Rutgers University Law Review

VOLUME 78 COMMENTARIES
Fall 2025

UNDERSTANDING FREE SPEECH VALUES AT THE SUPREME COURT

Noah C. Chauvin[*]

THE SUPREME COURT AND THE PHILOSOPHER: HOW JOHN STUART MILL SHAPED US FREE SPEECH PROTECTIONS. By *Eric T. Kasper* and *Troy A. Kozma*. Ithaca: Northern Illinois University Press. 2024. Pp. 278. Hardcover, $44.95.

ABSTRACT

This essay is a book review of The Supreme Court and the Philosopher: How John Stuart Mill Shaped US Free Speech Protections*, by Professors Eric Kasper and Troy Kozma. The book argues that John Stuart Mill had an indelible impact on the Supreme Court's free speech jurisprudence, and that through the power of precedent, we have come to have a "Millian" First Amendment. As I explain in the review, Kasper and Kozma have made a compelling case. However, because Mill offered an expansive defense of freedom of expression, it is not enough to say that the Court's free speech jurisprudence is "Millian," because that could mean many different things. Understanding with greater precision what motivates the Justices in free speech cases is crucial for attorneys, advocates, and scholars.*

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[*] Associate Professor of Law, University of Oklahoma College of Law. This paper benefitted from presentation at the Hungary Foundation and careful editing by the *Rutgers University Law Review*.

I. INTRODUCTION

Under the leadership of Chief Justice John Roberts, the United States Supreme Court has been highly protective of free speech rights. The Court has sided with speakers in a range of First Amendment cases, including challenges to restrictions on corporate political spending,[1] prohibitions on falsely claiming decorations for military service,[2] and punishments for off-campus student speech,[3] to name but a few. And while the Court has allowed some restrictions on speech, particularly where the government claims a risk to national security,[4] the overall trend is towards a First Amendment speech right so expansive that some scholars fear it will inhibit legitimate regulation.[5]

This highly protective conception of the speech right reflects a remarkable shift in the Court's First Amendment jurisprudence over the last century. In his dissenting opinion in *Abrams v. United States*, Justice Oliver Wendell Holmes, Jr. famously wrote that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[6] The notion that competition in ideas is a better means of achieving truth than government censorship is so deeply ingrained in contemporary free speech law and culture that it is practically cliché.[7] But when Holmes debuted what came to be known as the marketplace of ideas in 1919, it was a radical innovation in First Amendment law.[8]

Where did Holmes's belief in the indispensability of free speech to the search for truth come from? And how did it go from a fringe idea in a

1. Citizens United v. FEC, 558 U.S. 310, 339–41 (2010).

2. United States v. Alvarez, 567 U.S. 709, 725–30 (2012).

3. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 594 U.S. 180, 190–94 (2021).

4. *See* TikTok Inc. v. Garland, 604 U.S. 56, 71–73 (2025) (per curiam) (finding that a law requiring the forced sale of TikTok did not violate the First Amendment); Holder v. Humanitarian L. Project, 561 U.S. 1, 39 (2010) (holding that a prohibition on training foreign terrorist organizations on peaceful means of conflict resolution did not violate the First Amendment).

5. *See, e.g.*, Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1241, 1334 (2020) (arguing that First Amendment law limits legitimate government regulation because it wrongly conceives of free speech as a negative right, rather than as a positive right to robust public debate on important issues); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 150 (arguing that the Court's recognition of the First Amendment rights of commercial speakers will make it increasingly difficult for governments to regulate commercial activity).

6. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

7. *See* James Boyd White, *Free Speech and Valuable Speech: Silence, Dante, and the "Marketplace of Ideas"*, 51 UCLA L. REV. 799, 814 (2004). *But see* Rodney A. Smolla, *The Meaning of the "Marketplace of Ideas" in First Amendment Law*, 24 COMM. L. & POL'Y 437, 444 (2019) ("[T]he marketplace of ideas metaphor is not fairly characterized as a cliché.").

8. *See* Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 829–30 (2008).

dissenting opinion drawing only two votes to one of the fundamental justifications for the robust First Amendment speech rights we enjoy today? In their new book, *The Supreme Court and the Philosopher: How John Stuart Mill Shaped US Free Speech Protections*, Professors Eric T. Kasper and Troy A. Kozma seek to answer these questions.[9] The authors make the compelling case that Holmes and other early judicial adopters of a robust understanding of First Amendment protections were strongly influenced by John Stuart Mill's work *On Liberty*. And through the power of precedent, Kasper and Kozma argue, Mill came to have an indelible impact on the Court's free speech decisions, to the point that our modern First Amendment law is most accurately described as "Millian."

In this review, I seek to expand on Kasper and Kozma's thesis. While it is true that the Court's Speech Clause cases have become increasingly aligned with Mill's philosophy, Mill's justifications for speech were expansive. It is not enough to say that the Court's speech rights jurisprudence is Millian—it also matters *which* of Mill's rationales for free expression has motivated the Justices' decisions. As I argue, the answer to that question has varied significantly over time and by justice.

The review proceeds in three parts. Part II provides a brief overview of *The Supreme Court and the Philosopher*, with particular emphasis on two themes crucial to the book's argument: the importance of personnel and precedent in creating a Millian First Amendment. Next, Part III builds on Kasper and Kozma's work and argues that while the Court's Speech Clause jurisprudence has become consistently Millian, the question of which of Mill's justifications for free speech undergirds any given First Amendment opinion has varied significantly. Finally, Part IV explains why it is important for both advocates and scholars to understand which values inform the Justices' free speech decisions.

II. THE COMPELLING CASE FOR MILL'S INFLUENCE

Appropriately for a book about John Stuart Mill's influence on the Supreme Court, Kasper and Kozma begin *The Supreme Court and the Philosopher* with a discussion of the nineteenth-century English

9. ERIC T. KASPER & TROY A. KOZMA, THE SUPREME COURT AND THE PHILOSOPHER: HOW JOHN STUART MILL SHAPED US FREE SPEECH PROTECTIONS (2024). The book builds on Kasper and Kozma's previous work on the same theme. *See generally* Eric T. Kasper & Troy A. Kozma, *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*, 15 U. MASS. L. REV. 2 (2020) (examining the Court's increasing adoption of Mill's libertarian free speech philosophy and identifying areas where the Court has diverged from Mill's approach).

philosopher's views on free speech.[10] The author of several important works, one of Mill's most significant and enduring contributions was his essay *On Liberty*, the second portion of which is devoted to defending "the liberty of thought and discussion."[11] *On Liberty*'s defense of freedom of expression is expansive, multifaceted, and reflective of Mill's utilitarian beliefs.[12] Mill wrote that speech should be protected because it helps people reach the truth, is an essential component of democratic self-governance, and is crucial to individual autonomy.

As Kasper and Kozma note, it is the first of these justifications—what we today describe as the importance of speech to the marketplace of ideas—for which Mill is best known.[13] Mill thought that untrammeled free speech contributed to the search for truth in three ways. First, it is possible that a view the majority seeks to suppress is true, in which case it is vital that people be allowed to hear it.[14] Second, both the majority and the minority may hold partial truths, and by comparing them against one another, the whole may be found.[15] Finally, the majority may seek to suppress a false opinion—but by doing so, they risk holding their view "as a dead dogma, not a living truth," because "[h]e who knows only his own side of the case, knows little of that."[16] Thus, Mill believed that freedom of expression contributed to the search for truth in all circumstances.[17]

But Mill did not stop there. He also argued that free speech was crucial to democratic self-governance—or, as he put it, "a healthy state of political life."[18] It was necessary for there to be political parties with conflicting worldviews, Mill explained, because "it is in a great measure the opposition of the other that keeps each within the limits of reason

10. KASPER & KOZMA, *supra* note 9, at 12–28.

11. JOHN STUART MILL, *On Liberty*, *in* ON LIBERTY, UTILITARIANISM, AND OTHER ESSAYS 5, 18 (Mark Philp & Frederick Rosen eds., 2015).

