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Absolute Freedom of Opinion and Sentiment on All Subjects: John Stuart Mill's Enduring (and Ever-Growing) Influence on the Supreme Court's First Amendment Free Speech Jurisprudence

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ABSTRACT

A majority of Justices on the contemporary U.S. Supreme Court have increasingly adopted a largely libertarian view of the constitutional right to the freedom of expression. Indeed, on issues ranging from campaign finance to offensive speech to symbolic speech to commercial speech to online expression, the Court has struck down many laws on free speech grounds. Much of the reasoning in these cases mirrors John Stuart Mill's arguments in *On Liberty*. This is not new, as Mill's position on free speech has been advocated by some members of the Court for a century. However, the advocacy of Mill's position has grown over time, to the point now where it is the dominant view expressed by the Justices in free speech cases. Even where the majority has in recent years found limits to free speech rights (including in cases involving student speech, public employee speech, and speech related to foreign terrorist organizations), several Justices have advocated a Millian framework and arguably followed the exceptions that Mill outlined when advocating the Harm Principle for free speech. Through textual analysis of illustrative cases we demonstrate the growth of Mill's influence on the Supreme Court and where the Justices have deviated from what Mill advocated.

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I. INTRODUCTION

Over the past several decades, the U.S. Supreme Court has been adopting a broader vision of the freedom of expression that is protected by the First Amendment to the U.S. Constitution. Although these decisions are not always unanimous, the Supreme Court's growing free speech libertarianism can be seen in its striking down of laws and practices that have prohibited the following: burning the American flag,[1] burning a cross,[2] advertising alcohol,[3] making indecent online communications to minors,[4] advertising casino gaming,[5] posting virtual child pornography online,[6] making corporate independent expenditures in campaigns for public office,[7] making contributions to candidates for public office in excess of aggregate statutory limits,[8] depicting animal torture,[9] selling violent video games to children,[10] engaging in hate speech,[11] lying about having won military medals,[12] protesting outside of abortion clinics,[13] accessing the Internet as a registered sex offender,[14] adopting a racially disparaging trademark,[15] and adopting a trademark that is regarded as immoral or scandalous.[16] Considering this plethora of rulings, the modern Court is a case study in promoting a libertarian view of the freedom of expression.

The Court's decisions were not always so protective of the freedom of expression. Prior to World War I, the Court held a rather

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1 Texas v. Johnson, 491 U.S. 397 (1989).

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

3 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

4 Reno v. ACLU, 521 U.S. 844 (1997).

5 Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999).

6 Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).

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

8 McCutcheon v. FEC, 572 U.S. 185 (2014).

9 United States v. Stevens, 559 U.S. 460 (2010).

10 Brown v. Entm't Merchs. Ass'n, 564 U.S. 786 (2011).

11 Snyder v. Phelps, 562 U.S. 443 (2011).

12 United States v. Alvarez, 567 U.S. 709 (2012).

13 McCullen v. Coakley, 573 U.S. 464 (2014).

14 Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

15 Matal v. Tam, 137 S. Ct. 1744 (2017).

16 Iancu v. Brunetti, 139 S. Ct. 2294 (2019).

crabbed view of the Free Speech Clause. Over the century since World War I, the Court has often struggled over how to balance what is protected by the First Amendment. With the notable exceptions of Justices Oliver Wendell Holmes, Jr. and Louis Brandeis, followed later by Justices like Hugo Black and William Douglas, most Court members from 1919 until the 1960s adopted a much more restrictive interpretation of the freedom of expression. The majority of Justices instead used the Bad Tendency Test or a narrow understanding of the Clear and Present Danger Test to judge the constitutionality of limits on expression, or the Court deemed major categories of expression to have little to no First Amendment protection. Over time, however, a majority on the Court has adopted reasoning on the freedom of expression that mirrors much of what British political philosopher John Stuart Mill argued in his famous book *On Liberty*, where he advocated for the protection of "absolute freedom of opinion and sentiment on all subjects."[17] Indeed, support for this position has been growing on the Court and becoming more popular among its members for a century, coming to fruition in the last few decades and becoming the dominant view of the freedom of expression. Furthermore, even in recent cases where the majority has curtailed free speech rights (including cases involving public employee speech,[18] student speech,[19] speech related to foreign terrorist organizations,[20] and speech by judicial candidates[21]), the Court has been reasoning within a Millian framework and arguably adhering to notable exceptions to free speech rights that Mill described when advocating the Harm Principle.

Our article will proceed as follows. Part II reviews Mill's theory on the freedom of expression and its basis in the Harm Principle as explained in *On Liberty*. Part III describes how Justice Holmes, along with Justice Brandeis, began advocating for a position on free speech similar to Mill's in the early twentieth century. Part IV explains how the other members of the Court struggled over the ensuing decades on whether to adopt a similar position as Mill and Holmes/Brandeis, with Justices Black and Douglas later carrying the mantle for this approach.

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17 JOHN STUART MILL, ON LIBERTY 11 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859) [hereinafter MILL].

18 Garcetti v. Ceballos, 547 U.S. 410 (2006).

19 Morse v. Frederick, 551 U.S. 393 (2007).

20 Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

21 Williams-Yulee v. Florida Bar, 135 S. Ct. 1656 (2015).

Part V subsequently expounds on how the Court majority began to be swayed by this more libertarian view, with the current Court largely adopting it and repeatedly striking down legislation in violation of the Harm Principle. Part VI will emphasize how, even as the Court has become more enamored with the freedom of speech than at any other time in its history, there remain cases where the Court upholds significant restrictions on the freedom of expression; these cases can be seen as matching the exceptions Mill had to his general rule on when speech should be protected. Overall, through textual analysis of illustrative examples, we will demonstrate the growth of Mill's influence on the Supreme Court and where the Justices have deviated from what Mill advocated.

II. JOHN STUART MILL'S FREEDOM OF SPEECH AND THE HARM PRINCIPLE IN *ON LIBERTY*

John Stuart Mill published *On Liberty* in 1859 to explain his utilitarian position on how to resolve the conflict between majority rule and minority rights.[22] With the acceptance of democratic governance, majoritarian rule came to be seen as the legitimate expression of "the people." Mill worried, however, that "[t]he 'people' who exercise the power are not always the same people with those over whom it is exercised; and the 'self-government' spoken of is not the government of each by himself, but of each by all the rest."[23] Mill knew that he was not alone in decrying the "tyranny of the majority,"[24] understanding that too often, society is over-willing to restrict individual freedom on the grounds of preserving public order or to protect society from immorality. Mill did not dispute that there must be limits to individual freedom, but he worried that the limits which society draws are often arbitrary and reflect the particular "prejudices or superstitions" of the dominant group.[25]

According to Mill, the Harm Principle is the appropriate way to resolve this conflict. He described the Harm Principle as follows in *On Liberty*: "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to

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22 Elizabeth Rapaport, *Editor's Introduction* to MILL, *supra* note 17, at vii–viii.

23 MILL, *supra* note 17, at 4.

24 Terence H. Qualter, *John Stuart Mill, Disciple of de Tocqueville*, 13 W. POL. Q. 880, 883–84 (1960).

25 MILL, *supra* note 17, at 6.

prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."[26] In other words, government should generally protect individual liberties, even if exercising them may cause harm to the person exercising those liberties or will be immoral in some way. It is only the causing of physical harm or property harm to others that Mill finds to be a sufficient justification for restraining human freedoms.[27] Mill continued to say that one "cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right."[28] Put another, more succinct, way, "[o]ver himself, over his own body and mind, the individual is sovereign."[29] Mill's position on freedom was part of his greater philosophy of utilitarianism, whereby he modified Jeremy Bentham's notion of the Greatest Happiness Principle.[30] Mill regarded utility to mean that "actions are right in proportion as they tend to promote happiness" and "wrong as they tend to produce the reverse of happiness," with special emphasis placed on the "higher pleasures" that include intellectual pursuits.[31] This distinction by Mill explains why the focus of *On Liberty* is connecting individual liberty with well-being and, indeed, to the capacity to flourish as a human being. A person who does not evaluate his or her life critically (through neglect or because of a lack of freedom), "does not educate or develop in him any of the qualities which are the distinctive endowment of a human being. The human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference are exercised only in making a choice."[32] As we will explore below, this explains why the freedom of expression in particular was an important right to be protected in Mill's scheme.

There are limits to Mill's Harm Principle, however. Mill did not advocate that this level of freedom should pertain to all persons. First,

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26 *Id.* at 9.

27 Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 120–21 (1999).

28 MILL, *supra* note 17, at 9.

29 *Id.*

30 JOHN STUART MILL, UTILITARIANISM 3–4 (George Sher ed., Hackett Publ'g Co. 1979) (1861).

31 *Id.* at 7, 10.

32 MILL, *supra* note 17, at 56.

Mill proclaimed that "[i]t is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood."[33] Therefore, one needs to reach a certain age and stage of mental development before the Harm Principle applies, and before such an age, society may put more limits on one's freedom, according to Mill.[34] His text, referring to the "maturity of their faculties," also suggests that adults who are mentally ill or are below a certain level of intelligence would not be fully protected by the Harm Principle. One can derive this from later statements Mill makes where he claims limiting freedom is acceptable in the young because they still require "being taken care of by others,"[35] an argument that could also apply to certain narrow classes of adults.

Second, Mill did not believe that the Harm Principle was the appropriate way to judge freedom for "backward states of society."[36] Instead, Mill averred that "[d]espotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement and the means justified by actually effecting that end."[37] Mill also warned his readers against the "East" where "the despotism of custom" has made "a people all alike, all governing their thoughts and conduct by the same maxims and rules."[38] From a writer whose views, at the time, were so progressive on women's rights,[39] this racism and ethnocentrism may come as surprising; even more so when one considers that Mill emphasized our tendency to place an "unbounded reliance" on our own cultural, political, and social norms.[40] Indeed, according to Mill in *On Liberty*, the following was true of many persons:

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33 *Id.* at 9.

34 Rudi Verburg, *John Stuart Mill's Political Economy: Educational Means to Moral Progress*, 64 REV. SOC. ECON. 225, 234–35 (2006).

35 MILL, *supra* note 17, at 9.

36 *Id.* at 10.

37 *Id.*

38 *Id.* at 67–69.

