Court is largely a political body, which in turn can weaken the Court and the judiciary in the eyes of the public.

While Chief Justice Roberts' opinion has been praised, at least in some circles, for concisely restating the doctrine of *stare decisis*,³²⁶ both the chief justice and Justice Kennedy, in actuality, veered from what

³²³Justice Stevens' opinion largely focuses on traditional *stare decisis* calculations. Most literature agrees that reliance factors, antiquity of a precedent, and the workability of a precedent have long been considered key components of *stare decisis*. See, e.g., Burton, *supra* note 19, at 1693-94; Frickey, *supra* note 27, at 70; Kozel, *supra* note 68, at 421-25, 430.

³²⁴See, e.g., *Freed v. Geisinger Med. Ctr.*, 5 A.3d 212, 215 (Pa. 2010).

³²⁵See John M. Scheb II & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOC. SCI. Q. 928, 929 (2000).

³²⁶See Shapiro & Mosvick, *supra* note 19, at 135 .

have been viewed in the scholarship as traditional *stare decisis* considerations. Justice Kennedy in his majority opinion listed five reasons *stare decisis* should not be followed in *Citizens United: Austin* was not well reasoned, the decision contravened *Buckley v. Valeo*³²⁷ and *First National Bank of Boston v. Bellotti*,³²⁸ *Austin* had been undermined, the defense of *Austin* had relied on other rationales than the original justifications, and there were no reliance issues at stake. Three of these — the well-reasoned argument, the departure from previous precedents, and reliance considerations — are commonly discussed in literature and cases dealing with *stare decisis*.

Even Justice Kennedy's analysis of these traditional considerations was not without at least two flaws, however. First, while *Austin* departed from *Buckley*, it was a departure from a single precedent rather than a long line of cases or clearly established First Amendment doctrine. While the *stare decisis* literature supports the idea that cases that do not follow precedent have less protection under *stare decisis*, these situations typically involve long lines of cases and departure from well-established doctrine. That was not the case in *Citizens United*. Furthermore, these authors contend that *stare decisis* is simply weaker in these situations, not that it does not apply at all.³²⁹ In addition, *Bellotti* did not deal with candidate elections — which were at issue in *Austin* — and the *Bellotti* Court specifically stated that a profit-making corporation's right to speak on issues of public interest “implies no comparable right in the quite different context of participation in political campaigns for election to public office.”³³⁰ Thus, *Austin* was not a deviation from *Bellotti*, since *Bellotti* did not directly speak to the issue presented by *Austin*.

Second, as Justice Stevens noted, there was a significant reliance issue at stake in *Citizens United*. While reliance was, of course, not universal at the state level, many state legislatures and courts had been relying on the ability to craft and uphold state campaign finance laws

³²⁷424 U.S. 1 (1976).

³²⁸435 U.S. 765 (1978).

³²⁹See, e.g., Kozel, *supra* note 68, at 440 (“If a precedent represents a break from the cases that came before it, it tends to receive *diminished stare decisis* effect.”) (emphasis added).

³³⁰*Id.* at 787 n.26 (“The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted. The case before us presents no comparable problem, and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office. Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections” (citations omitted)).

for decades. For example, in 2011, a year after *Citizens United*, the Montana Supreme Court decided *Western Tradition Partnership, Inc. v. Attorney General of Montana*.³³¹ In upholding a campaign finance law that had now become clearly unconstitutional under *Citizens United*,³³² the Montana Supreme Court relied heavily on the historical precedent and the historical necessity for allowing campaign finance restrictions in the state.³³³ The court contended that prior to Montana's campaign finance laws "the state of Montana and its government were operating under a mere shell of legal authority."³³⁴ The only traditional consideration that Justice Kennedy articulated that is impossible to argue against is his declaration that *Austin* was not well reasoned because this is really simply another way of Justice Kennedy saying the Court did not agree with *Austin*.

The other factors Justice Kennedy articulated appear to be new considerations or at least considerations that have not been widely discussed in the literature. Justice Kennedy's and Chief Justice Roberts' contention that *Austin* was weakened because the force of *stare decisis* is diminished when "neither party defends the reasoning of the precedent"³³⁵ appears to be a novel creation – one that has now been adopted by lower court judges.³³⁶ As for Justice Kennedy's argument that *Austin* had been undermined by experience, it is unclear how much influence this reasoning will have since it is not completely clear what Justice Kennedy was referring to by the argument, and he offered no evidence to explain or substantiate the claim.

Similarly, despite adulation that the chief justice's opinion took "great pains to respect the long-standing role of *stare decisis*,"³³⁷ his opinion actually ignored several long-standing considerations, and his admonition that "spirited dissents" weakened a precedent has generated controversy. As one author noted, "This astonishing passage makes all contested precedents non-binding [and] implies that every constitutional precedent in which there was at least one dissent should be liable to overruling just for that reason."³³⁸ Although the chief justice's point

³³¹271 P.3d 1 (Mt. 2011).

³³²In 2012, the Supreme Court reversed the Montana Supreme Court without hearing oral arguments in a short per curiam opinion that simply stated the issue had already been settled by *Citizens United*. See *American Tradition Partnership, Inc. v. Bullock*, 132 S.Ct. 2490 (2012).