12. For Mill, liberty was "never an end but rather the means in which individual lives can best flourish." KASPER & KOZMA, *supra* note 9, at 18; *see also* Vincent Blasi, *Is John Stuart Mill's* On Liberty *Obsolete*?, 5 J. FREE SPEECH L. 151, 153 (2024) ("A striking feature of *On Liberty* is its emphasis on the supreme importance of high-quality opinion formation throughout the population in order to advance the well-being of society.").

13. KASPER & KOZMA, *supra* note 9, at 3, 199.

14. MILL, *supra* note 11, at 19.

15. *Id.* at 45.

16. *Id.* at 35.

17. *See* KASPER & KOZMA, *supra* note 9, at 25. It is for this reason that free speech advocate Greg Lukianoff refers to Mill's arguments about the search for truth as his "invincible[] Trident." Greg Lukianoff, *Mill's (Invincible) Trident: An Argument Every Fan (or Opponent) of Free Speech Must Know*, FIRE (May 14, 2021), https://www.thefire.org/news/blogs/eternally-radical-idea/mills-invincible-trident-argument-every-fan-or-opponent-free [https://perma.cc/4PJQ-AA42].

18. MILL, *supra* note 11, at 47.

and sanity."[19] Mill argued that answers to significant questions regarding social and political values could only be found "by the rough process of a struggle between combatants fighting under hostile banners."[20] In other words, competition in ideas would help create "a better-functioning democratic policy-making process."[21]

While Mill was a utilitarian who "belie[ved] that liberty . . . is never an end but rather the means in which individual lives can best flourish," and who justified freedom of expression primarily through the benefits it provides to the collective, he did give some credence to free speech's importance to personal autonomy.[22] In summarizing his argument in the second chapter of *On Liberty*, Mill wrote that "freedom of opinion, and freedom of the expression of opinion" was "necess[ary] to the mental well-being of mankind (on which all their other well-being depends)."[23] He continued this theme in chapter three, arguing that "individuality" was "one of the principal ingredients of human happiness" and "should assert itself," at least "in things which do not primarily concern others."[24]

Having explained Mill's views on the importance of freedom of expression, Kasper and Kozma spend the remainder of *The Supreme Court and the Philosopher* carefully detailing how Mill's values have animated—and been incorporated into—the Court's Speech Clause jurisprudence. The authors begin with Justice Holmes's articulation of the importance of free speech in *Abrams*. As they note, Holmes's *Abrams* dissent marked a significant departure from the Court's earlier approaches to the First Amendment—including some of Holmes's earlier majority opinions upholding convictions under the Espionage Act for speech opposed to the United States's involvement in World War I.[25]

According to Kasper and Kozma, Holmes's shift from a justice willing to uphold Espionage Act convictions for pacifists to one who believed that "the ultimate good desired is better reached by free trade in ideas"[26] was achieved in part because of explicit lobbying by Harvard Law School professors Harold Laski and Zechariah Chafee.[27] Holmes's friend Laski persuaded the Justice to reread *On Liberty*, which Holmes did in 1919.[28] After Chafee published "Freedom of Speech in War Time," his famous

19. *Id.*
20. *Id.*
21. KASPER & KOZMA, *supra* note 9, at 25.
22. *Id.* at 17–18, 21, 26.
23. MILL, *supra* note 11, at 51.
24. *Id.* at 56.
25. *See id.* at 45–47, 52.
26. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
27. KASPER & KOZMA, *supra* note 9, at 45–47.
28. *Id.* at 42.

Harvard Law Review article, which explicitly criticized Holmes's Espionage Act decisions and favorably cited "the philosophical speculations of John Stuart Mill,"[29] Laski arranged a meeting between himself, Holmes, and Chafee.[30] Several months later, Holmes issued his *Abrams* dissent.[31] From that point forward, Holmes espoused a substantially more speech-protective (and Millian) understanding of the First Amendment.[32]

Like Justice Holmes, there is direct evidence that Chief Justice Charles Evans Hughes was influenced by Mill. As Kasper and Kozma relay, Mill was one of "just two historical figures" whose portraits hung in the Chief's home office.[33] That influence was reflected in several of Hughes's First Amendment opinions issued in the 1930s. In cases such as *Stromberg v. California*,[34] *Near v. Minnesota ex rel. Olson*,[35] and *De Jonge v. Oregon*,[36] Hughes expressed a distinctly Millian understanding of the importance of freedom of speech, which he said helped ensure "that government may be responsive to the will of the people and that changes, if desired, may be obtained through peaceful means."[37] These majority opinions were the Court's first foray into striking down laws as violating the First Amendment and began the current era of robust speech protections.[38]

Following these cases, the Court rapidly began to take a more speech-protective view of the First Amendment. In 1944, it reversed itself on the Espionage Act, finding that an individual who "wrote three articles" that portrayed World War II "as a gross betrayal of America, denounce[d] our English allies and the Jews and assail[ed] in reckless terms the integrity and patriotism of the United States" did not violate the Act, which, as "a highly penal statute restricting the freedom of expression," had to be construed narrowly.[39] It went on to substantially narrow the "clear and present danger" test that had justified those convictions, explaining in

29. Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 943–44, 955 (1919).

30. KASPER & KOZMA, *supra* note 9, at 46.

31. *Id.* at 47.

32. *E.g.*, Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

33. KASPER & KOZMA, *supra* note 9, at 65.

34. 283 U.S. 359 (1931).

35. 283 U.S. 697 (1931).

36. 299 U.S. 353 (1937).

37. *Id.* at 365; *see also Near*, 283 U.S. at 718–19 (emphasizing the importance of press freedom to democratic self-governance); *Stromberg*, 283 U.S. at 369 (explaining that free political discussion ensures "government may be responsive to the will of the people and that changes may be obtained by lawful means").

38. KASPER & KOZMA, *supra* note 9, at 63.

39. Hartzel v. United States, 322 U.S. 680, 683, 686 (1944).

Terminiello v. City of Chicago that "a function of free speech under our system of government is to invite dispute," so the First Amendment prohibited a person being punished for speech merely because the speech "stirred people to anger, invited public dispute, or brought about a condition of unrest."[40] Ultimately, the Court would do away with the clear and present danger test entirely.[41] As Kasper and Kozma document, Millian reasoning ran through all of these cases.[42]

Perhaps the most well-known defense of freedom of expression and freedom of conscience from this era came from *West Virginia State Board of Education v. Barnette*, a case in which several Jehovah's Witness school children challenged a state requirement that all students in public schools salute the flag and recite the pledge of allegiance.[43] Ruling for the students, the Court explained that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[44] "[C]ompelling the flag salute and pledge," the Court said, "transcends constitutional limitations on [government] power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[45] As Kasper and Kozma put it, "*Barnette* strongly reaffirmed the Court's earlier commitment to Millian philosophy in free expression cases."[46]

The authors demonstrate how, as the twentieth century progressed, that commitment only grew. The Court expanded First Amendment protections for expression regarding government officials and public figures,[47] political protest that drew public opprobrium for its vulgarity,[48] and even speech that purportedly threatened national security.[49]

40. 337 U.S. 1, 4–5 (1949).

41. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

42. *See* KASPER & KOZMA, *supra* note 9, at 77, 80–81, 116–17.