39 Wendy Donner, *John Stuart Mill's Liberal Feminism*, 69 PHIL. STUD. 155, 155 (1993).

40 MILL, *supra* note 17, at 17.

> *He devolves upon his own world the responsibility of being in the right against the dissentient worlds of other people; and it never troubles him that mere accident has decided which of these numerous worlds is the object of his reliance, and that the same causes which make him a churchman in London would have made him a Buddhist or a Confucian in Peking.*[41]

Nevertheless, Mill's language made it clear that he believed even these societies he called "backward" or filled with "barbarians" have the capacity to progress and that once they do, they too must be given the freedom that his home country rightly enjoyed:

> *[A]s soon as mankind have attained the capacity of being guided to their own improvement by conviction or persuasion . . . compulsion, either in the direct form or in that of pains and penalties for noncompliance, is no longer admissible as a means to their own good, and justifiable only for the security of others.*[42]

Thus, according to Mill and in somewhat of a puzzle, "backwards" states may first need to be under illiberal rule, where basic freedoms are denied to them before liberal freedoms (like the freedom of speech) can be protected in the full sense that Mill envisioned.[43]

Third, Mill asserted that "[t]here are also many positive acts for the benefit of others which [one] may rightfully be compelled to perform," including "certain acts of individual beneficence."[44] For Mill, this categorical exception included things such as being required to give evidence in a court of law, to be drafted into the military, or to act as a Good Samaritan.[45] This third exception includes situations where one has chosen to take on familial or public responsibilities—in those cases one can be compelled to act.[46] For instance, Mill described in detail the "duties of the parents" to make certain provisions to their

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41 *Id.*

42 *Id.* at 10.

43 William Voegeli, *Liberalism and Tolerance*, 54 SAN DIEGO L. REV. 319, 322 (2017).

44 MILL, *supra* note 17, at 10.

45 *Id.* at 10–11.

46 Y.N. Chopra, *Mill's Principle of Liberty*, 69 PHIL. 417, 436–37 (1994).

children, including education and nourishment.[47] Similarly, Mill told his readers that if one holds a job where one has responsibilities to the public, then one's liberties may be curtailed more than would be the case for the general populace. Mill described this as follows: "when a person disables himself, by conduct purely self-regarding, from the performance of some definite duty incumbent on him to the public, he is guilty of a social offense."[48] Mill went on to colorfully state the following:

> *No person ought to be punished simply for being drunk; but a soldier or policeman should be punished for being drunk on duty. Whenever, in short, there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty and placed in that of morality or law.*[49]

These are all examples of duties one has agreed to complete. Therefore, the Harm Principle does not absolve a person of fulfilling "other-regarding" activities that one previously volunteered to undertake.[50]

Upon explaining the contours of his Harm Principle, Mill turned to the specifics of the freedom of expression. He described what are First Amendment freedoms in the United States as the primary examples of the liberty that should be protected:

> *This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness, demanding liberty of conscience in the most comprehensive sense, liberty of thought and feeling, absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people, but, being*

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47 MILL, *supra* note 17, at 104.

48 *Id.* at 79–80.

49 *Id.* at 80.

50 Anthony D'Amato, *Natural Law – A Libertarian View*, 3 FIU L. REV. 97, 100–101 (2007).

> *almost of as much importance as the liberty of thought itself and resting in great part on the same reasons, is practically inseparable from it.*[51]

The freedoms of religion, speech, and press were all tied together in Mill's mind because they all stem from the liberty of thought.[52] Mill referenced these three rights similarly to show how these rights were tied together in the First Amendment to the U.S. Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ."[53] Mill advocated protection of a broad notion of the freedom of expression, encompassing modes of communication that are not just oral, but also written and in other forms. Furthermore, Mill announced that when it comes to the freedom of expression, "[i]f all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind."[54] This is one of the strongest assertions of what should be protected by the freedom of expression.

Mill next explained why the freedom of expression is a key liberty that needs to be protected in all cases, whether the expression is true or not. First, Mill declared that, for obvious reasons, the freedom of expression should be protected where "the opinion which it is attempted to suppress by authority may possibly be true."[55] Mill told the reader that humans are fallible, and silencing a speaker who states the truth is "robbing the human race" because "they are deprived of the opportunity of exchanging error for truth."[56] Put another way, Mill stated that "every age [has] held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions, now general, will be rejected by future ages."[57] Thus, for Mill, we may believe someone to be speaking something offensive or false, but we may be wrong, so silencing such a speaker is bad for the

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51 MILL, *supra* note 17, at 11–12.

52 Karen Zivi, *Cultivating Character: John Stuart Mill and the Subject of Rights*, 50 AM. J. POL. SCI. 49, 56–58 (2006).

53 U.S. CONST. amend. I.

54 MILL, *supra* note 17, at 16.

55 *Id.*

56 *Id.*

57 *Id.* at 17.

human race in the long run.[58] Said differently, according to Mill there is no conceivable reason to silence the truth or what may be true.

Second, Mill proclaimed that the freedom of expression should be protected when the speech contains both some truth and some falsity:

> *[T]hough the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.*[59]

Even if a statement contains just a kernel of truth, the speaker is partially speaking the truth. In silencing that view, the government would, therefore, be suppressing some truth.[60] Mill admitted that much speech is like this, containing some truth but also some falsity.[61] When describing our observations, we may try to make ourselves (and our arguments) look better, or we may have simply misperceived an event or what we have read or heard. Thus, what we often say may contain some truth and some falsity. Mill saw no reason to ban such speech even if it has only a kernel of truth because of the great value he placed on hearing the truth.

But what about the situation where everything that a speaker states is false? And what if we actually *knew* what they were saying is false? Would we be justified in silencing such a speaker? For Mill, the answer remained no because of the benefit to humanity of hearing contrasting views. Mill professed that:

> *[E]ven if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds.*[62]

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58 Nigel Rapport, *The Liberal Treatment of Difference: An Untimely Meditation on Culture and Civilization*, 52 CURRENT ANTHROPOLOGY 687, 691 (2011).

59 MILL, *supra* note 17, at 50.

60 Mark Strasser, *Mill, Holmes, Brandeis, and a True Threat to* Brandenburg, 26 BYU J. PUB. L. 37, 56 (2011).

61 MILL, *supra* note 17, at 50–51.

62 *Id.*

Mill explained that there is value in us constantly reevaluating our beliefs and being able to defend them, or else we will start merely believing simple dogma. As he colorfully stated at one point in *On Liberty*, "[b]oth teachers and learners go to sleep at their posts as soon as there is no enemy in the field."[63] In other words, Mill believed that government should not silence these types of speakers, even when what they spout is something the overwhelming majority of society has concluded is an absolutely false statement. This perceived false view helps those who think they are right be able to defend what they believe to be true.[64]

Mill's strong defense of the freedom of expression, or what he called "absolute freedom of opinion and sentiment on all subjects,"[65] against government interference applies to many situations. Take, for example, where Mill described that if one will "misstate the elements of the case, or misrepresent the opposite opinion."[66] He went on to write that "still less could law presume to interfere with this kind of controversial misconduct."[67] Mill also appeared to support protecting the freedom of speech against government interference when the speech is something we believe to be not only false, but also offensive and hateful.[68]

Significantly, Mill argued that all types of speech ought to be protected, even cases where speakers engage in "intemperate discussion, namely invective, sarcasm, personality, and the like."[69] The context in which this arises is noteworthy because Mill contended that demands for a "studied moderation of language" are a way in which the dominant group disenfranchises the voices of the powerless.[70] For Mill, the language of protest, of satire, and of ridicule are, at times, the only weapons the weak have to make their case heard. Enforcement of rules of decorum in debate will often be

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63 *Id.* at 41.

64 Jeremy J. Ofseyer, *Taking Liberties with John Stuart Mill*, 1999 ANN. SURV. AM. L. 395, 425 (1999); *see also* Rapport, *supra* note 58, at 691.

65 MILL, *supra* note 17, at 11.

66 *Id.* at 51.

67 *Id.*

68 Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1649 (2010).

69 MILL, *supra* note 17, at 51.

70 *Id.*

selective, resulting in the government ultimately helping one side and hurting another.[71] Mill warned that calls for civil discourse are shot through with hypocrisy; when satire or intemperate language is employed by those who favor received opinion, "they may not only be used without general disapproval, but will be likely to obtain for him who uses them the praise of honest zeal and righteous indignation."[72]

With such a mixture of ideas—the true, the false, the confused, and the intemperate—how can one come to the truth? Mill's answer was the marketplace of ideas. We have already seen how Mill advocated that prevailing opinions are best fortified by hearing from the opposition.[73] Later in *On Liberty*, Mill declared that people must "be free to consult with one another about what is fit to be so done; to exchange opinions, and give and receive suggestions."[74] However, Mill did not mean to make the reader believe that all opinions are of equal quality. Rather, Mill thought that the proper remedy to ill-informed speech is to respond with well-informed speech.[75] Mill clarified that while it is "obvious that law and authority have no business with restraining" speech, it is the case that "opinion ought, in every instance, to determine its verdict by the circumstances of the individual case."[76] Mill was not naïve and did not believe that the truth, in and of itself, will always win out, noting "[m]en are not more zealous for truth than they often are for error."[77] However, he did believe that the truth will always resurface and that it will eventually gain acceptance.[78] According to Mill, the free market of ideas is what shall determine what is right and wrong in opinion, and the government should take no steps to limit any speakers.[79]

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71 Vincent Blasi, *Learned Hand's Seven Other Ideas About the Freedom of Speech*, 50 ARIZ. ST. L.J. 717, 734–35 (2018).

72 MILL, *supra* note 17, at 51.

73 *Id.* at 50.

74 *Id.* at 97.

75 *Id.* at 52.

76 *Id.*

77 *Id.* at 28.

78 *Id.*

79 Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 829–30 (2008); *see also id.* at 871 (explaining how Mill's views on free speech formed a part of Justice Holmes's conception of a "market-place of ideas").

Beyond his limits on freedom generally noted above, the only additional limit on the freedom of expression which Mill allowed was when one's speech might serve as an immediate incitement to harm others.[80] As explained below, the modern U.S. Supreme Court has employed similar reasoning for permitting restrictions on speech. Thus, it is important that Mill's "indispensable" proviso in this regard be fully recounted:

> *No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob . . . . Acts, of whatever kind, which without justifiable cause do harm to others may be, and in the more important cases absolutely require to be, controlled by the unfavorable sentiments, and, when needful, by the active interference of mankind.*[81]

Mill advocated for a narrow government power to restrict expression if there was a tangible and immediate threat of harm, such as provoking an angry crowd. The reason why Mill found this example to be a situation when the expression cannot be protected is because there is no time for the listeners to reflect upon the logic of such a speech when they are in a mob that is whipped up into a frenzy.[82] As explored in more detail in the parts that follow, Mill supported restricting speech when that speech could lead to something similar to imminent lawless action,[83] a standard comparable to what was advocated by Justice Holmes and eventually adopted by the Court in *Brandenburg v. Ohio*.[84] This is also consistent with Mill's advocacy of the more general Harm Principle to protect human freedom.

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80 MILL, *supra* note 17, at 53.

81 *Id.*

82 Strasser, *supra* note 60, at 42.

83 Ofseyer, *supra* note 64, at 412–13.

84 395 U.S. 444 (1969).

