The Four Pillars of Constitutional Doctrine

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INTRODUCTION

The least dangerous branch, the judiciary, is once again at the forefront of American politics—with a twist. Many liberals, previously champions of the judiciary but now chastened by decades of conservative Republican appointments and disheartened by President Obama's seeming reluctance to appoint liberal firebrands, are condemning judicial activism and calling for popular constitutionalism.[1] Many conservatives who previously embraced strict constructionism as a way of keeping the courts from invalidating conservative gains in the political branches now see the judiciary as a two-edged sword: Although they still want to keep liberal activists off the bench, they also hope that courts filled with previously appointed conservative activists might serve to mitigate the effects of recent losses in the political branches.[2]

Despite this reversal of roles, the underlying dispute remains the same: How should courts interpret the Constitution? And the battle is played out in all the usual forums. Judicial nominations continue to

[*] Herman O. Loewenstein Professor of Law, Vanderbilt University. The core of this Article was originally presented as the Uri and Caroline Bauer Lecture at the Benjamin N. Cardozo School of Law. I am grateful to three consecutive editorial boards of the *Cardozo Law Review* (2008-09, 2009-10, and 2010-11) for making possible that lecture. I also thank Mark Brandon, Lisa Bressman, Dan Farber, Paul Edelman, Rob Mikos and Richard Nagareda for helpful comments on earlier drafts.

[1] *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); JEREMY WALDRON, THE DIGNITY OF LEGISLATION (1999); *see also* BARACK OBAMA, THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM (2006) ("[I]n our reliance on the courts to vindicate not only our rights but also our values, progressives had lost too much faith in democracy."). Not all liberals subscribe to this approach; for a contrary view, see Justin Driver, *Why Law Should Lead*, THE NEW REPUBLIC, Apr. 8, 2010, at 28.

[2] *See, e.g.*, Michael Greve, *Conservatives and the Courts*, *in* CRISIS OF CONSERVATISM? THE REPUBLICAN PARTY, THE CONSERVATIVE MOVEMENT AND AMERICAN POLITICS AFTER BUSH (forthcoming Feb. 2011); George Will, *More Judicial Activism Please*, REALCLEARPOLITICS (June 14, 2009), http://www.realclearpolitics.com/articles/2009/06/14/more_judicial_activism_please_96981.html.

garner ever more press and generate ever more acrimonious debates, and academics continue to debate the relative merits of originalism and other grand theories of constitutional interpretation.[3]

I do not propose, in this Article, to resolve any of these disputes. Indeed, I think they are irresolvable. Constitutional interpretation, and thus constitutional doctrine, is inevitably controversial. Judges, scholars, lawyers, politicians, and the American public all disagree among themselves, not only about the correct constitutional outcome, but even about the right approach to constitutional interpretation. We are unlikely to reach consensus on whether we should read the Constitution as a living and evolving document or instead read it in accordance with a fixed original meaning, much less on whether it does or does not protect campaign contributions, reproductive rights, affirmative action policies, gun ownership, or any of the other contested issues that have recently come before the Supreme Court.

Nevertheless, I believe that we can find an important degree of common ground by focusing on the essential elements of sound constitutional doctrine as an abstract matter. Even if we cannot identify standards to evaluate outcomes or approaches, we can at least specify the minimum requirements for sound doctrine. Thus we *can* come to agreement about how to evaluate the Supreme Court (and its Justices) at some basic level. In this Article, I identify the four necessary pillars underlying sound constitutional doctrine. By doing so, I hope to begin a conversation about the courts and the Constitution that, unlike most such conversations, does not end in a political impasse.

The Article proceeds as follows. Part I sketches out the four pillars of constitutional doctrine. Part II provides a practical illustration of these essential principles by using them to test the soundness of a recent, little-noticed Supreme Court case that I believe violates all four principles. Part III broadens the focus to examine other recent Supreme Court cases, demonstrating the usefulness of my four pillars to critique judicial output independent of political valence.

I. THE FOUR PILLARS OF SOUND CONSTITUTIONAL DOCTRINE

The essential principles of sound constitutional doctrine are not complex, controversial, or novel. They are the principles to which lawyers and judges have adhered—at least in aspiration—since the Constitution was adopted, the building blocks of the rule of law, the unstated assumptions that undergird much of our critique (and our

[3] For a recent contribution, see Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. L., Research Paper No. 07-24, 2008), *available at* http://ssrn.com/abstract=1120244.

praise) of judicial opinions. Yet we seem to have lost sight of these basic principles. Instead, we are simultaneously too abstract and not abstract enough: We engage in ethereal arguments about whether the Constitution is a living document at the same time that we are mired in political squabbles about particular outcomes. In this Part, I recall and elaborate the four pillars of sound constitutional doctrine: *legal analysis*, *judicial craftsmanship*, *constitutional aspiration*, and *human understanding*.