43. 319 U.S. 624, 628–29 (1943).

44. *Id.* at 642.

45. *Id.*

46. KASPER & KOZMA, *supra* note 9, at 77.

47. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256, 279–80 (1964) (public officials); Gertz v. Robert Welch, Inc., 418 U.S. 323, 325–26, 342–43 (1974) (public figures).

48. Cohen v. California, 403 U.S. 15, 16, 22–23 (1971).

49. N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (allowing the *New York Times* and *Washington Post* to publish the Pentagon Papers).

Building on these precedents, the Court also began extending the First Amendment's coverage outside of the political speech at the core of its protection, granting some degree of protection to commercial actors,[50] schoolchildren,[51] and depictions of sex.[52] In every instance, this broadening of constitutional speech protections was justified by explaining speech's importance to the search for truth, democracy, or personal autonomy. Ultimately, by the late 1980s, the Court began to take a Millian approach to the freedom of speech "on a consistent basis."[53]

Nor was Mill's influence over the Court's increasingly speech-protective conception of the First Amendment merely implicit. As Kasper and Kozma detail, the Justices have regularly referenced Mill in their opinions.[54] This trend began in 1959, when Justice Hugo Black twice cited Mill in his dissenting opinion in *Barenblatt v. United States*.[55] Following *Barenblatt*, citation to *On Liberty* became a regular feature of the Court's free speech cases.[56] So in vogue became Mill's thinking that in 2012, *On Liberty* was favorably cited in both the concurring and dissenting opinions in *United States v. Alvarez*.[57]

Indeed, one of the most compelling pieces of evidence that Kasper and Kozma marshal to show how deeply rooted Mill's philosophy is in our First Amendment jurisprudence is the extent to which both the majority and dissenting opinions in free speech cases have claimed to be advancing the Millian position.[58] For example, in *Tinker v. Des Moines Independent Community School District*, in which the Court held that a public school could not punish students for a silent, non-disruptive protest, both the

50. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561, 566 (1980) (describing the test the Court uses to determine if commercial speech is protected by the First Amendment).

51. *E.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512–13 (1969) (holding that public school students' speech may be limited only where it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others").

52. *E.g.*, Miller v. California, 413 U.S. 15, 24 (1973) (limiting the application of state obscenity law to "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value").

53. Kasper & Kozma, *supra* note 9, at 28; *see also* KASPER & KOZMA, *supra* note 9, at 149 (explaining that by the late 1980s, "the Supreme Court's Millian approach was becoming more evident").

54. KASPER & KOZMA, *supra* note 9, at 100–01.

55. 360 U.S. 109, 151 n.22, 159 n.38 (1959) (Black, J., dissenting).

56. *See, e.g.*, Red Lion Broad. v. FCC, 395 U.S. 367, 392 n.18 (1969); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 272 n.13, 279 n.19 (1964); Poe v. Ullman, 367 U.S. 497, 514 n.5 (1961) (Douglas, J., dissenting).

57. 567 U.S. 709, 733 (2012) (Breyer, J., concurring); *id.* at 752 (Alito, J., dissenting).

58. This transition began in earnest during the Rehnquist Court. KASPER & KOZMA, *supra* note 9, at 144.

majority opinion and Justice Black's dissent claimed that their approach was consistent with the First Amendment's purpose of advancing the marketplace of ideas.[59] This dynamic has also been visible in a range of recent cases, including *Counterman v. Colorado*,[60] *Morse v. Frederick*,[61] and *Garcetti v. Ceballos*.[62] As these and other cases demonstrate, the question is no longer whether free speech is important to the search for truth, democratic self-government, and autonomy, but rather how best to promote those values.

According to Kasper and Kozma's account, it is not just the Court's expansive protections of speech that are Millian, but also the exceptions to the First Amendment that leave some forms of speech unprotected. For example, while he thought speech should be broadly protected, Mill recognized that these same protections could not be applied to children, who "must be protected against their own actions as well as against external injury."[63] Likewise, he recognized that the liberty of public employees could be limited in circumstances in which an individual "disables himself, by conduct purely self-regarding, from the performance of some definite duty incumbent on him to the public."[64] As such, the Court's willingness to allow restrictions on the speech of children and

59. *Compare* 393 U.S. 503, 512 (1969) ("The classroom is peculiarly the 'marketplace of ideas.'" (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967))), *with id.* at 522 (Black, J., dissenting) ("Nor are public school students sent to the schools at public expense to broadcast political or any other views to educate and inform the public."). The majority also argued that students "are possessed of fundamental rights which the State must respect" and that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas." *Id.* at 511–12 (majority opinion).

60. *Compare* 600 U.S. 66, 81–82 (2023) (holding that the recklessness intent standard necessary for true threats prosecutions to avoid restrictions on speech that is "central to the theory of the First Amendment"), *with id.* at 107, 112 (Barrett, J., dissenting) (stating that the constitutional value of speech is determined by "its proximity to public discourse;" true threats "carry little value").

61. *Compare* 551 U.S. 393, 397, 402–03 (2007) (indicating that the First Amendment did not prevent a school from punishing a student for displaying a banner reading "BONG HiTS 4 JESUS" in part because the banner was not "political speech"), *with id.* at 448 (Stevens, J., dissenting) ("Even in high school, a rule that permits only one point of view to be expressed is less likely to produce correct answers than the open discussion of countervailing views.").

62. *Compare* 547 U.S. 410, 422 (2006) (arguing that allowing the government to restrict a public employee's speech made pursuant to his official duties "is consistent with [the Court's] precedents' attention to the potential societal value of [public] employee speech" and "does not prevent [public employees] from participating in public debate" or making "contributions to the civic discourse"), *with id.* at 433 (Souter, J., dissenting) ("Nothing . . . accountable on the individual and public side of the *Pickering* balance changes when an employee speaks 'pursuant' to public duties.").

63. MILL, *supra* note 11, at 13.

64. *Id.* at 79.

public employees, Kasper and Kozma persuasively argue, is often consistent with Mill's philosophy.[65]

Throughout the book, the authors emphasize two themes that help explain how Mill came to have such a significant influence: The importance of precedent and of personnel. Regarding the importance of precedent, Kasper and Kozma note: "Minority opinions espousing Millian philosophy from 1919 and the 1920s [came to be] adopted in majority opinions, extending Mill's thoughts into Supreme Court jurisprudence in the future."[66] In other words, Mill got in on the ground level. His work came to have outsized influence on the Court's free speech cases because it was to him that Justices Holmes, Louis Brandeis, and Hughes turned to when searching for a theoretical justification for protecting free expression.[67] And it was to the opinions of those Justices the Court turned when confronting the same issues in the future.[68]

Kasper and Kozma also detail how changes in personnel impacted whether and to what extent the Court embraced Millian reasoning in its free speech opinions. When justices favoring civil liberties replaced those more deferential to government power, the Court would more frequently apply Millian reasoning in its free expression cases.[69] Of course, the shifting composition of the Court could also move it away from Mill. Kasper and Kozma relate how the replacement of speech-protective justices with ones more skeptical of civil liberties or deferential to government power led the Court to take a more restrictive view of First Amendment rights.[70]

Likewise, justices could change their views over time. Sometimes, this was to the benefit of speech protections (Justice Holmes, for example, "moved more toward Mill the longer he served on the US Supreme Court"),[71] but occasionally it was not. For instance, Justice Robert Jackson, who wrote the Court's stirring defense of free speech in *Barnette*,[72] came to have a more straightened view of the First

65. *E.g.*, KASPER & KOZMA, *supra* note 9, at 79–80, 111–12.

66. *Id.* at 79.