III. OLIVER WENDELL HOLMES, JR. BEGINS ADVOCATING MILL'S FREE SPEECH POSITION

For the first 129 years of its history, the U.S. Supreme Court had relatively little to say about the meaning of the freedom of expression that is protected by the First Amendment. Indeed, the right to the freedom of speech was not incorporated to apply to states until *Gitlow v. New York*,[85] meaning there were few germane cases for the Court to review state action that touched upon this right. Furthermore, until the early twentieth century, a lack of relevant federal statutory regulation and congressional limits on the Court's procedural and substantive jurisdiction left the Justices little opportunity to interpret the textual commands of the First Amendment as they applied to the federal government.[86] Nevertheless, toward the end of the nineteenth century, the Court began issuing some significant decisions on the freedom of speech. The reasoning in these rulings, however, was a far cry from the philosophy of John Stuart Mill.

For instance, in *Davis v. Massachusetts* the Court upheld the conviction of a reverend who preached on government property in violation of a Boston ordinance that prohibited making an address on public grounds without a permit from the mayor.[87] In affirming Davis's conviction for a unanimous Court, Justice Edward White viewed the ordinance as a question of government having the power to control its property, ignoring the implications for the freedom of speech (or the freedom of religion):

> *The [F]ourteenth [A]mendment to the [C]onstitution of the United States does not destroy the power of the [S]tates to enact police regulations as to the subjects within their control, and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the state.*[88]

The freedom of speech fared no better in *United States ex rel. Turner v. Williams*, where the Court upheld the exclusion of an alien

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85 268 U.S. 652 (1925).

86 Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 FORDHAM L. REV. 263, 267–72 (1986).

87 167 U.S. 43, 47–48 (1897).

88 *Id.* at 47–48 (citations omitted).

who was believed to have advocated the political philosophy of anarchism.[89] Chief Justice Melville Fuller wrote for another unanimous Court that held that the law which permitted the government to exclude or expel illegal aliens could not violate the First Amendment because, on its face, the law "has no reference to . . . nor [does it] abridge the freedom of speech."[90] According to Chief Justice Fuller, any constitutional protections for the freedom of speech applied to citizens only; even if Turner was "cut off from . . . speaking or publishing . . . in the country," it was "merely because of his exclusion therefrom. He does not become one of the people to whom these things are secured by our Constitution by an attempt to enter, forbidden by law."[91] Fuller went on to reason that "[e]ven if Turner . . . only regarded the absence of government as a political ideal . . . when he sought to attain it by advocating [anarchy] . . . we cannot say that the inference was unjustifiable either that he contemplated the ultimate realization of his ideal by the use of force, or that his speeches were incitements to that end."[92] Thus, simply advocating anarchism was enough justification for the government to exclude Turner, something Mill clearly would not have supported. It is noteworthy that Justice Holmes participated in this case and sided with Fuller and the majority.

Holmes penned the opinion of the Court in *Patterson v. Colorado*, a case where a 7-2 majority upheld a contempt conviction against newspaper publisher Thomas Patterson for printing articles and a cartoon critical of the state's supreme court.[93] Finding no violation of the Fourteenth Amendment, Holmes wrote that it could not be shown that the contempt conviction was arbitrary, and as such, the decision was "a matter of local law."[94] After deferring to the state on the contempt matter, Holmes, in addressing the freedom of expression issue, declined to definitively state if the Fourteenth Amendment incorporated the freedom of expression.[95] Holmes opined that even if the freedom of expression is protected against state infringement, the

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89 194 U.S. 279, 293–95 (1904).

90 *Id.* at 292.

91 *Id.*

92 *Id.* at 294.

93 205 U.S. 454, 458–59 (1907).

94 *Id.* at 461.

95 *Id.* at 462.

freedom of speech under the First Amendment merely prohibits prior restraints.[96] Accordingly, Holmes declared that the Constitution does "not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."[97] Holmes then made what was quintessentially an anti-Millian statement: "[t]he preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false."[98] In other words, even if the prohibition on prior restraint protects false speech, the government may, in pursuance of a vague notion of "public welfare," subsequently punish both false *and* true speech.

It was not long before the Justices upheld a blanket prior restraint. Eight years after upholding Patterson's seditious libel conviction, the Court, in *Mutual Film Corp. v. Industrial Commission of Ohio*, subsequently found no violation in a state-created review board that had the power to screen all movies before they could be publicly shown.[99] Justice Joseph McKenna wrote, for a unanimous Court, that although films may have many praiseworthy qualities, "they may be used for evil" as well, especially if they are shown to children or if "a prurient interest may be excited and appealed to" in a film.[100] Even though the power of this Ohio review board was challenged because it was a type of prior restraint, McKenna rejected this by simply finding that motion pictures were not subject to a constitutional protection of the freedom of speech: "the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . we think, as part of the press of the country, or as organs of public opinion."[101] Like in *Turner* and *Patterson*, Justice Holmes sided with the majority in taking this rather crabbed, non-Millian view of the freedom of speech.

Holmes's approach to these issues began to change at the close of World War I in *Schenck v. United States*, a case where Holmes again

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96 *Id.* "In the first place, the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practised [sic] by other governments.'" *Id.* (citations omitted).

97 *Id.* (citations omitted).

98 *Id.*

99 236 U.S. 230, 243–45 (1915), *overruled by* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

100 *Id.* at 242.

101 *Id.* at 244. The Court reviewed the case under the protection of the freedom of expression under the Ohio Constitution. *Id.* at 242.

wrote for the Court. Charles Schenck was prosecuted for violating the Espionage Act after producing thousands of leaflets urging draft resistance and mailing them to draft-eligible persons.[102] Writing for a unanimous Court, Justice Holmes upheld Schenck's conviction, stating that, regarding the freedom of speech, "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[103] Since Congress has the authority to regulate the military, and since the distribution of the leaflets in question could obstruct draft recruitment, Holmes sustained Schenck's conviction.[104] Holmes's reasoning in the case was quite Millian, in that he found speech to be protected unless it is used to create a secondary danger where there is no time for reasoned, dispassionate discussion of the issue.[105] However, Holmes applied this Millian standard improperly, as it is quite difficult to argue that Schenck's leaflets were, in the immediate moment, about to substantively harm the U.S. war effort; indeed, there were only 15,000–16,000 of these documents printed in Philadelphia for distribution,[106] with no evidence provided that any draftee declined to report due to reading them. The suppression was grounded in language of the prevention of a "clear and present" harm, but the application of the test was done in a way that was very deferential to the government's power to censor ideas it found disagreeable.[107]

Nevertheless, Holmes's opinion for the Court in *Schenck* represents a different approach to the freedom of expression than what Holmes had previously reasoned in *Patterson*. What affected his shift in reasoning on this issue? Holmes frequently met and corresponded with Harvard lecturer Harold Laski, and in a noteworthy letter dated February 28, 1919, Holmes alluded to the fact that he had recently "reread Mill on [sic] *Liberty*" and referred to Mill positively as a "fine old sportsman."[108] This letter, written one week before *Schenck* was

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102 Schenck v. United States, 249 U.S. 47, 48–49 (1919).

103 *Id.* at 52.

104 *Id.* at 52–53.

105 MILL, *supra* note 17, at 53–54.

106 *Schenck*, 249 U.S. at 49–50.

107 *Id.* at 52.

108 Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Feb. 28, 1919), *in* THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL

released,[109] demonstrates that Mill's *On Liberty* was on Holmes's mind while he was penning the Court's opinion. In fact, Laski—a strong free speech advocate who studied Mill—recommended that Holmes take another look at *On Liberty*.[110]

However, Holmes received significant criticism in legal circles after authoring the Court's opinion in *Schenck*, with some scholars claiming the case did little to protect the freedom of speech.[111] Most notably, Harvard law professor Zechariah Chafee criticized Holmes in a law review article released in June of 1919.[112] That same article also referenced Mill on free speech multiple times.[113] Justice Holmes appeared to have taken note of this and other criticism, reevaluating his application of the Clear and Present Danger Test. When the Court was asked to review another Espionage Act conviction several months after *Schenck*, in *Abrams v. United States*, Holmes found himself dissenting from a decision upholding the prosecution. The majority in *Abrams* took a hardline stance limiting the freedom of expression, claiming that speech could be punished if it produced a bad tendency, in this case the intention of promoting a general workers' strike.[114] Here the Court could not be said to be employing Mill's indispensable proviso, as there was no imminent threat of harm. There is no evidence that anyone was swayed—or that many people could reasonably be expected to be swayed—to strike due to what Holmes, in dissent, called "a silly leaflet by an unknown man."[115] The Court majority, in adopting this more deferential Bad Tendency Test, was making use of an old British standard for free speech cases that dated back to *Regina*

OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 143 (Richard A. Posner ed., 1992).

109 *Schenck*, 249 U.S. at 47 (decided on Mar. 3, 1919).

110 THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND – AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA 98 (2014).

111 Philippa Strum, *Brandeis: The Public Activist and Freedom of Speech*, 45 BRANDEIS L.J. 659, 675–77 (2007).

112 Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919).

113 *Id.* at 933 n.1, 955.

114 Abrams v. United States, 250 U.S. 616, 624 (1919).

115 *Id.* at 628 (Holmes, J., dissenting).

v. Hicklin.[116] Holmes, however, continued to embrace a more Millian approach to the freedom of speech in his dissent, declaring that:

> *Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.*[117]

There is quite a bit of Mill's political theory contained in this dense paragraph by Holmes. It is reminiscent of *On Liberty*, in that it proclaims "that the best test of truth is the power of the thought to get itself accepted in the . . . market."[118] Mill's notion of the fallibility of human knowledge is also quite evident in Holmes's proclamation "that

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116 Regina v. Hicklin [1868] 3 LRQB 360 at 370 (Eng.).

117 *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

118 *Id.*

time has upset many fighting faiths."[119] And the concept of protecting a broad range of expression, even those views "we loathe and believe to be fraught with death,"[120] continues Mill's proclamations on allowing speech that is both believed to be false and that is delivered by intemperate means. Thus, Mill's influence on Holmes's thought is quite evident. Holmes becomes the important bridge for the purposes of our current discussion because he turns what is otherwise political theory espoused by a foreign philosopher into an explanation of the meaning of the U.S. Constitution by a sitting Supreme Court Justice. As we shall show below, the precedential value of prior opinions would lead future Supreme Court Justices to adopt this approach as well.