³³³See 271 P.3d 1 at 10–13.

³³⁴*Id.* at 11.

³³⁵*Citizens United v. FEC*, 558 U.S. 310, 363 (2010). See also *id.* at 383 (Roberts, C.J., concurring).

³³⁶See, e.g., *Miller v. Johnson*, 289 P.3d 1098, 1140 (Kan. 2012) (Bier, J., concurring in part and dissenting in part).

³³⁷Shapiro & Mosvick, *supra* note 19, at 123.

³³⁸Burton, *supra* note 19, at 1693.

is not completely novel — he cited an earlier Supreme Court opinion for this proposition³³⁹ — his reassertion surely strengthens the consideration as a *stare decisis* factor. The “spirited dissent” rationale has yet to catch on in the lower courts, however.

When the chief justice relied on established *stare decisis* considerations, he conveniently interpreted them to support his apparent desire to overturn *Austin*. For example, like Justice Kennedy, the chief justice contended that *Austin* upended settled jurisprudence — that it was an errant precedent and overruling it would preserve the law’s coherence. However, as explained above, *Buckley* could be considered as much an aberration as *Austin*. In 1976, the Court ruled that independent expenditures were more like speech than contributions.³⁴⁰ However, in 1986, the Court began to distinguish independent expenditures made by for-profit corporations from other types of independent expenditures when in *Massachusetts Citizens For Life*³⁴¹ the Court created a three-part test to distinguish between ideological nonprofit corporations and business corporations created for economic purposes. This approach was consistently reinforced until 2007. Indeed, the Supreme Court deemed not a single campaign finance law unconstitutional after *Buckley* until the Court’s decision in *Randall* in 2007. In addition to changing three decades worth of settled law, the *Citizens United* majority also went against a century of statutory law.³⁴² Against that backdrop, it is hard to see *Austin* as an aberration.

The chief justice’s argument that *Austin* was “uniquely destabilizing” because it threatened to subvert the Court’s decisions outside the context of corporate express advocacy was also oddly constructed.³⁴³ His worry that *Austin* had been cited by two Supreme Court opinions seems both overblown and to fly in the face of *stare decisis*. On one hand, citations in only two cases, both dealing with campaign finance laws, hardly seem to provide evidence that *Austin* was creeping into other areas of First Amendment law. On the other hand, if later Court decisions were in fact based on *Austin*, this would seem to counsel affirming *Austin* based on *stare decisis* considerations because *Austin* had become settled law. When his opinion is stripped down, it thus seems that, like the

³³⁹Payne v. Tennessee, 501 U.S. 808, 829 (1991). Chief Justice Rehnquist had earlier written that two precedents should be overturned because the cases “were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions.” *Id.*

³⁴⁰Buckley v. Valeo, 424 U.S. 1, 20–21 (1976).

³⁴¹479 U.S. 238 (1986).

³⁴²See Kerr, *supra* note 126, at 316. As noted above, *Citizens United* undermined a long tradition of legislation that began in the late nineteenth and early twentieth century.

³⁴³Citizens United v. FEC, 558 U.S. 310, 380 (2010) (Roberts, C.J., concurring).

majority, Chief Justice Roberts' main complaint with *Austin* was that he did not like the ruling.

That the majority's and Chief Justice Roberts' main reason for overturning *Austin* thus seems to be the "erroneous decision" rationale is problematic for numerous reasons, particularly when lower courts cite to *Citizens United* as support for overruling their own precedents. For example, Justice Nahmias' discussion in the Georgia Supreme Court case *Smith v. Baptiste*,³⁴⁴ where he approvingly cites *Citizens United* to overturn precedent that is erroneous, demonstrates the trouble with this approach. As noted above, Justice Nahmias wrote separately in the case only to address *stare decisis*. In his opinion, Justice Nahmias wrote that in constitutional cases, "the soundness" of a decision was the "most important consideration" in *stare decisis*. Such an approach seems to elevate "soundness" — another name for agreement — to a new level of importance.

This approach, of course, begs the question of how important *stare decisis* actually is in constitutional cases. If a precedent is "right," it should be followed without even mentioning *stare decisis*, Justice Nahmias wrote. If a precedent is "wrong," though, *stare decisis* counsels not following the precedent. But making soundness both a trigger and the overriding factor in deciding whether to follow a precedent eviscerates the entire concept of *stare decisis*. As Judge Jerome Frank once wrote, "*Stare decisis* has no bite when it means merely that a court adheres to a precedent it considers correct. It is significant only when a court feels constrained to stick to a former ruling although the court has come to regard it as unwise or unjust."³⁴⁵

An approach to *stare decisis* that emphasizes the rightness of a decision is additionally problematic because when to follow precedent frequently only becomes an issue after personnel changes on a court, as was the case in *Citizens United*. In addition, debates about *stare decisis* often involve judges openly and divisively accusing each other of following personal preferences rather than legal doctrine.³⁴⁶ These discussions and the truncated *stare decisis* calculations that frequently accompany them undermine faith in the judicial process. Thus, *Citizens United* and the lower court opinions that have cited it only add to attacks on the Court's legitimacy and undermine the myth of legality that is central to the judicial process. The myth of legality holds that a major component of adherence to the Court's decision is the public's belief that opinions are based on legal reasoning rather than policy preferences.