67. *See id.* ("Ultimately, the intellectual origins of [the Court's speech-protective] approach lie in Mill's *On Liberty*.").

68. *See id.* Of course, as the authors note, precedent was also used to turn the Court away from a Millian approach to speech, too; during the 1950s, the Justices frequently relied upon never-overruled early twentieth-century precedents to deny First Amendment claims. *See id.* at 95.

69. *E.g.*, *id.* at 69, 121.

70. *E.g.*, *id.* at 81–82, 85, 127, 187.

71. *Id.* at 82. Kasper and Kozma also give the example of Justice Harry Blackmun, who "would become more Millian on a variety of issues, but earlier in his career [his] views on the First Amendment were far from the philosophy of *On Liberty*." *Id.* at 123.

72. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 625 (1943).

Amendment in the succeeding years.[73] Kasper and Kozma attribute Justice Jackson's shifting views to his service as a prosecutor at Nuremberg, which they say opened his eyes to the dangers of totalitarian political movements and made him more open to restrictions on the speech of communists and fascists.[74] Regardless of the precise motivation, however, the point is that when it comes to protecting freedom of expression, there are no permanent victories.

One of the strengths of *The Supreme Court and the Philosopher* is that Kasper and Kozma are careful not to overstate their case. The Court's free speech cases might be Millian, but that does not necessarily mean that Mill directly influenced the Court or individual justices, and the authors are generally careful to distinguish between the two circumstances.[75] For example, in describing Justice Brandeis's famous 1920s opinions in cases such as *Schaefer v. United States*, in which Brandeis began to take a speech-protective view of the First Amendment,[76] Kasper and Kozma say merely that the Justice's opinions were "similar to" or "reminiscent of Mill."[77] They then clarify that they have no "smoking gun" showing that Brandeis "was influenced by Mill," but that they believe such influence is evident in the way "[his] arguments in these cases reflect Mill's core reasoning from *On Liberty*" and "his close connection to Holmes and his citation of Chafee."[78]

73. *See, e.g.*, Terminiello v. City of Chicago, 337 U.S. 1, 24 (1949) (Jackson, J., dissenting) ("[P]eople lose faith in the democratic process when they see public authority flouted and impotent and begin to think the time has come when they must choose sides in a false and terrible dilemma such as was posed as being at hand by the call for the Terminiello meeting: 'Christian Nationalism or World Communism—Which?'").

74. KASPER & KOZMA, *supra* note 9, at 81–82.

75. Occasionally, the book strays close to the line, such as when it discusses Justice Stevens's opinion for the Court in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). In that case, the Court upheld Detroit zoning regulations that treated movie theaters that showed sexually explicit films from those that did not, reasoning that "the city's interest in the present and future character of its neighborhoods adequately support[ed] its classification of motion pictures." *Id.* at 72–73. Relying on Mill's discussion in *On Liberty* of the power of the state to suppress the speech of bookies, pimps, and purveyors of alcohol, *The Supreme Court and the Philosopher* argues that *Young* is demonstrative of "Mill's growing influence over the Supreme Court's First Amendment jurisprudence." KASPER & KOZMA, *supra* note 9, at 135–37. This pronouncement is difficult to square with what the authors acknowledge was *On Liberty*'s ambivalent approach to "a problem that Mill himself struggled with, and one where it may be difficult to fully discern his views." *Id.* at 136. However, rhetorical lapses of this kind are unusual in *The Supreme Court and the Philosopher*; generally, Kasper and Kozma are careful and precise.

76. *See* 251 U.S. 466, 486 (1920) (Brandeis, J., dissenting) (arguing that speech should not be suppressed when it did not create a clear and present danger).

77. KASPER & KOZMA, *supra* note 9, at 53–54.

78. *Id.* at 55.

Concessions such as these maintain Kasper and Kozma's credibility with the reader.[79]

Kasper and Kozma are also careful to acknowledge that not all justices have acceded to the Court's Millian approach to freedom of speech—or its reliance upon Mill. For example, in his dissenting opinion in *McIntyre v. Ohio Elections Commission*, Justice Antonin Scalia criticized the majority for "[p]referring the views of the English utilitarian philosopher John Stuart Mill to the considered judgment of the American people's elected representatives."[80] Likewise, in his dissenting opinion in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, then-Justice William Rehnquist took umbrage with the majority's reliance on Mill.[81] Similarly, in a case concerning whether an adult theater had a First Amendment right to play pornographic films, Chief Justice Warren Burger rejected the view, which he attributed to Mill, that "conduct involving consenting adults only is always beyond state regulation."[82] Still, there is no questioning that on the whole, the Court's First Amendment jurisprudence has become distinctly Millian.

The authors are able to avoid over-claiming in part because their thesis does not require it. This is the case for at least two reasons. First, as described above, Mill directly influenced some of the Court's early speech-protective opinions, and those opinions came to have an outsized influence on later cases.[83] Thus, those later cases were consistent with Mill because he got in at the ground level. Second, as also described above, Mill's defense of freedom of expression was expansive and multifaceted.[84] Because the Court's Speech Clause jurisprudence has become so speech-protective, it is unsurprising that much of it is consistent with one or more aspects of Mill's argument for free speech in *On Liberty*.

79. Another example of this modest argumentation is the authors' discussion of Mill's influence on Justice William Brennan's opinion in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). They carefully note that there is some evidence that Brennan's *Sullivan* opinion was influenced more by philosopher Alexander Meiklejohn, but explain why this evidence is not compelling. KASPER & KOZMA, *supra* note 9, at 107–08 (citing William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965)).

80. 514 U.S. 334, 371 (1965) (Scalia, J., dissenting) (citation omitted).

81. 447 U.S. 557, 592 (1980) (Rehnquist, J., dissenting).

82. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 & n.14 (1973).

83. *See supra* notes 27–33 and accompanying text.

84. *See supra* notes 13–24 and accompanying text.

III. WHICH MILL?

While Kasper and Kozma persuasively argue that Mill has had an outsized influence on the Supreme Court's First Amendment free speech cases—or at least that the Court's free speech doctrine is largely Millian—their book is somewhat hazy on what that means. As the authors describe, while "Mill is mostly and most famously known for the truth-seeking rationale to protect the freedom of speech, . . . democracy and autonomy were important reasons to safeguard free expression for him as well."[85] Understanding which of these values has animated the Court's First Amendment decisions is at least as important as whether Mill's ideas influenced those decisions, but the book largely does not distinguish among them. In this part, aided by *The Supreme Court and the Philosopher*'s able descriptions of the Court's free speech cases, I attempt to trace those trends.

TABLE 1: FIRST AMENDMENT VALUES OF THE SUPREME COURT'S "MOST MILLIAN JUSTICES"[86]

Justice	**First Amendment Values**		
	Truth	*Democracy*	*Autonomy*
Oliver Wendell Holmes, Jr.	Yes	Yes	No
Louis Brandeis	Yes	Yes	Yes
Charles Evans Hughes	Yes	Yes	No
Hugo Black	Yes	Yes	Yes
William O. Douglas	Yes	Yes	Yes
William J. Brennan, Jr.	Yes	Yes	Rarely
Thurgood Marshall	Yes	Yes	Yes
Anthony Kennedy	Yes	Yes	Yes

Differences in values were apparent in the opinions of the Court's earliest speech-protective opinions. For example, in his *Abrams* opinion, Justice Holmes focused on the importance of freedom of expression to the discovery of truth.[87] He later expanded his defense of speech to include

85. KASPER & KOZMA, *supra* note **Error! Bookmark not defined.** at 199.

86. Table 1 summarizes the First Amendment values emphasized by justices whom Kasper and Kozma identify as the Court's "most Millian." *See id.* at 152, 202. For a detailed analysis and case citations supporting these classifications, see *infra* notes 87–116 and accompanying text.

87. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

its importance to democratic self-governance, explaining that if political beliefs "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."[88] Justice Brandeis, in his *Whitney v. California* concurrence, emphasized the importance of all three Millian values, explaining that freedom of speech is essential to "happiness," "the discovery and spread of political truth," and "stable government."[89] Chief Justice Hughes, in contrast, focused primarily on the importance of free expression to democracy,[90] though he did also note its value to the marketplace of ideas.[91] Thus, while all three Justices can accurately be described as taking a Millian approach to First Amendment questions, it is not the *same* Millian approach.

So too with the justices who built on the Millian framework supplied by Justices Holmes, Brandeis, and Hughes. For instance, in his early First Amendment Speech Clause opinions, Justice Hugo Black focused almost entirely on the importance of freedom of expression to democratic self-governance. In his opinion for the Court in *Bridges v. California*, for example, he emphasized the First Amendment's role in preventing the state from restricting "the arena of public discussion."[92] In later opinions, while he continued to emphasize free speech's centrality to democracy, Justice Black also began to reference its importance to individual autonomy, as in his dissenting opinion in *Dennis v. United States*, in which he explained that he had "always believed that the First Amendment is the keystone of our Government, [and] that the freedoms it guarantees provide the best insurance against destruction of all freedom."[93] Still later, Justice Black identified "the experimentation and development of new ideas essential to our country's welfare" as an important interest safeguarded by the First Amendment.[94] Thus, while Justice Black maintained a relatively consistent libertarian approach to

88. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

89. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

90. *E.g.*, De Jonge v. Oregon, 299 U.S. 353, 365 (1937) (explaining the importance of "the constitutional rights of free speech, free press and free assembly" which ensure "that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means").

91. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 717–18 (1931).

92. 314 U.S. 252, 269 (1941); *see also, e.g.*, United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 110–11 (1947) (Black, J., dissenting) (explaining that the First Amendment serves the functions of democracy); Kovacs v. Cooper, 336 U.S. 77, 103 (1949) (Black, J., dissenting) ("It is of particular importance in a government where people elect their officials that the fullest opportunity be afforded candidates to express and voters to hear their views.").

93. 341 U.S. 494, 580 (1951) (Black, J., dissenting).

94. Barenblatt v. United States, 360 U.S. 109, 144 (1959) (Black, J., dissenting).

freedom of expression, his reasons for doing so evolved over time (though the centrality of speech to democracy was a consistent through-line).[95]

Justice Black's contemporary, Justice William O. Douglas, joined with him so frequently in defense of free expression that Kasper and Kozma refer to the two men as a "venerable pair."[96] But while the two agreed on the importance of robust speech protections, Justice Douglas took a consistently broader view of the values served by the First Amendment than did Justice Black. In his dissenting opinion in *Dennis*, for instance, he wrote that "[f]ree speech . . . . is essential to the very existence of a democracy"; that "[w]hen ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents"; and that "[f]ull and free discussion . . . . has been the safeguard of every religious, political, philosophical, economic, and racial group amongst us."[97] So too in his opinions in *Scales v. United States*,[98] *Brandenburg v. Ohio*,[99] and *Kleindienst v. Mandel*,[100] each of which referenced or discussed all three Millian values. To be sure, Justice Douglas was not always so expansive.[101] Nevertheless, he differed significantly from Justice Black in his regular invocation of all three arguments for freedom of expression familiar to adherents of *On Liberty*.

Justice William Brennan likewise took what Kasper and Kozma fairly describe as a Millian approach to the First Amendment. For example, in his opinions in *New York Times Co. v. Sullivan*,[102] *Lamont v. Postmaster General*,[103] *Keyishian v. Board of Regents*,[104] and *Connick v.*

95. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 296–97 (1964) (Black, J., concurring) ("[F]reedom to discuss public affairs and public officials is unquestionably . . . the kind of speech the First Amendment was primarily designed to keep within the area of free discussion.").

96. KASPER & KOZMA, *supra* note 9, at 96.

97. *Dennis*, 341 U.S. at 584 (Douglas, J., dissenting).

98. *See* 367 U.S. 203, 267–70 (1961) (Douglas, J., dissenting).

99. *See* 395 U.S. 444, 452–56 (1969) (Douglas, J., concurring).

100. *See* 408 U.S. 753, 772–73 (1972) (Douglas, J., dissenting).

101. *See, e.g.*, N.Y. Times Co. v. United States, 403 U.S. 713, 723–24 (1971) (Douglas, J., concurring) (per curiam) (discussing only the First Amendment's importance to democratic self-governance); Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (same).

102. *See* 376 U.S. 254, 269–70 (1964) (recognizing that the purpose of the First Amendment is to ensure effective democracy; the First Amendment reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

103. *See* 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("It would be a barren marketplace of ideas that had only buyers and no sellers.").

104. *See* 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth.").

Myers,[105] among many others, Justice Brennan repeatedly identified free speech as critical to democratic self-governance and the search for truth. In all of these cases, however, Justice Brennan focused primarily on the benefit of speech to the *collective*. As he explained in *Roth v. United States*, Justice Brennan believed that "[a]ll ideas having even the slightest redeeming *social importance* . . . have the full protection of the [First Amendment]."[106] But while this view frequently led Justice Brennan to support expansive First Amendment rights, it gave short shrift to the importance of free expression to the individual. In many instances, as Kasper and Kozma put it, Justice Brennan "effectively ignor[ed] free speech protections based on personal autonomy, falling short of *On Liberty*'s standard."[107] Nevertheless, because so many of his opinions discussed the importance of speech to the search for truth and democratic self-governance, the authors can fairly describe Justice Brennan as one of "the Supreme Court's most Millian justices."[108]

Justice Thurgood Marshall, who frequently joined with Justice Brennan in defending First Amendment freedoms, nonetheless took a more expansive view than did Justice Brennan of the values served by those freedoms. While Justice Marshall, like Justice Brennan, recognized the importance of free expression to the search for truth and democratic self-governance, he also viewed it as crucial to "personal rights" beyond any "general public interest."[109] This was not universally the case—for instance, in *Pickering v. Board of Education*, which concerned whether a public-school teacher could be fired for his extracurricular speech, Justice Marshall discussed only "[t]he public interest in having free and unhindered debate on matters of public importance"[110]—but on the whole, Justice Marshall discussed the importance of free expression to

105. *See* 461 U.S. 138, 156 (1983) (Brennan, J., dissenting) (explaining that protecting "communications necessary for self-governance . . . was a central purpose of the First Amendment").

106. 354 U.S. 476, 484 (1957) (emphasis added). Justice Brennan disclaimed the ability of the Court to determine the "social value" that should be "ascribed" to speech as a means of determining whether it merited First Amendment protection. FCC v. Pacifica Found., 438 U.S. 726, 762–63 (1978) (Brennan, J., dissenting).

107. KASPER & KOZMA, *supra* note 9, at 97. This was not universally the case. For instance, in *Texas v. Johnson*, a case involving whether burning the American flag in protest was protected by the First Amendment, Justice Brennan quoted approvingly from cases discussing the importance of free speech to individual autonomy. *See* 491 U.S. 397, 414 (1989). So too in *Pacifica Foundation*, in which Justice Brennan lamented a decision he felt leant ammunition to "the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking." 438 U.S. at 777 (Brennan, J., dissenting).