The espousal of the Holmes/Mill approach to free speech was not immediate, however. In *Abrams*, Holmes was joined solely in dissent by Justice Louis Brandeis, who would join with Holmes several times over the next decade in dissents (or concurrences) against majorities that upheld speech prosecutions.[121] One notable example was *Gitlow v. New York*, which involved the prosecution of a communist who printed a pamphlet (the *Left Wing Manifesto*) advocating for the overthrow of capitalism in the United States.[122] Justice Edward Sanford, writing for the majority, reaffirmed the Bad Tendency Test, declaring that "the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent."[123] In dissent, Justice Holmes again pushed his Millian version of freedom of expression:

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119 *Id.*

120 *Id.*

121 *See* Whitney v. California, 274 U.S. 357, 372–73 (1927) (Brandeis, J., concurring) (stressing that speech should not be restricted unless it will produce "a clear and imminent danger of some substantive evil"); Gitlow v. New York, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting) (arguing that every idea is an incitement and only those that threaten to start a "conflagration" can be restricted); Pierce v. United States, 252 U.S. 239, 253, 272–73 (1920) (Brandeis, J., dissenting) (asserting that the leaflets did not create "a clear and present danger" of defying the Selective Draft Act or discouraging enlistment); Schaefer v. United States, 251 U.S. 466, 482, 494–95 (1920) (Brandeis, J., dissenting) (reaffirming the Clear and Present Danger Test and arguing that speech restrictions "threaten [the] freedom of thought and belief).

122 *Gitlow*, 268 U.S. at 654–56.

123 *Id.* at 671 (citations omitted).

> *It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.*[124]

Again, the influence of Mill is evident. Holmes's dissent directly draws from the "positive instigation" test from Mill's proviso.[125] Finding no immediate danger of lawlessness, Holmes rejected the majority's reasoning.[126] For many people, the ideas expressed by Gitlow in the *Left Wing Manifesto* were wrong, but for Holmes that was not a sufficient reason to ban the ideas or to punish the speaker. In fact, according to Holmes, if there is time for debate we must let these ideas be discussed, just as advocated by Mill. Holmes did not think these ideas would command majoritarian support, but if they did, that is what the freedom of expression is ultimately meant to protect. Put another way by Justice Brandeis in *Whitney v. California*, "the necessity which is essential to a valid restriction [on expression] does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent."[127]

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124 *Id.* at 673 (Holmes, J., dissenting).

125 MILL, *supra* note 17, at 53.

126 *Gitlow*, 268 U.S. at 672–73 (Holmes, J., dissenting).

127 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

IV. THE SUPREME COURT CONTINUES TO STRUGGLE WITH THE FREEDOM OF EXPRESSION

Over the next few decades, especially after the retirement of Holmes and Brandeis, the Court struggled to determine what was protected by the First Amendment's Free Speech Clause. For instance, in *Thomas v. Collins* the Court provided reasoning very protective of free expression, extolling "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment,"[128] which mandates that "any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger."[129] Yet several years later, during the Red Scare, the Court declared in *Dennis v. United States* that "the societal value of speech must, on occasion, be subordinated to other values and considerations."[130] The majority in *Dennis* went on to fashion a test for the freedom of speech in which the Court would "ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[131] This standard bears some similarities to Holmes's Clear and Present Danger Test, but the language and application in the *Dennis* opinion suggest that it was more of a Clear and *Probable* Danger test.[132] In addition, it was during this era that the Court formally established that certain categories of speech were wholly outside of First Amendment protection, including "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[133] During the same time period, the Court also declared that commercial speech had no First Amendment protection by stating that although the freedom of speech is generally protected in public forums, "the Constitution imposes no

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128 323 U.S. 516, 530 (1945).

129 *Id.*

130 341 U.S. 494, 503 (1951).

131 *Id.* at 510 (internal quotation marks omitted) (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951)).

132 *Id.* Note the use of the word "improbability" in the Court's description of the test. *Id.*

133 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

such restraint on government as respects purely commercial advertising."[134]

Nevertheless, like Holmes and Brandeis before them, Justice Hugo Black and Justice William Douglas continued to carry the torch for a more Millian interpretation of the freedom of expression. Writing in dissent in *Dennis*, Justice Black declared a form of First Amendment absolutism:

> *Undoubtedly, a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk. They embodied this philosophy in the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."*[135]

Likewise, Justice Douglas's *Dennis* dissent reads like a summary of *On Liberty*:

> *Free speech has occupied an exalted position because of the high service it has given our society. Its protection is essential to the very existence of a democracy. The airing of ideas releases pressures which otherwise might become destructive. When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.*[136]

All of the major arguments from Mill's chapter "Of the Liberty of Thought and Discussion" are present in Douglas's dissent: the freedom of speech is utile in that it fosters democratic government, the freedom

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134 Valentine v. Chrestensen, 316 U.S. 52, 54 (1942), *overruled by* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976).

135 *Dennis*, 341 U.S. at 580 (Black, J., dissenting) (quoting U.S. CONST. amend. I).

136 *Id.* at 584 (Douglas, J., dissenting).

of speech helps lead to the discovery of truth, and protecting even false or dangerous speech forces us to recall the reasons for our own beliefs and prevents us from "falling asleep" at our posts. Unlike Black, Douglas made repeated references to the Clear and Present Danger Test in his *Dennis* dissent,[137] and concluded his opinion by specifically citing to Holmes: "There have been numerous First Amendment cases before the Court raising the issue of clear and present danger since Mr. Justice Holmes first formulated the test in *Schenck v. United States*."[138] Thus, the connection to Mill—through Holmes—was being carried on by other Justices decades after Holmes's death.

However much Black and Douglas were, like Holmes and Brandeis, extending the Millian line of thinking, some of their most notable opinions were concurrences or dissents on these questions.[139] The majority of Justices on the Court did not adhere to Mill's philosophy on the freedom of speech during the 1950s and into the 1960s. The Court's move toward a more libertarian view of the freedom of speech was evident, however, by the time the Justices decided *Brandenburg v. Ohio*. Brandenburg was a Ku Klux Klan ("KKK") leader who invited a TV reporter and camera crew to a KKK rally; at the rally, Brandenburg made racist remarks and threatened to take "revengent" action on the President, Congress, and the Supreme Court if certain demands were not met.[140] After being convicted of violating an Ohio syndicalism statute, he appealed his case to the Supreme Court. In a *per curiam* opinion, the Court declared that:

> *[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or*

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137 *Id.* at 585–88.

138 *Id.* at 591 app. (citations omitted).

139 *See* Rosenblatt v. Baer, 383 U.S. 75, 88–89 (1966) (Douglas, J., concurring) (suggesting that "public issues" rather than "public officials" should be the standard used in answering the question of First Amendment protections); New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (Black, J., concurring) (reasoning that the constitutional guarantees of free speech and press granted the defendants an absolute privilege to publish); Roth v. United States, 354 U.S. 476, 508 (1957) (Douglas, J., dissenting) (finding that the statutes violated the constitutional protections afforded to free speech and press).

140 Brandenburg v. Ohio, 395 U.S. 444, 445–46 (1969) (per curiam).

> *producing imminent lawless action and is likely to incite or produce such action.*[141]

In other words, the Court adopted a standard for incitement cases where the freedom of speech is protected unless the speaker is stirring the listener(s) to break the law in the immediate future and such action is expected. This is remarkably similar to Mill's statement in *On Liberty* that the freedom of speech should be generally protected, but also that "opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act."[142] Mill emphasized that even mischievous opinions "ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob" because of the threat of physical "harm to others."[143] A united Court declared a Millian and Holmesian standard for the freedom of speech, one that is controlling for questions related to incitement in the twenty-first century.[144]

At first glance, *Brandenburg* may appear to be a culmination of a move by the Court toward a more strident Millian position on the freedom of speech. During the 1960s and 1970s, the Court was narrowing the definition of obscenity,[145] beginning to create protections for offensive speech,[146] giving greater protection to the press against libel suits,[147] and, at one point, even making a very Millian declaration that "[u]nder the First Amendment, there is no such thing as a false idea."[148] These points notwithstanding, *Brandenburg* and other cases decided during the height of the Warren Court and early Burger Court did not lead to a fundamental, permanent shift in the Court's understanding of the freedom of speech. The fighting words doctrine remained undisturbed.[149] No Court decision offered any protection to hate speech during the Warren Court era. In

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141 *Id.* at 447.

142 MILL, *supra* note 17, at 53.

143 *Id.*

144 Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 791 (2011).

145 Redrup v. New York, 386 U.S. 767, 769–70 (1967).

146 Cohen v. California, 403 U.S. 15, 26 (1971).

147 New York Times Co. v. Sullivan, 376 U.S. 254, 264–65, 292 (1964).

148 Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

149 *Cohen*, 403 U.S. at 20.

United States v. O'Brien, the Court restricted protections for symbolic speech and upheld the prosecution of protestors who burned their draft cards, and in doing so devised a four-part test for symbolic expression that was very deferential to government interests.[150] Furthermore, within five years of *Brandenburg*, the Court expanded the definition of obscenity in *Miller v. California*,[151] and made it easier to sue for libel in *Gertz v. Robert Welch, Inc*.[152] During the same period, the Court also allowed for significant regulation of broadcast media in *Red Lion Broadcasting v. FCC* and *FCC v. Pacifica Foundation*.[153] The Court issued a mixed ruling on the Federal Election Campaign Act ("FECA") of 1971, striking down federal candidate expenditure limits as violating the First Amendment but upholding contribution limits to federal candidates in *Buckley v. Valeo*.[154] Thus, even after *Brandenburg*, the Court had not adopted Mill's views in wholesale form. Ultimately, the shift initiated by the Court in the 1960s would instead be brought to fruition during the late 1980s, 1990s, and the early twenty–first century.

V. A MAJORITY OF THE COURT ADOPTS MILL'S POSITION ON THE FREEDOM OF EXPRESSION

The Court's strong move toward a Millian approach to the freedom of speech, on a consistent basis, began in 1989 with *Texas v. Johnson*. After Gregory Johnson burned the U.S. flag as part of a political protest taking place outside the 1984 Republican National Convention, he was convicted of violating a Texas statute prohibiting the "desecration of a venerated object."[155] Writing for a 5-4 majority, Justice William Brennan overturned Johnson's conviction on First Amendment grounds, finding that Texas was unconstitutionally

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150 391 U.S. 367, 369, 377 (1968). "[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377.

151 413 U.S. 15, 15–16 (1973).

152 418 U.S. at 346–48.

153 395 U.S. 367, 375 (1969); 438 U.S. 726, 737–38, 748 (1978).

154 424 U.S. 1, 143 (1976) (per curiam).