³⁴⁴694 S.E.2d 83, 89 (Ga. 2010) (Nahmias, J., concurring).

³⁴⁵United States v. Shaughnessy 234 F. 2d 715, 719 (2d Cir. 1955).

³⁴⁶See, e.g., Regents of the University of Michigan v. Titan Insurance Co., 791 N.W. 897 (Mich. 2010).

As an unelected institution that has no means of enforcing compliance from the other branches of government or the general populace, the Court's legitimacy is both sociological and integral. And a key factor supporting the legitimacy of the Court is the public's belief in the myth of legality. According to Professors John M. Scheb and William Lyons, the myth of legality is, "The belief that judicial decisions are based on autonomous legal principles . . . [and] cases are decided by the application of legal rules formulated and applied through a politically and philosophically neutral process of legal reasoning."³⁴⁷ The myth, which is often bolstered by media coverage, suggests that the Supreme Court is capable of objective legal decisions through the justices' suspension of biases and political motivations. *Stare decisis* is an important component of this legitimacy because it serves to reinforce public perception of an apolitical court that follows the rule of law. *Stare decisis*, in other words, is less important as an actual legal doctrine than it is as a perceived legal doctrine. It is a means to an end — public faith that the Court is apolitical even if and when it is not.

All of this, of course, rests on the notion that the public does not want a judiciary where constitutional understanding shifts with membership changes. Not all legal scholars agree with this. Some authors have suggested that reversing behavior is normal and does not endanger the Court's legitimacy. Professor Banks, for example, wrote that when there is an ideological directional shift on the Court it is natural for there to be constitutional flux and policy change and this does not affect the legitimacy of the Court.³⁴⁸ Justice William O. Douglas concluded that the Supreme Court inevitably enters into periods of constitutional flux when newly appointed justices are given the opportunity to revisit the decisions of their predecessors.³⁴⁹ Justice Douglas wrote that it was a part of the natural judicial process for precedents to fall during times of rapid turnover as new majorities instituted their policy preferences.³⁵⁰

This stance, however, assumes the American public is willing to accept a judiciary that follows policy preferences without an attempt to moderate the process through a principled approach to *stare decisis*. An approach to *stare decisis* that emphasizes factors beyond mere agreement with previous cases allows society, in the words of Justice Marshall, to "presume that bedrock principles are founded in law rather than the proclivities of individuals."³⁵¹ Using the rhetoric of *stare decisis* and paying heed to this rhetoric constrains the Court and reinforces the

³⁴⁷Scheb & Lyons, *supra* note 325, at 929.

³⁴⁸Banks, *supra* note 91, at 234.

³⁴⁹William O. Douglas, *Stare Decisis*, 49 COLUMB. L. REV. 735, 736-37 (1949).

³⁵⁰*Id.*

³⁵¹*Vasquez v. Hillery*, 474 U.S. 254, 256 (1986).

idea that policy preferences do not always rule the legal day. Being intellectually honest in one's approach to precedent and taking the doctrine seriously by examining and weighing factors beyond erroneousness — another name for agreement — moderates fluctuations in constitutional interpretations. While constitutional flux is natural, it should be constrained by the rule of law and constrained by factors other than merely whether a new majority of the Court likes an old opinion. Justice Scalia, who went so far as to write in one case that *stare decisis* was an “administrative convenience,”³⁵² also warned that judges who go against a precedent must give reasons that go beyond merely stating an overruled opinion was wrong.³⁵³ To do otherwise, he said, would completely nullify the effects of the doctrine.³⁵⁴ To add to Justice Scalia's argument, the reasons judges give should also be intellectually rigorous and based on previously established doctrine.

CONCLUSION

Because the change in campaign finance law announced by *Citizens United* came only after personnel changes on the Court, one little-discussed possible effect of the *stare decisis* discussions in the three opinions is a weakening of the doctrine in lower courts and the minds of the public. *Stare decisis* reinforces faith in an independent judiciary and support for the idea that judicial decisions are not simply policy preferences. Even if *stare decisis* does not and cannot completely restrain judicial behavior, it *should* restrain the judiciary in some meaningful way. *Citizens United*, though, arguably played fast and loose with the *stare decisis* doctrine, and lower court judges have since latched onto *Citizens United* as another tool in their judicial toolbox that they can invoke to support an argument to overturn precedent. Creating more and more exceptions to the *stare decisis* rules or focusing on how “well reasoned” a case is in a flimsy attempt to use a “principled” approach to *stare decisis* is unwise. When *stare decisis* calculations frequently boil down to “if you like the opinion, keep it,” this does not constrain policy preferences or reinforce faith in the judiciary.

³⁵²Payne v. Tennessee, 501 U.S. 808, 834 (1991) (Scalia, J., concurring).

³⁵³Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring).

³⁵⁴*Id.*