108. KASPER & KOZMA, *supra* note 9, at 152.

109. Kleindienst v. Mandel, 408 U.S. 753, 776 (1972) (Marshall, J., dissenting).

110. 391 U.S. 563, 572–73 (1968).

individual autonomy with much greater regularity than did Justice Brennan.[111]

Finally, consider Justice Anthony Kennedy, whom Kasper and Kozma describe as "one of the most devoted adherents of Millian philosophy" during his time on the Court.[112] Justice Kennedy's tenure as a justice was characterized by his values-driven approach to judging[113]—for which he was frequently criticized.[114] Unsurprisingly, then, Justice Kennedy's Speech Clause opinions were often paeans to the Millian ideals served by the First Amendment. For example, in *Citizens United v. FEC*, Justice Kennedy dwelt at length on the importance of speech as "an essential mechanism of democracy," an instrument by which individuals may "strive to establish worth," and a means by which the public may exercise "the right and privilege to determine for itself what . . . speakers are worthy of consideration."[115] This broad approach to the values served by the First Amendment was a consistent feature of Justice Kennedy's freedom of expression opinions and distinguished him from many of his contemporaries on the Court.[116]

111. *E.g.*, Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("This right to receive information and ideas, regardless of their social worth, is fundamental to our free society." (citation omitted)); Interstate Cir., Inc. v. City of Dallas, 390 U.S. 676, 684 (1968) (describing the "vast wasteland" that could result if artists were chilled from making films).

112. KASPER & KOZMA, *supra* note 9, at 192.

113. *E.g.*, Obergefell v. Hodges, 576 U.S. 644, 665–66 (2015) ("[T]he right to personal choice regarding marriage is inherent in the concept of individual autonomy."); Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.").

114. *E.g.*, Packingham v. North Carolina, 582 U.S. 98, 110 (2017) (Alito, J., concurring) ("I cannot join the opinion of the Court . . . because of its undisciplined dicta. . . . I am troubled by the implications of the Court's unnecessary rhetoric."); *Obergefell*, 576 U.S. at 719 (Scalia, J., dissenting) ("[Justice Kennedy's] opinion is couched in a style that is as pretentious as its content is egotistic."); *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) ("Though there is discussion of 'fundamental proposition[s]' and 'fundamental decisions,' nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause." (alteration in original) (citations omitted)).

115. 558 U.S. 310, 339–41 (2010).

116. *E.g.*, *Packingham*, 582 U.S. at 104–05, 107 ("By prohibiting sex offenders from using [social media], North Carolina 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."); United States v. Alvarez, 567 U.S. 709, 723 (2012) ("The mere potential for the exercise of [a broad censorial] power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom."); Garcetti v. Ceballos, 547 U.S. 410, 420 (2006) ("The Court's decisions . . . have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern."); *see also supra* Table 1 (illustrating that Justice Kennedy valued truth, democracy, and autonomy in First Amendment cases, unlike others such as Justice Holmes and Justice Hughes who did not

The purpose of this Part is not to provide a comprehensive overview of the varying aspects of Mill's philosophy reflected in the Court's free speech jurisprudence. That is something that Kasper and Kozma have already done—ably!—in *The Supreme Court and the Philosopher*. Rather, it is to demonstrate that the aspects of Mill's philosophy motivating the Justices *do* vary and that it is not enough to say that a justice or a case is "Millian." Mill's defense of free speech was expansive, and two justices may independently reach Millian results by different means. For those interested in fully understanding the Court's approach to issues related to freedom of expression, it is therefore necessary to identify which aspect or aspects of Mill's philosophy have mattered at a given time to a given justice.

To be sure, the Court's free speech reasoning is over-determined. As Professor Steven Shiffrin has put it, "[t]oo many values interact in too many complicated ways to expect that a single value, or small set of values, would emerge as the transcendent master value in resolving freedom of speech questions."[117] And with so many values to choose from and a wide range of fact patterns to which to apply them, we should not expect the reasoning of the Court or of the individual justices to remain entirely stable over time. Nevertheless, as will be discussed in Part IV, it is important to understand what values animate the Court's approaches to its free speech cases.

IV. FREE SPEECH VALUES IN COURT

Focusing on which of Mill's justifications for free speech are reflected in the Supreme Court's First Amendment cases is not merely the pedantry for which lawyers are famous—though it is that, too. As discussed above, one thing *The Supreme Court and the Philosopher* makes clear is the importance of personnel: It matters who the Justices are and the extent to which they are committed to free speech.[118] Advocates seeking to persuade the Court, and scholars seeking to understand it, would therefore do well to consider not just the doctrinal rules the Justices subscribe to, but what motivates them to do so. Accordingly, this part discusses what values animate the contemporary Court's Speech Clause decisions before outlining circumstances in which understanding those values may be particularly significant.

prioritize autonomy); *infra* Table 2 (demonstrating that most of the current Justices do discuss autonomy as a First Amendment principle, unlike Justice Kennedy).

117. Steven Shiffrin, *Dissent, Democratic Participation, and First Amendment Methodology*, 97 VA. L. REV. 559, 559 (2011).

118. *See supra* Part III.

TABLE 2: FIRST AMENDMENT VALUES OF THE CURRENT SUPREME COURT JUSTICES[119]

Justice	**First Amendment Values**		
	Truth	*Democracy*	*Autonomy*
John Roberts	Rarely	Yes	Yes
Clarence Thomas	Yes	Yes	No
Samuel Alito	Yes	Yes	Yes
Sonia Sotomayor	No	Yes	No
Elena Kagan	Yes	Yes	No
Neil Gorsuch	Yes	Yes	Yes
Brett Kavanaugh[120]	N/A	N/A	N/A
Amy Coney Barrett	Yes	Yes	Yes
Ketanji Brown Jackson[121]	N/A	N/A	N/A

As detailed visually in Table 2, a survey of the values the current Justices say are served by speech protections reveals a surprising variety of approaches. Justices Samuel Alito, Neil Gorsuch, and Amy Coney Barrett have each discussed all three Millian values in their opinions for

119. The chart relies solely upon opinions the Justices wrote while members of the Court. Justices were only given credit for a value if it was expressed in an opinion written by the Justice. For instance, although Justice Sotomayor joined Justice Alito's opinion in *Reed v. Town of Gilbert*, which emphasized the importance of speech to "democratic self-government and the search for truth," 576 U.S. 155, 174 (2015) (Alito, J., concurring), she was not given credit for this value in the chart because it has not been reflected in the opinions she herself has authored. For a detailed analysis and case citations supporting these classifications, see *infra* notes 120–39 and accompanying text.

120. Although Justice Kavanaugh has written opinions in First Amendment free speech cases, those opinions have not discussed First Amendment values. *See generally* Barr v. Am. Ass'n of Pol. Consultants, Inc., 591 U.S. 610 (2020) (plurality opinion) (holding that robocall restriction favoring debt-collection speech over political speech violated First Amendment); Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 591 U.S. 430 (2020) (holding that foreign affiliates lack First Amendment rights by applying extraterritoriality and corporate law principles).