155 Texas v. Johnson, 491 U.S. 397, 399–400 (1989).

engaging in viewpoint discrimination: "We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents."[156] He also stated the following, which is very similar to Mill's position in *On Liberty*: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[157] Although the Court did not overrule what it characterized as the "relatively lenient standard" toward government interests in *O'Brien*, the Court created new law and found that since the government interest was related "to the 'suppression of free expression,'" the case was "outside of *O'Brien*'s test altogether."[158] This greatly limited the use of *O'Brien* in symbolic speech cases.[159] The Court shifted away from giving the government more power to restrain symbolic speech and opened the door for much greater protection of this type of expression.[160]

Three years later in *R.A.V. v. St. Paul*, the Court eviscerated what had been its consistent fighting words doctrine since the 1940s. *R.A.V.* involved a minor white male who assembled a cross out of chair legs and, with several other teenagers, burned it in the yard of an African-American family living in his neighborhood.[161] St. Paul charged R.A.V. with violating the city's Bias-Motivated Crime Ordinance, which prohibited using certain objects, including a burning cross, in a way that "one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . . ."[162] Even though the case involved hate speech, the Supreme Court unanimously overturned his conviction, with the majority concluding that the ordinance engaged in both content and viewpoint discrimination, which is unconstitutional even if the expression can be categorized as "fighting words."[163] Justice Antonin

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156 *Id.* at 417.

157 *Id.* at 414.

158 *Id.* at 407, 410.

159 Alicia Otazo Sorondo, Comment, *Flag Burning Yes, Loud Music No: What's the Catch?*, 44 U. MIAMI L. REV. 1033, 1063, 1065 (1990).

160 The Court continued to apply the *O'Brien* test in at least one case after deciding *Johnson*. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567–68 (1991).

161 R.A.V. v. City of St. Paul, 505 U.S. 377, 379 (1992).

162 *Id.* at 380.

163 *Id.* at 391.

Scalia, writing for the majority, explained that "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."[164] Although the symbolic speech in question is clearly something that would qualify as fighting words, the Court ruled that because St. Paul disfavored the viewpoint expressed by the burning cross, the ordinance was unconstitutional.[165]

Over a decade later in *Virginia v. Black*, the Court would affirm that cross-burning cannot be prosecuted unless it constitutes a "true threat,"[166] which includes "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[167] Thus, the Court unquestionably left in place the protection of any political messages or hate speech that is carried out by such an act, only restricting a realistic danger of physical harm to others.[168] These cases moved the Court further toward a Millian position on hate speech and symbolic speech, as they permit what Mill called the "absolute freedom of opinion and sentiment on all subjects,"[169] even in cases where the expression in question involves "intemperate discussion, [including] invective . . . and the like."[170]

The Court's drive toward Mill's position on free expression was further exemplified by its commercial speech decisions in *44 Liquormart, Inc. v. Rhode Island* and *Greater New Orleans Broadcasting Ass'n v. United States*. The *44 Liquormart* case involved a state ban on alcohol advertising, with an exception allowing only for "price tags or signs displayed" in a liquor store that were "not visible from the street."[171] The Court struck down the prohibition, advancing a test developed in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.*[172] The strength of *Central Hudson*'s

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164 *Id.* at 392.

165 *Id.* at 392–94.

166 538 U.S. 343, 359, 363 (2003).

167 *Id.* at 359.

168 Steven G. Gey, *A Few Questions About Cross Burning, Intimidation, and Free Speech*, 80 NOTRE DAME L. REV. 1287, 1327–29 (2005).

169 MILL, *supra* note 17, at 11.

170 *Id.* at 51.

171 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996).

172 447 U.S. 557, 566 (1980).

test for protection of commercial speech, however, had been in doubt since the Court used the *Central Hudson* test in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico* to uphold a restriction on advertising for casino gambling from being targeted to residents, despite the fact that casino gambling was legal and could be advertised to tourists.[173] In announcing the judgment of the *44 Liquormart* Court, Justice John Paul Stevens noted that:

> *Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond "irrationally" to the truth. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products.*[174]

This reasoning is in line with Mill's in that it strikes down a law that prevents people from advertising and learning truthful information about products that the government has deemed to be immoral.[175] Indeed, Mill was clear that one's "own good, either physical or moral, is not a sufficient warrant" to restrict expression.[176] Along with others, this case has proved to move the Court permanently away from a more restrictive approach regarding commercial speech.[177] Even though the Court maintained its four-part *Central Hudson* test in *44 Liquormart*, three years later in *Greater New Orleans Broadcasting Ass'n v. United States*, the Court confirmed its stronger protection of commercial speech when it struck down a prohibition on television and radio advertisements for private casino gambling when "such gambling is legal."[178] This ruling buried *Posadas de Puerto Rico Associates*

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173 478 U.S. 328, 344 (1986).

174 *44 Liquormart*, 517 U.S. at 503 (citation omitted).

175 Note, *Limiting the State's Police Power: Judicial Reaction to John Stuart Mill*, 37 U. CHI. L. REV. 605, 613 (1970).

176 MILL, *supra* note 17, at 9.

177 Lee Mason, Comment, *Content Neutrality and Commercial Speech Doctrine After* Reed v. Town of Gilbert, 84 U. CHI. L. REV. 955, 991–92 (2017).

178 Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 176 (1999).

without specifically overruling it. In *Greater New Orleans Broadcasting Ass'n*, the Court reaffirmed "the presumption that the speaker and the audience, not the Government, should be left to assess the value of accurate and nonmisleading information about lawful conduct."[179] Like *44 Liquormart*, the case promotes the Harm Principle understanding of free speech, letting people learn information about gambling and allowing them to make their own determination regarding whether they want to engage in the activity or not.

When asked for the first time how to interpret speech on the Internet in *Reno v. ACLU*, the Court gave it a strong level of protection, much greater than what the Court afforded to speech on other media developed in the twentieth century, such as radio and television.[180] It was also an opportunity for the Court to revisit the *Miller* test on obscenity and decide how it would be applied online.[181] *Reno* involved the Communications Decency Act ("CDA"), which prohibited online indecent or obscene communication to minors. The CDA had failed to sufficiently define what constituted "indecent" communication,[182] and the law's reference to "obscene" material encompassed only one portion of the Court's *Miller* test.[183] Justice Stevens, writing for the Court, declared that the more restrictive prohibitions for broadcast media announced in *Red Lion* and *Pacifica* would not apply to the Internet, in part, because there was no history

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179 *Id.* at 195.

180 Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 954–56 (1998).

181 Miller v. California, 413 U.S. 15, 24 (1973). "The basic guidelines for the trier of fact must be: (a) whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* (citations omitted).

182 Reno v. ACLU, 521 U.S. 844, 871 (1997).

183 *Id.* at 873. The Court reasoned that the law's definition was unconstitutionally vague "because the CDA's 'patently offensive' standard . . . is [only] one part of the three-prong *Miller* test . . . . The second prong of the *Miller* test . . . contains a critical requirement that is omitted from the CDA: that the proscribed material be 'specifically defined by the applicable state law.' This requirement reduces the vagueness inherent in the open-ended term 'patently offensive' as used in the CDA." *Id.*

of regulation on the Internet like there was for broadcast media.[184] Putting aside the potential problem in the Court's logic (that letting a law regulating speech on a medium of communication stand in operation for a longer period of time before being brought to the Court should result in less constitutional protection afforded to speech on that medium), the Court clearly moved to a more Millian approach to protecting expression. Lest there be any doubt in this presumption, Justice Stevens's words later in the Court's opinion demonstrate the point when explaining why the CDA's restrictions on Internet expression were overbroad:

> *It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not "reduc[e] the adult population . . . to . . . only what is fit for children."*[185]

This fits Mill's ideas from *On Liberty* quite well: it protects a right of expression for adults, even when dealing with topics and speech content many people would find to be immoral. Mill intended the protection of not only speech but also sexual activities with his Harm Principle,[186] so the application of it in *Reno v. ACLU* to strike down the CDA was certainly Millian.

The Court followed *Reno v. ACLU* with an even more protective ruling for Internet speech in *Ashcroft v. Free Speech Coalition*.[187] This time, the federal law at issue was the Child Pornography Prevention Act ("CPPA").[188] The Act "extends the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children" which could include images using adults who appear to be children or images enhanced using computer imaging programs.[189] Even though the Court had upheld child pornography laws that banned non-obscene images

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184 *Id.* at 867.

185 *Id.* at 875 (citations omitted).

186 MILL, *supra* note 17, at 97–98.

187 Ashcroft v. Free Speech Coal., 535 U.S. 234, 256 (2002).

188 *Id.* at 239.

189 *Id.* at 239–40.

for two decades, dating back to *New York v. Ferber*—where the Court emphasized the physiological, emotional, and mental harms to children involved in the production of such materials[190]—the Court's majority reasoned in *Free Speech Coalition* that the CPPA was different. The *Ferber* Court had noted that the value of permitting child pornography "is exceedingly modest, if not *de minimis*,"[191] but the Court in *Free Speech Coalition* nevertheless held that "where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment" and "some works in this category might have significant value,"[192] resulting in the majority declaring that the CPPA was overbroad.[193] Without the direct physical harm presented in *Ferber*, the Court in *Free Speech Coalition* drew a distinction that reflects the Harm Principle and struck down the application of the law at issue. As Justice Sandra Day O'Connor's concurrence in part pointed out, virtual child pornography serves to "whet the appetites of child molesters . . . who may use the images to seduce young children"[194] and "defendants indicted for the production, distribution, or possession of actual child pornography may evade liability by claiming that the images attributed to them are in fact computer-generated."[195] However, the majority protected virtual child pornography for reasons that echoed *On Liberty*. *Reno v. ACLU* and *Ashcroft v. Free Speech Coalition* combined serve as statements by the Court that Internet expression between adults—even if it includes images or statements that are indecent, borderline obscene, or virtual child pornography—are protected by the First Amendment. The two cases demonstrate the Court's Millian position regarding Internet speech, in that they permit speech that does not cause a direct tangible harm to someone else;[196] they also call into question the Court's approach to obscenity that had remained stable since *Miller*.[197]

In another context, the Court has gravitated toward what the majority would see as a Millian position on freedom of expression

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190 458 U.S. 747, 758–61 (1982).

191 *Id.* at 762.

192 *Free Speech Coal.*, 535 U.S. at 251.

193 *Id.* at 256, 258.

194 *Id.* at 263 (O'Connor, J. dissenting) (citations omitted).

195 *Id.*

196 MILL, *supra* note 17, at 9.

197 Robert L. Tsai, *Speech and Strife*, 67 L. & CONTEMP. PROBS. 83, 94–95 (2004).

regarding campaign finance, which is amply demonstrated by *Citizens United v. FEC* and *McCutcheon v. FEC*. Each case involved different provisions of the Bipartisan Campaign Finance Act ("BCRA") of 2002, which amended FECA.[198] The Court had previously taken an approach toward campaign finance that limited the First Amendment protection afforded to this type of expression, including by upholding contribution limits in *Buckley*[199] and by upholding limits on independent expenditures by corporations in *Austin v. Michigan Chamber of Commerce*.[200] As recently as 2003, the Court in *McConnell v. FEC* upheld by a 5-4 vote the BCRA's ban on electioneering communications by labor unions and corporations thirty days before a primary and sixty days before a general election.[201] In doing so, the Court majority in *McConnell* used a standard of review, '"closely drawn' scrutiny," that it had utilized since *Buckley* in campaign finance cases;[202] this is also a standard of review that is less protective of free expression than the more rigorous strict scrutiny standard.[203] The Court continued its use of the closely drawn scrutiny in *McConnell* because it reasoned that "[o]ur treatment of contribution restrictions reflects more than the limited burdens they impose on First Amendment freedoms"[204] and it "shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise."[205]

By 2010, however, the Court majority had changed. In *Citizens United*, the Court, after Justice Samuel Alito was appointed to the seat vacated by Justice O'Connor, struck down BCRA's ban on labor union and corporation independent expenditures for electioneering

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198 Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974), *amended by* Bipartisan Campaign Finance Reform Act of 2002, Pub. L. No. 107-155, 166 Stat. 81 (codified in scattered sections of 2 U.S.C.) (2002), *portions invalidated by* McCutcheon v. FEC, 572 U.S. 185 (2014), *and* Citizens United v. FEC, 558 U.S. 310 (2010).

199 Buckley v. Valeo, 424 U.S. 1, 23–29 (1976).

200 494 U.S. 652, 654–55 (1990), *overruled by Citizens United*, 540 U.S. at 365.

201 540 U.S. 93, 121–22 (2003), *overruled in part by Citizens United*, 540 U.S. at 365.

202 *Id.* at 137.

203 *Id.*

204 *Id.* at 136.

205 *Id.* at 137.

communications by a 5-4 vote.[206] In doing so, the Court overruled *Austin*'s upholding of a law that limited corporate independent expenditures,[207] and the Court overruled the portions of *McConnell* that upheld restrictions on corporate independent expenditures.[208] Overall, the majority in *Citizens United* reversed its older rulings by holding that "[l]aws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"[209] Thus, the Court held that all forms of political speech, even those that are sponsored by corporations at election time, would be given a high level of protection by the First Amendment. According to Justice Anthony Kennedy, writing for the majority, this approach was required because "the First Amendment stands against attempts to disfavor certain subjects or viewpoints."[210] Put another way, the Court justified striking down the relevant law for the same reason that Mill opposed restrictions on expression: government may not deem that certain positions are the "truth" or that certain types of communication should be less favored.[211]

The Court's more protective approach toward the speech elements of campaign finance was expressed again four years later in *McCutcheon v. FEC*.[212] This time, the regulation at issue was the BCRA's restrictions on how much individual campaign donors could directly contribute to federal candidates and noncandidate committees during every two-year election cycle, which was a total of $123,200 in 2013–14.[213] Chief Justice John Roberts, writing for a plurality of the Court, struck down this aggregate limit, stating that "[t]he right to participate in democracy through political contributions is protected by the First Amendment . . . ."[214] Chief Justice Roberts stated that even though this form of expression "may at times seem repugnant to some," and that many "would be delighted to see fewer television

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206 *Citizens United*, 558 U.S. at 318–19, 372.

207 *Id.* at 365.

208 *Id.*

209 *Id.* at 340.

210 *Id.* (citation omitted).

211 Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1507 (2013).

212 572 U.S. 185 (2014).

213 *Id.* at 194.

214 *Id.* at 191.

commercials touting a candidate's accomplishments or disparaging an opponent's character," such unwelcome speech is still protected by the First Amendment.[215] In this vein, Roberts argued that "[t]he Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse."[216] Here, Roberts adopted a Millian utilitarian approach to expression in *McCutcheon* similar to what the Court decided in *Citizens United*: the freedom of speech protects the greater good, even if the expression being restricted is seen as "repugnant" to some Americans. The logic here is not that such unrestricted funding will increase the likelihood of discovering the truth but rather, the greater good is the protection of the method of expression itself. The fifth vote to strike down these restrictions belonged to Justice Clarence Thomas, who would have gone even further by overruling *Buckley* and finding *all* campaign contributions limits unconstitutional.[217] Whether Mill himself would have viewed campaign contributions as "speech" is immaterial; what is clear in these campaign finance cases is that the Court applies Mill's approach to an activity the Court deems to involve political speech.

United States v. Stevens took the Supreme Court into yet another area of expression. For the first time, the majority found that depictions of animal cruelty have constitutional protection.[218] *Stevens* involved a federal law which prohibited the portrayal of animal cruelty in any visual or audio depiction "'in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed,' if that conduct violates federal or state law where 'the creation, sale, or possession takes place.'"[219] The law exempted depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value."[220] Writing for an 8-1 majority, Chief Justice Roberts struck down the provision, stating that, although there remains a small number of unprotected classes of speech (including obscenity, defamation, incitement, and child pornography),[221]

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215 *Id.*

216 *Id.* at 204.

217 *Id.* at 228 (Thomas, J., concurring).

218 United States v. Stevens, 559 U.S. 460, 468–69 (2010).

219 *Id.* at 465 (quoting 18 U.S.C. § 48(c)(1) (2010)).

220 *Id.* (internal quotations omitted) (quoting 18 U.S.C. § 48(b) (2010)).

221 *Id.* at 468–69.

"*Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment."[222] The Court made clear that new emerging categories of unprotected speech will be exceptionally rare, and the norm is that classes of speech that are protected now cannot be restricted in the future.[223] For the Chief Justice, the "First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs."[224] The Court concluded that the statute was "substantially overbroad," and was therefore invalid under the First Amendment.[225] Overall, it is another case extending the line of thinking expressed by Mill in *On Liberty*: the speech expressed messages which many people find to be abhorrent, but in true utilitarian fashion, the Chief Justice explained that the benefits of limiting the power of the state to regulate speech outweigh the costs of censorship when there is no direct harm to another person.

One year after *Stevens*, the Court decided *Brown v. Entertainment Merchants Ass'n*. The case challenged a California law that prohibited the sale or rental to minors of "violent video games" (including games where players can engage in the "killing, maiming, dismembering, or sexually assaulting the image of a human being" if done according to the *Miller* obscenity standard).[226] Justice Scalia, writing for a 7-2 majority, struck down the regulation, finding it to be underinclusive by not banning all violent content from children (e.g. violent cartoons) and also overinclusive by banning the sale of videogames to children whose parents did not object to them playing such games.[227] At first blush this may seem like a restriction on the speech of minors that would fit one of Mill's categories that is permissible. However, unlike the *Morse v. Frederick* case below, the *Brown* case was not solely about restricting the speech of young people with less than fully

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222 *Id.* at 472.

223 Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 86 (2011).

224 *Stevens*, 559 U.S. at 470.

225 *Id.* at 482.

226 Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 789 (2011).

227 *Id.* at 801–05.

developed intellectual capacities. The statute was also restricting the freedom of expression for the makers and sellers of video games, and it was restricting the choices of parents as to what media they wanted to allow their children to access.

Indeed, the *Brown* Court declared in no uncertain terms that "video games qualify for First Amendment protection,"[228] and that although the "Free Speech Clause exists principally to protect discourse on public matters . . . we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try."[229] For the Court, this was clearly a case where protecting public discourse was at issue (at least potentially), so restrictions on the content of speech, such as in the relevant California law, are subject to the highest level of constitutional scrutiny, the strict scrutiny test.[230] In the course of his majority opinion, Justice Scalia noted that minors themselves are entitled to a significant measure of First Amendment protection, although it is less protection than is afforded to adults.[231] And even though the types of messages that were targeted by this law were excessively violent and misogynistic, the Court concluded that "disgust is not a valid basis for restricting expression."[232] All told, the case reminds us that, in Millian fashion, minors do not have full free speech rights (although they certainly have some), and speech that is considered vile receives a great deal of protection if it is made by adults and potentially contains discourse on public matters.

The same year that the Court struck down a prohibition on selling violent video games to minors, the Court protected offensive speech in another context in *Snyder v. Phelps*. After Marine Lance Corporal Matthew Snyder was killed in Iraq in the line of duty, his father, Albert Snyder, arranged for his funeral to take place in Snyder's hometown of Westminster, Maryland.[233] Fred Phelps's Westboro Baptist Church, which has a history of picketing at funerals,[234]

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228 *Id.* at 790.

229 *Id.*

230 *Id.* at 799.

231 *Id.* at 794.

232 *Id.* at 799.

233 Snyder v. Phelps, 562 U.S. 443, 448 (2011).

234 Lindsay Deutsch, *Five Incendiary Westboro Baptist Church Funeral Protests*, USA TODAY (Mar. 21, 2014, 11:31 AM), https://www.usatoday.com/story/news/nation-now/2014/03/21/westboro-baptist-church-pickets-funerals/6688951/./ [https://perma.cc/BV94-CNTF].

including military funerals,[235] chose to picket near Snyder's funeral with homophobic messages expressing a view that that God hates and punishes the United States for its tolerance of gays and lesbians, particularly within the military.[236] Albert Snyder later filed a lawsuit claiming intentional infliction of emotional distress because of his exposure to the signs Westboro Baptist Church displayed at a site near the funeral.[237] At trial, a jury awarded him $2.9 million in compensatory damages and $8 million in punitive damages, which was reduced by the trial court to $2.1 million.[238] The Supreme Court, in an opinion written by Chief Justice Roberts, overturned the jury awards by an 8-1 vote.[239] According to the Chief Justice, "[t]he Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits, including intentional infliction of emotional distress."[240] Although the majority gave special protection to "speech on public issues"[241] above speech on "matters of purely private significance,"[242] the Court did not probe the limits of expression rights for the latter category because the Court determined that the Westboro Baptist Church's speech in this case was on matters of public concern, broadly defined by the Court.[243] The Chief Justice concluded that since "Westboro's speech was at a public place on a matter of public concern, that speech is entitled to 'special protection' under the First Amendment."[244] Furthermore, the Court concluded that even though the Church's signs included messages that were homophobic, hateful, unpatriotic, and perhaps blasphemous, "[s]uch speech cannot be restricted simply because it is upsetting or arouses contempt."[245] The majority concluded with the following Millian sentiment:

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235 *Id.*

236 *Snyder*, 562 U.S. at 448–49.

237 *Id.* at 449–50.

238 *Id.* at 450.

239 *Id.* at 461.

240 *Id.* at 451.

241 *Id.* at 452 (citation omitted).

242 *Id.*

243 *Id.* at 454.

244 *Id.* at 458.

245 *Id.*

> *Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.*[246]

Without using the phrase "Harm Principle," the Court certainly applied it in this case.