121. In her time on the Court, Justice Jackson has written only one free speech opinion, which did not discuss First Amendment values. *See generally* United States v. Hansen, 599 U.S. 762 (2023) (Jackson, J., dissenting) (arguing immigration statute "encourag[ing] or induc[ing]" illegal immigration was facially overbroad under the First Amendment).

the Court.[122] Even among these three, however, there is some variety: Whereas Justice Gorsuch regularly (though not universally) addresses all three values in a single opinion,[123] Justices Alito and Barrett generally do not do so.[124] In her opinions, Justice Kagan has talked about the importance of speech to the marketplace of ideas and democracy.[125] Justice Sotomayor, on the other hand, has talked only about democracy.[126]

Somewhat unusually, Chief Justice John Roberts regularly discusses the importance of free speech to democracy and personal autonomy, but only rarely talks about it serving the search for truth.[127] One exception to this general principle was *McCullen v. Coakley*, in which the Chief

122. *E.g.*, TikTok, Inc. v. Garland, 604 U.S. 56, 82, 85 (2025) (Gorsuch, J., concurring in the judgment) (per curiam); Moody v. NetChoice, LLC, 603 U.S. 707, 746 (2024) (Barrett, J., concurring) (emphasizing the importance of autonomy); Counterman v. Colorado, 600 U.S. 66, 107, 112 (2023) (Barrett, J., dissenting) (explaining that true threats are unprotected by the First Amendment because they "carry little value" and that value is determined by "proximity to public discourse"); Janus v. Am. Fed. of State, Cnty., & Mun. Emps., 585 U.S. 878, 893 (2018) (Justice Alito explaining that "[f]ree speech serves many ends. It is essential to our democratic form of government, and it furthers the search for truth. . . . When speech is compelled . . . additional damage is done. . . . Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning" (citations omitted)); *Reed*, 576 U.S. at 174 (Alito, J., concurring) (explaining that content-based restrictions on speech "may interfere with democratic self-governance and the search for truth").

123. *See e.g.*, 303 Creative LLC v. Elenis, 600 U.S. 570, 584–85, 603 (2023) (declaring the government may not interfere with the "uninhibited marketplace of ideas"; that free speech is "indispensable to the discovery and spread of political truth"; and that "the opportunity to think for ourselves" is among our "most cherished liberties" (first quoting McCullen v. Coakley, 573 U.S. 464, 476 (2014); and then quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 514 (2022) (holding that the "Free Speech Clause[] of the First Amendment protect[s] expressions" and that "the Constitution and the best of our traditions counsel mutual respect and tolerance"). *But see* Hous. Cmty. Coll. Sys. v. Wilson, 595 U.S. 468, 478 (2022) (mentioning only democracy).

124. In *Janus*, Justice Alito discussed the value of free speech "to our democratic form of government" and "the search for truth," and argued that compelled speech "is always demeaning." 585 U.S. at 893.

125. *E.g.*, *Counterman*, 600 U.S. at 76–77 (discussing the importance of free speech in the search for truth and self-government); *Reed*, 576 U.S. at 181–82 (Kagan, J., concurring) (same).

126. *E.g.*, Lane v. Franks, 573 U.S. 228, 235–36 (2014) ("Speech by citizens on matters of public concern lies at the heart of the First Amendment, which 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

127. *E.g.*, Snyder v. Phelps, 562 U.S. 443, 452 (2011) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)); United States v. Stevens, 559 U.S. 460, 470 (2010) (discussing First Amendment protection in terms of preventing government censorship and protecting personal expression).

Justice identified the "First Amendment's purpose [as] 'to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'"[128] By far his most typical approach, however, has been to focus on speech's importance to the former two values.[129]

Justice Clarence Thomas began his time on the Court with, relative to his colleagues, a somewhat idiosyncratic approach. When he first joined the Court, he explicitly rejected efforts to import values into the First Amendment analysis, which he said "superimposes . . . modern theories concerning expression upon the constitutional text."[130] As he put it then, "whether certain types of expression have 'value' today has little significance; what *is* important is whether the Framers in 1791 believed [the type of speech at issue] sufficiently valuable to deserve the protection of the Bill of Rights."[131] In the intervening years, however, he has sometimes referenced free speech values in his own First Amendment opinions. For example, in *McConnell v. FEC*, he averred that "core political speech" is "the 'primary object of First Amendment protection.'"[132] Nor was this pronouncement a mere description of the Founders' views; later in the opinion, relying solely upon Supreme Court precedent, he reiterated that freedom of speech was crucial to democratic self-government and the search for truth.[133]

128. 573 U.S. 464, 476 (2014) (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984)).

129. *E.g.*, Morse v. Frederick, 551 U.S. 393, 403–04 (2007) (explaining that political speech is a "concern[] at the heart of the First Amendment"); Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 63–64 (2006) ("[T]he fundamental of protection under the First Amendment, [is] that a speaker has the autonomy to choose the content of his own message." (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995)).

130. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 370 (1995) (Thomas, J., concurring).

131. *Id.*; *cf.* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 836 (2011) (Thomas, J., dissenting) ("Admittedly, the original public understanding of a constitutional provision does not always comport with modern sensibilities.").

132. 540 U.S. 93, 264 (2003) (Thomas, J., concurring in part and dissenting in part) (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 410–11 (2000) (Thomas, J., dissenting)); *see also* McCutcheon v. FEC, 572 U.S. 185, 228 (2014) (Thomas, J., concurring) ("Political speech is 'the primary object of First Amendment protection' and 'the lifeblood of a self-governing people.'" (internal quotation marks omitted) (quoting FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 465–66 (2001) (Thomas, J., dissenting)).

133. *McConnell*, 540 U.S. at 265 (Thomas, J., concurring in part and dissenting in part). In other opinions, Justice Thomas has returned to his criticism of First Amendment doctrine that does not sufficiently rely on history. *See, e.g.*, *Morse*, 551 U.S. at 420 (Thomas, J., concurring) ("The *Tinker* Court made little attempt to ground its holding in the history of education or in the original understanding of the First Amendment.").

Notably, many of the current Justices are inconsistent in describing the values served by the First Amendment.[134] One possible explanation for this phenomenon is that with free speech serving so many values, and with these values well-established in the Court's First Amendment jurisprudence, the Justices may view mere passing references to the purposes of free expression as sufficient—particularly if only one of them is relevant to a particular case. For example, if a Justice believes that free speech is important both to the search for truth and self-governance, he may discuss only democracy in a case involving speech that does not clearly contribute to the marketplace of ideas.[135]

Too, as a legal doctrine develops, it becomes less necessary to resort to first principles. Over the course of hundreds of cases, the policy considerations that animated early decisions will calcify into doctrinal rules that come to dominate judges' reasoning.[136] Accordingly, the Justices may view extensive discussion of the values served by the First Amendment as superfluous. This may also explain why in some recent Speech Clause opinions, such as Justice Kavanaugh's plurality opinion in *Barr v. American Association of Political Consultants* and Justice Sotomayor's majority opinion in *City of Austin v. Reagan National Advertising of Austin, LLC*, the Justices did not discuss the free speech values that underpinned their decisions.[137] Indeed, neither Justice Kavanaugh nor Justice Ketanji Brown Jackson has ever discussed First Amendment values in their opinions as members of the Court.[138] Even

134. *See* KASPER & KOZMA, *supra* note 7, at 198.

135. *See, e.g.*, Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 594 U.S. 180, 195 (2021) (Alito, J., concurring) (explaining that "public schools have the duty to teach students that freedom of speech . . . is essential to our form of self-government" in a case involving a high school student's vulgar off-campus remarks); Murthy v. Missouri, 603 U.S. 43, 77–78 (2024) (Alito, J., dissenting) (discussing the First Amendment's importance to promoting the search for truth and democratic self-governance).

136. *See* KASPER & KOZMA, *supra* note 9, at 3, 193. In the context of the First Amendment, some Court justices resist this trend. *See, e.g.*, TikTok Inc. v. Garland, 604 U.S. 56, 83 (2025) (per curiam) ("[W]hile I do not doubt that the various 'tiers of scrutiny' discussed in our case law . . . can help focus our analysis, I worry that litigation over them can sometimes take on a life of its own and do more to obscure than to clarify the ultimate constitutional questions."); City of Austin v. Reagan Nat'l Advert. of Aus., LLC, 596 U.S. 61, 77 (2022) (Breyer, J., concurring) ("[First Amendment] purposes are often better served when judge-made categories (like 'content discrimination') are treated, not as bright-line rules, but instead as rules of thumb.").