United States v. Alvarez dealt with the constitutionality of the Stolen Valor Act, a federal law that criminalizes false representations about having been awarded any decoration or medal authorized by Congress for the U.S. armed forces.[247] Xavier Alvarez was convicted of violating this law when, as a board member of the Three Valley Water District Board, he falsely introduced himself at his first public meeting as having been a retired Marine who was awarded the Congressional Medal of Honor.[248] The Court overturned Alvarez's conviction, with Justice Kennedy reasoning that "falsity alone may not suffice to bring the speech outside the First Amendment."[249] This is an important point to the case because Alvarez was not making false statements about anyone else, nor was he trying to use false statements to financially defraud anyone.[250] Given the blanket prohibition the law had on one's false statements about being awarded medals, it called into question theatrical performances or lies whispered within one's home.[251] For Kennedy, this went too far:

> *Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First*

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246 *Id.* at 460–61.

247 567 U.S. 709, 715–16 (2012).

248 *Id.* at 713–14.

249 *Id.* at 719, 729–30.

250 *Id.* at 714.

251 *Id.* at 722.

> *Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.*[252]

This broad protection of speech, even speech we know is false and can factually verify to be false, still deserves constitutional protection according to the Court because of the greater danger posed by the government being able to censor speech. Like Mill, the Court in *Alvarez* tells us that allowing false speech actually protects the search for truth. Indeed, reminiscent of Mill, the Court's answer is more speech, not less: "The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest. The facts of this case indicate that the dynamics of free speech, of counterspeech, of refutation, can overcome the lie."[253]

The Court in *McCullen v. Coakley* struck down a Massachusetts law that prohibited knowingly standing on a public way or sidewalk that was within thirty-five feet of a facility or a hospital where abortions were performed.[254] The law was challenged by Eleanor McCullen, who represented a group that engaged in what it styled "sidewalk counseling" outside of abortion clinics to offer information about abortion alternatives.[255] According to Chief Justice Roberts, writing for a unanimous Court, this wide buffer zone was not narrowly tailored because it compromised a speaker's "ability to initiate the close, personal conversations that they view as essential to 'sidewalk counseling.'"[256] The buffer zone often forced these speakers to raise their voices so the patients could hear them, which was "a mode of communication sharply at odds with the compassionate message" they desired to express.[257] It also made it difficult for speakers to approach patients to offer them literature.[258] The messages of these "sidewalk counselors" were probably unwelcome to many of the patients and other persons entering the clinics or hospitals in question. However, following Millian reasoning, the Court struck down the buffer zone in a scenario where there was no realistic threat of violence and where

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252 *Id.* at 723.

253 *Id.* at 726.

254 573 U.S. 464, 469, 497 (2014).

255 *Id.* at 472.

256 *Id.* at 487.

257 *Id.*

258 *Id.* at 488.

there was opportunity for patients to ignore their messages or provide their own counterspeech against perceived falsehoods.

Furthermore, *Packingham v. North Carolina* involved a state law that prohibited registered sex offenders from using social media websites that were also accessible to children.[259] In an extension of *Reno v. ACLU*, the Court found the statute to be overbroad because the state "with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge."[260] According to Justice Kennedy, since social media websites "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard," the Court found unconstitutional a complete prohibition on registered sex offenders accessing them.[261] Such an approach echoes Mill: speech by an adult that is orderly (and perhaps even true) cannot be banned with no evidence of immediate tangible harm to someone else.

Finally, for two recent cases involving the freedom of speech as it applies to trademarks, one can examine *Matal v. Tam* and *Iancu v. Brunetti*. At issue in *Matal* was an application for a trademark by an Asian-American band called "The Slants."[262] The name, a pejorative term for Asian-Americans, was chosen by the band as a way to help "reclaim" the phrase.[263] However, the Patent and Trademark Office ("PTO") refused to process the application, finding it to be in violation of the Lanham Act, which prohibits trademarks that "disparage" any persons.[264] Writing for a unanimous Court, Justice Alito struck down the law, finding that "[s]peech may not be banned on the ground that it expresses ideas that offend."[265] The Court even went so far as to say that "[g]iving offense is a viewpoint."[266] As in *R.A.V.* and *Snyder*, the

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259 137 S. Ct. 1730, 1733–34 (2017).

260 *Id.* at 1737.

261 *Id.*

262 Matal v. Tam, 137 S. Ct. 1744, 1751 (2017).

263 *Id.*

264 *Id.*

265 *Id.* at 1751.

266 *Id.* at 1763.

Court in *Matal* found protected expression even when there was, in the words of Mill, "intemperate discussion," including "invective."[267]

Similarly, in *Iancu*, the PTO refused to register a trademark for Erik Brunetti's clothing line, called FUCT, on the grounds that the name violated the Lanham Act's prohibition on "immoral[ ] or scandalous" trademarks.[268] Writing for the Court, Justice Elena Kagan put forth Millian reasoning on the issue, disapproving the fact that "the PTO has refused to register marks communicating 'immoral' or 'scandalous' views about (among other things) drug use, religion, and terrorism. But all the while, it has approved registration of marks expressing more accepted views on the same topics."[269] Accordingly, the Court found the PTO's refusal to be unconstitutional,[270] just as in *Matal*, reasoning in *Iancu* that "[i]f the 'immoral or scandalous' bar . . . discriminates on the basis of viewpoint, it must also collide with our First Amendment doctrine."[271] In *Iancu*, the Court struck down the application of a law that prohibited "immoral" expression,[272] finding that this reason alone is, in the words of Mill, "not a sufficient warrant"[273] to ban speech. Like in *Matal*, Mill's influence in *Iancu* is abundantly clear.

VI. THE CURRENT COURT'S FREE SPEECH EXCEPTIONS ARE (ARGUABLY) MILL'S FREE SPEECH EXCEPTIONS

In recent years, the Justices continue to place some limits on the freedom of expression, notwithstanding the trend of the modern Court's pro-free speech cases explored above. Indeed, the Court has not simply struck down every government attempt to restrict and even ban speech in the twenty-first century, as the First Amendment absolutist Hugo Black might have advised. However, the cases upholding government restrictions on expression are, at the very least, more examples of the Court using a Millian philosophy, with both the majority and dissents disagreeing with each other about how to apply

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267 MILL, *supra* note 17, at 51.

268 Iancu v. Brunetti, 139 S. Ct. 2294, 2297–98 (2019) (citation omitted).

269 *Id.* at 2300.

270 *Id.* at 2302.

271 *Id.* at 2299.

272 *Id.* at 2302.

273 MILL, *supra* note 17, at 9.

Millian principles. Even more to the point, in these cases one can also argue that the majority's rulings are in line with Mill's position in *On Liberty*, in that they do not extend the protection of the First Amendment to classes of people whom Mill also would not have given protection, or they arguably involve incitement. Although we can debate how well the Court has applied these exceptions by Mill, there is no question that the Justices are debating within Mill's framework, even if they may be misinterpreting his exceptions.

One example of this took place in *Garcetti v. Ceballos*, where a Los Angeles County deputy district attorney believed that a search warrant affidavit contained inaccuracies and informed the defense attorney in the case as such.[274] Ceballos claimed that he was then subjected to disciplinary action, including "reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion."[275] In a 5-4 decision, the Court ruled against Ceballos's claim that his First Amendment rights were violated. Reasoning that "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom,"[276] the majority concluded that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[277] The majority reached this conclusion, in part, for institutional reasons: "Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission."[278]

The majority saw the situation in *Garcetti* the same way that Mill expressed an exception to protecting the freedom of speech in *On Liberty*, in that working as a deputy district attorney involved what Mill might have referred to as "performance of some definite duty

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274 547 U.S. 410, 413–14 (2006).

275 *Id.* at 415.

276 *Id.* at 418.

277 *Id.* at 421.

278 *Id.* at 422–23.

incumbent on him to the public."[279] For the Court majority, Ceballos voluntarily took on a career as a prosecutor and knew there were additional limitations on his freedom of expression compared to other members of society, and he could be punished for his speech in ways that the general public could not. As we have already seen with the Roberts Court, the focus is not on whether a particular action leads to the truth but on whether the conceptual architecture of free speech protections remains intact.

There is strong evidence, however, based on Mill's statements in *On Liberty* quoted above, that he would have wanted someone like Ceballos to be able to speak out as a whistleblower, as silencing Ceballos was potentially, in Mill's words, "robbing the human race"[280] by depriving us of "the opportunity of exchanging error for truth."[281] In his *Garcetti* dissent, Justice Stephen Breyer also used a Millian framework but saw this as not falling into a type of performance-of-duty exception: "the Constitution itself here imposes speech obligations upon the government's professional employee," but "[w]here professional and special constitutional obligations are both present, the need to protect the employee's speech is augmented, [and] the need for broad government authority to control that speech is likely diminished . . . ."[282] In other words, for Breyer, the personal free speech rights of Ceballos trumped the government's power to limit him as a public employee. Regardless of whether the majority or the dissent was correctly interpreting one of Mill's exceptions, both the majority and dissent were debating within a Millian framework.

For another arguable exception to the freedom of speech contained in *On Liberty*, one can look to *Morse v. Frederick*. At a school sanctioned event, a public high school student unfurled a banner that read "BONG HiTS 4 JESUS."[283] The student was subsequently suspended for ten days.[284] That suspension was upheld by a 5-4 vote of the Supreme Court because "'the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings' . . . and [because] the rights of students 'must

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279 MILL, *supra* note 17, at 79–80.

280 *Id.* at 16.

281 *Id.*

282 *Garcetti*, 547 U.S. at 447 (Breyer, J., dissenting).

283 Morse v. Frederick, 551 U.S. 393, 397 (2007).

284 *Id.* at 398.

be "applied in light of the special characteristics of the school environment."'"[285] In particular, Chief Justice Roberts explained for the majority that "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."[286] According to the Chief Justice, schools need greater authority to restrict speech that promotes illegal drug use because such activity "can cause severe and permanent damage to the health and well-being of young people."[287] In other words, like Mill, the Court majority restricted the speech of young people here because schools are not dealing with "human beings in the maturity of their faculties."[288]

Like in *Garcetti*, however, one can question whether or not the majority's reasoning in *Morse* really fits Mill's exception. As noted by Justice Stevens in dissent, given the relatively facile message being expressed on the banner, other teenage students possessed sufficient faculties to be able to evaluate it and ignore it:

> *Admittedly, some high school students (including those who use drugs) are dumb. Most students, however, do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it. The notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible.*[289]

Overall, Stevens argues that the high school students in this case possessed the requisite faculties to be afforded the free speech right to unfurl a banner expressing this type of idea; in other words, they were over the hurdle of maturity that Mill describes in *On Liberty*. Given the message and the age of the students, Stevens contended that their rights cannot be completely taken away under these circumstances. Mill advocated for more limits on freedom for those who have not attained adulthood,[290] but he did not argue anywhere in *On Liberty* for

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285 *Id.* at 396–97 (citations omitted).

286 *Id.* at 403.

287 *Id.* at 407.

288 MILL, *supra* note 17, at 9.

289 *Morse*, 551 U.S. at 444 (Stevens, J., dissenting).