137. *See generally* Barr v. Am. Ass'n of Pol. Consultants, 591 U.S. 610 (2020) (plurality opinion) (applying strict scrutiny to content-based government-debt exception to robocall restriction); *Reagan Nat'l Advert.*, 596 U.S. 61 (applying content-neutrality analysis to regulations that treated on- and off-premises signs differently).

138. *See supra* notes 162–63 and accompanying text.

where justices *do* mention or discuss the Speech Clause's purpose in modern opinions, they often do so in a relatively cursory manner.[139]

Knowing what values the Court (and individual justices) understand to be served by the First Amendment is crucial to advocates seeking to craft arguments that can garner a majority of votes.[140] But understanding is not merely a matter of persuasion: The free speech values justices ascribe also have a substantial impact on substance.[141] This point may seem so self-evident as to be banal, but it is worth momentarily dwelling upon because a close examination of the values animating the present Justices' free speech opinions may upset some broadly held conceptions about what kinds of expression do or will receive constitutional protection.

Take, for example, the "fighting words" doctrine, which comes from the 1942 case of *Chaplinsky v. New Hampshire*.[142] That case involved a Jehovah's Witness who was arrested for referring to a law enforcement officer as a "damned racketeer" and a "damned Fascist" after the police refused to protect him from a crowd opposed to his street preaching.[143] The man appealed his conviction to the Supreme Court, which ruled that governments could constitutionally proscribe "'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[144] This was so, the Court explained, because "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[145]

Courts have long recognized that criticism of public officials, including criticism of police officers, is protected by the First

139. *See, e.g.*, *TikTok*, 604 U.S. at 66–67 (explaining, in a single sentence, that "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence" (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994)).

140. Values matter just as much, if not more, outside of the courts, which is why it is crucial that advocates for free expression not limit themselves to discussing only certain values served by robust speech protections. *See* Noah Chauvin, *Foreign Influence and the Immorality of Censorship*, KNIGHT FIRST AMEND. INST. (Feb. 28, 2025), https://knightcolumbia.org/content/foreign-influence-and-the-immorality-of-censorship [https://perma.cc/V5L9-G74X]; *see also* Blasi, *supra* note 12, at 162 ("One idea of Mill's that is not in the least rendered obsolete by digital technology is his claim that the regulation of speech by nongovernmental actors and institutions deserves as much attention, even if not necessarily the same governing principles, as regulation by the state.").

141. *See* KASPER & KOZMA, *supra* note 9, at 201.

142. 315 U.S. 568, 572 (1942).

143. *Id.* at 569–70.

144. *Id.* at 572.

145. *Id.*

Amendment.[146] That, in combination with the Court ruling in *R.A.V. v. City of St. Paul*, that even laws proscribing fighting words must be content- and viewpoint-neutral,[147] led many commentators to argue that *Chaplinsky*, while never overruled, was a dead letter.[148] But *Chaplinsky* was at the core of Justice Barrett's dissent in *Counterman v. Colorado*,[149] and while her approach drew only two votes in that case, it is not inconceivable that justices who prioritize the search for truth over other values served by the First Amendment could be persuaded to adopt her position in the future.

Finally, close attention to the values justices identify as served by their free speech reasoning may be of particular use to scholars. As mentioned in the Introduction, many scholars have expressed concern that the Court has developed an expansive First Amendment jurisprudence that will make it substantially more (and, in the view of those scholars, unnecessarily) difficult for governments to regulate conduct involving an aspect of speech.[150] Some proponents of this view have argued that the problem is a Speech Clause jurisprudence that prioritizes individual autonomy to the detriment of the First Amendment's traditional concern with ensuring a fair and well-functioning democratic process.[151]

However, as reflected in Tables 1 and 2, this conclusion does not necessarily follow from how the justices surveyed describe their motivations in free speech cases, historically or in the present. This does not necessarily undercut the shift-to-autonomy thesis for at least two reasons. First, for the purposes of this Commentary, I have performed only a partial survey of the values justices have said are served by freedom of expression. Future work should address this question more fulsomely, paying particular attention to how the Justices' stated values have changed over time. Second, as mentioned, my survey has prioritized the Justices' *stated* values—but it does not follow that an opinion or doctrine necessarily advances the values justices claim it does. Legal

146. *E.g.*, City of Houston v. Hill, 482 U.S. 451, 461 (1987).

147. *See* 505 U.S. 377, 391–92 (1992).

148. *E.g.*, Kasper & Kozma, *supra* note 9, at 29 (arguing that "in *R.A.V. v. St. Paul*, the Court eviscerated . . . [the] fighting words doctrine"). *But see* David L. Hudson, Jr., *The Fighting Words Doctrine: Alive and Well in the Lower Courts*, 19 U.N.H. L. REV. 1, 6–17 (2020) (detailing cases in which the lower courts have continued to apply the fighting words doctrine).

149. 600 U.S. 66, 107–09 (2023) (Barrett, J., dissenting).

150. *E.g.*, Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1962–64 (2018).

151. *E.g.*, Lakier, *supra* note 5, at 1334; *see also* Douglas E. Edlin, *The Undignified First Amendment*, 51 U.C. L. CONST. Q. 453, 499–500 (2024) (arguing that autonomy theory fails to adequately account for the autonomy interests of the listener).

scholars add significant value when they can identify circumstances in which such is the case. It may also be important to consider—to the extent such is the case—why the values the academy sees served by freedom of speech are out of phase with those reflected in the Court's jurisprudence. Fortunately, as scholars undertake these and other projects, Kasper and Kozma have provided a framework for understanding what values motivate the Justices in free speech cases.

V. CONCLUSION

The Supreme Court and the Philosopher is a significant contribution to our understanding of the Supreme Court's free speech jurisprudence. Kasper and Kozma have persuasively argued that the Court's Speech Clause cases are consistent with Mill's philosophy, particularly as described in *On Liberty*. Nor is this confluence mere happenstance: As the authors demonstrate, Mill directly influenced some of the Court's earliest speech-protective opinions, which through the power of precedent came to be well-established law.

However, while the Court's First Amendment jurisprudence has been Millian, the Justices have not been consistent with respect to which of Mill's justifications for free speech they have given primacy in their opinions. While speech-protective First Amendment opinions have generally emphasized the importance of speech to individual autonomy, the discovery of truth, and democratic self-government, the combination of those values relied upon has varied significantly over time and by justice. As I have argued, understanding these trends matters for both advocates and scholars seeking to understand the Court's (and individual Justices') approach to First Amendment cases.

In making this argument, I have drawn extensively on *The Supreme Court and the Philosopher*, as will any future scholar who wishes to engage seriously with the philosophical roots of the Court's free speech jurisprudence. And as Kasper and Kozma note, with the Court overturning a range of significant precedents and some Justices openly questioning whether it should do the same with respect to the First Amendment, such engagement is now more important than ever.[152]

152. *See* KASPER & KOZMA, *supra* note 9, at 202–03; *see also, e.g.*, McKee v. Cosby, 586 U.S. 1172, 1173 (2019) (Thomas, J., concurring in denial of certiorari) (arguing that *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), was a "policy-driven decision[] masquerading as constitutional law" and that the proper approach to resolving the First Amendment issues raised by public-figure defamation suits is to "carefully examine the original meaning of the First and Fourteenth Amendments").