290 MILL, *supra* note 17, at 9.

completely taking those rights away either, particularly for students who would be of high school age.[291] Nevertheless, for present purposes it is irrelevant how Mill would have decided *Morse*; what the arguments of the majority and dissent show is that the Justices were debating whether or not the facts of the case fit an exception described by Mill to the general rule that the freedom of expression is to be protected.

Holder v. Humanitarian Law Project is another case where the Court ruled against the freedom of expression, but it again was arguably within Mill's framework. This case interpreted the Antiterrorism and Effective Death Penalty Act's prohibition on providing material support to foreign organizations found to be engaging in terrorist activity.[292] The prohibition is based on the finding that such organizations "are so tainted by their criminal conduct that any contribution to such an organization facilitates [their illegal activities]."[293] After the Secretary of State designated the Partiya Karkeran Kurdistan ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE") as foreign terrorist organizations, the Humanitarian Law Project and other plaintiffs filed suit against the U.S. Attorney General, claiming that they should be allowed to train members of these organizations on how to peacefully resolve their disputes.[294] Writing for the majority, Chief Justice Roberts proclaimed that even though the law "regulates speech on the basis of its content,"[295] the statute was constitutional, in part, because the training that the Humanitarian Law Project proposed to provide to the groups in question could have also been used "as part of a broader strategy to

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[291] *Id.* "Those who are still in a state to require being taken care of by others must be protected against their own actions as well as against external injury." *Id.* Thus, Mill advocates limits on children's freedom for their own protection, but he does not advocate giving more power than necessary to teach children how to rationally make use of their freedom as adults. Furthermore, even though Mill explained that "[s]ociety has had absolute power over [children] during all the early portion of their existence;" it is not clear that the high school years would qualify for that distinction. *Id.* at 80.

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

[293] *Id.* (quoting Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 301(a)(7), 110 Stat. 1247, note following 18 U.S.C. §2339B (Findings and Purpose)).

[294] *Id.* at 14–15.

[295] *Id.* at 27.

promote terrorism."[296] As Chief Justice Roberts elaborated, "training and advising a designated foreign terrorist organization on how to take advantage of international entities might benefit that organization in a way that facilitates its terrorist activities."[297] Thus, the Court was allowing the government to prohibit political speech on matters of public concerns (something it has struck down repeatedly in various other contexts above) because of the identity and location of one end of those in the conversation between the Humanitarian Law Project and the PKK or LTTE. Deferring to Congress and the executive branch on matters of national security and foreign policy,[298] the Court treated these interests as more important than the freedom of speech. The Court did so, however, because of its concerns about how the PKK and LTTE might use the information communicated to them. For this reason, what the Court majority argued was something akin to one of Mill's exceptions in *On Liberty*, in that the Court was essentially characterizing these groups in the way that Mill classified "barbarians,"[299] and possibly also because they were seen by the majority as living in "backward states of society."[300]

Although the Humanitarian Law Project and similar groups in the U.S. were not engaging in dangerous speech, the Court majority found restrictions on their expression constitutional because their speech could provide material advantages to the PKK and the LTTE, two groups that were already engaged in activities deemed by the U.S. government to be terrorist activity.[301] The Court majority was not permitting the government to shut down other speech by the Humanitarian Law Project, so for the majority it was still within the same framework as *Garcetti* and *Morse*. These points notwithstanding, the majority in *Holder* may have been employing a misrepresentation of Mill and using an approach that was more restrictive than Mill's. This may have been a case where, given the ties to terrorism and foreign affairs, the majority simply found another exception where Mill would not have. The majority saw this as enabling incitement by a terrorist organization, but the dissent, penned by Justice Breyer, did

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296 *Id.* at 37.

297 *Id.* at 38.

298 *Id.* 33–36.

299 MILL, *supra* note 17, at 10.

300 *Id.*

301 *Holder*, 561 U.S. at 38.

not characterize it as such: "Here the plaintiffs seek to advocate peaceful, *lawful* action to secure *political* ends; and they seek to teach others how to do the same. No one contends that the plaintiffs' speech to these organizations can be prohibited as incitement under *Brandenburg*."[302] As with *Garcetti* and *Morse* though, the ultimate outcome of the case is less interesting for our present purposes than is the fact that both the majority and the dissent were arguing about whether or not the case fit one of the exceptions to the freedom of expression articulated by Mill in *On Liberty*.

For a final example of a case where the Court upholds a restriction on speech similar to what Mill may have advocated, we can look to *Williams-Yulee v. The Florida Bar*. *Williams-Yulee* involved a judicial candidate who was found to have violated a provision of the Florida Code of Judicial Conduct which prohibited judicial candidates from personally soliciting campaign funds, requiring any such funds to be raised indirectly by campaign committees.[303] Yulee claimed that the provision violated her freedom of speech,[304] but the Supreme Court, writing again through Chief Justice Roberts, held by a vote of 5-4 that the provision served to protect "public confidence in judicial integrity," an interest the Court found to be "genuine and compelling."[305] The Court also found that the state's rule was appropriately tailored, in that it restricted only "a narrow slice of speech,"[306] which "leaves judicial candidates free to discuss any issue with any person at any time."[307] Thus, this was the rare case where the Court found a restriction on the freedom of speech to be constitutional under the strict scrutiny test.[308] The Court's ruling in *Williams-Yulee*, by focusing on the interest at stake to the public in the expression of judicial candidates who volunteer to engage in the "performance of some definite duty incumbent on him [or her] to the public," [309] can be

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302 *Id.* at 44 (Breyer, J., dissenting).

303 Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1662–64 (2015).

304 *Id.* at 1664.

305 *Id.* at 1667.

306 *Id.* at 1670.

307 *Id.*

308 As Gerard Gunther once famously wrote, strict scrutiny is typically understood as being "'strict' in theory and fatal in fact." Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

309 MILL, *supra* note 17, at 79–80; *see also Williams-Yulee*, 135 S. Ct. at 1673.

understood to fit one of the exceptions Mill provides to the general rule of protecting the freedom of speech.

However, as was also true in the last few cases above where the Court upheld a restriction on expression, the dissent also put forth an argument that this was not an exception to the Millian framework. For Justice Kennedy, there was an "irony in the Court's having concluded that the very First Amendment protections judges must enforce should be lessened when a judicial candidate's own speech is at issue."[310] Instead, Kennedy saw no duty-based limitation that should be placed on judicial candidates, as they remain people deserving the protections of free speech for the same reasons we protect free speech for everyone else:

> *First Amendment protections are both personal and structural. Free speech begins with the right of each person to think and then to express his or her own ideas. Protecting this personal sphere of intellect and conscience, in turn, creates structural safeguards for many of the processes that define a free society. The individual speech here is political speech. The process is a fair election. These realms ought to be the last place, not the first, for the Court to allow unprecedented content-based restrictions on speech.*[311]

Again, such protections for the freedom of speech—emphasizing the connection to the freedom of thought, how protecting speech leads to a greater good, permitting strong protection for speech without a discernable exception—are statements Mill could have made. The majority and the dissent remained within Mill's framework even as they disagreed about the proper outcome in *Williams-Yulee*.

VII. CONCLUSION

John Stuart Mill championed a version of the freedom of expression in *On Liberty* that stressed the dangers of government restrictions on the freedom of speech. Mill used his Harm Principle to guide when the freedom of speech should be protected. The earlier history of the Supreme Court is not one that could be characterized as following *On Liberty* with respect to the freedom of speech, as the

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310 *Williams-Yulee*, 135 S. Ct. at 1682 (Kennedy, J., dissenting).

311 *Id.* at 1682–83 (Kennedy, J., dissenting).

Justices were routinely upholding restrictions on this right in the late nineteenth and early twentieth centuries; these restrictions deemed constitutional by the Court included prior restraints.

Mill's idea of the freedom of expression was eventually adopted by Justice Holmes and Justice Brandeis. It was carried on by others, including Justice Black and Justice Douglas. Over many years, those Justices inserted Mill's line of thought into Supreme Court case law, creating precedential value that could be revisited in a later era. That era has arrived, with the Court majority over the last three decades consistently using an approach similar to Mill when interpreting the Free Speech Clause. Nevertheless, some Justices in the modern era have adhered to Mill's position more than others. When examining the cases above, the Justices who have used Mill's framework the most in freedom of expression cases in recent years include Justices Scalia,[312] Kennedy,[313] Breyer,[314] and Roberts.[315] These Justices span from liberal to conservative ideologically,[316] and they espouse a variety of methods of constitutional interpretation.[317] But they all have adhered to an understanding of the freedom of expression that, channeling through past Justices like Holmes and Douglas, has led them back intellectually to the thinking of Mill in *On Liberty*. Indeed, even in cases where the Court majority rules against the free speech claim, the debate on the Court is within that Millian framework.

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312 *See*, *e.g.*, Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 789–99 (2011); R.A.V. v. City of St. Paul, 505 U.S. 377, 392–93 (1992).

313 *See*, *e.g.*, Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017); *Williams-Yulee*, 135 S. Ct. at 1682–83 (Kennedy, J., dissenting); United States v. Alvarez, 567 U.S. 709, 719–24 (2012); Citizens United v. FEC, 558 U.S. 310, 340 (2010).

314 *See*, *e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 42–44 (2010) (Breyer, J., dissenting); Garcetti v. Ceballos, 547 U.S. 410, 447 (2006) (Breyer, J., dissenting).

315 *See*, *e.g.*, *Williams-Yulee*, 135 S. Ct. at 1667; McCullen v. Coakley, 573 U.S. 464, 487–88 (2014); McCutcheon v. FEC, 572 U.S. 185, 191, 204 (2014); Snyder v. Phelps, 562 U.S. 443, 458–61 (2011); *Humanitarian Law Project*, 561 U.S. at 39–40; United States v. Stevens, 559 U.S. 460, 470 (2010); Morse v. Frederick, 551 U.S. 393, 396–97 (2007).

316 Stephen A. Jessee & Alexander M. Tahk, *What Can We Learn About the Ideology of the Newest Supreme Court Justices?*, 44 PS: POL. SCI. & POL. 524, 526 (2011).

317 *See generally* Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 212–22 (2014) (discussing several constitutional methodologies including common law constitutionalism, originalism, pragmatism, and conventionalism).

Regardless of whether the Justices are using Mill's approach because they really believe in following Mill, they are blindly following prior opinions that used Mill, or for some other strategic reasons, the modern Supreme Court is publicly espousing a Millian approach to the freedom of speech. Mill's influence in American constitutional law may not be as great in other substantive areas, but his vision of how to protect the freedom of expression has definitely found a home in the Court. Although the Justices still maintain that some categories of expression receive less protection—or even no protection—under the First Amendment,[318] the Court has largely followed a path in recent years that uses a libertarian analysis. The origins of that approach lie with John Stuart Mill and his advocacy of the Harm Principle.

[318] *Alvarez*, 567 U.S. at 717.