A. *Legal Analysis*

Legal analysis is the basis for all legal work. It is what law students do when answering exam questions; what lawyers do when answering clients' questions; and what Supreme Court Justices do when answering constitutional questions. It is the basic skill that we teach—and test—in law school, and it is the core of every lawyer's day-to-day work.

At the risk of oversimplifying what it takes three years to begin learning and a lifetime to hone, let me describe what I mean by legal analysis. It is, in essence, the ability to recognize and utilize similarities and differences in a principled and persuasive way. Legal analysis cuts across all types of adjudication: common-law, constitutional, and statutory. It can take the form of comparing one constitutional or statutory provision to another, or examining conflicting historical evidence, but we use legal analysis most commonly to determine whether a previously decided case governs a new situation—whether one is advising a client, arguing to a court, or deciding a case.

It is always possible to find distinctions between the existing case and the new situation: At the very least, the names, places, dates, and so on will be different, but often there will be more significant distinctions as well. For example, if discrimination on the basis of race is usually unconstitutional, what about discrimination on the basis of skin color? Ethnicity? Gender? Religion? Sexual orientation? Obesity? Left-handedness? Cigarette-smoking? At some point the differences become more important than the similarities, and making persuasive arguments about where that line should be drawn is part of the skill in legal analysis.

It should be apparent even from this brief description that legal analysis is neither analytical logic nor rhetorical manipulation. Legal analysis of this sort does not have the conclusive quality of deductive reasoning: There is no way to demonstrate logically that race discrimination is (or is not) sufficiently similar to gender discrimination to warrant similar treatment. On the other hand, while rhetorical

arguments seize on any available differences to make the case for drawing distinctions, good legal analysis depends on drawing principled distinctions and explaining why they matter.

Legal analysis is thus more art than science, but it is still possible to distinguish good legal arguments from bad ones. How do we recognize poor legal arguments? Mostly by identifying those that focus on certain differences *without explaining why those differences are important*. The worst legal reasoning focuses on insignificant distinctions *and* fails to explain them. But even when the distinctions appear to be significant, good legal arguments should still explain their relationship to the question at hand.

Legal analysis is thus a sharpened version of a skill that most people learn at a young age—as illustrated by the Sesame Street song "One of these things is not like the others." Imagine determining which of the following four items is "not like the others": an apple, an orange, a cherry, and a tomato. (One difference between Sesame Street and legal analysis is that the former would substitute a live rabbit for the tomato, making the game easy and obvious to anyone over the age of four.) Each of the items is a plausible candidate for exclusion; the "right" answer depends on the purpose for which you are making the distinction. The differences among the objects include color, size, and whether the item is culinarily considered fruit—and which trait you focus on needs to be connected to the purpose for which you are sorting the objects. Planning a dessert, staging a photograph, or filling a large centerpiece might each demand a different choice. Good legal analysis, then, entails giving reasons that satisfactorily explain the focus on particular differences. Otherwise, it is no better than flipping a coin.

B. *Judicial Craftsmanship*

The demand for reasons is closely related to the second essential element of sound constitutional doctrine: judicial craftsmanship. Judges do more than simply decide who wins a case. They also explain their reasoning to the litigants and the public, and provide guidance for future disputes. In the Anglo-American legal tradition, written judicial opinions serve these purposes. With this in mind, what can we expect from well-written judicial opinions besides good legal reasoning?

One of the most important aspects of judicial craftsmanship is candor or transparency.[4] A judicial opinion ought to be an explanation,

[4] Other aspects of judicial craftsmanship include humility, courage, and the wisdom to know when to be humble and when to be courageous. These traits are much more difficult to measure and evaluate, and therefore I do not discuss them here. For elaboration, see Suzanna Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793 (2003).

not a rationalization. We should expect judges to straightforwardly and honestly give the reasons for their decision. A lack of candor would allow judges to evade the rule of law because they could reach their preferred results without confronting doctrinal inconsistencies, inconvenient facts or legal sources, or powerful counterarguments. Transparency is especially vital for unelected judges in a constitutional democracy, because the visible rationality of a transparent opinion is a necessary substitute for the missing democratic accountability. It is part of what leads the public to acknowledge the legitimacy of a judicial decision.

Failures of transparency can be difficult to identify, almost by definition. Occasionally a judge or scholar will explicitly argue against judicial transparency; Justice Scalia, for example, has written that he "never thought Oliver Wendell Holmes and the legal realists did us a favor by pointing out that all these [formalist] legal fictions were fictions: Those judges wise enough to be trusted with the secret already knew it."[5] Others have made similar arguments, suggesting that transparency might undermine courts' legitimacy or public compliance with judicial edicts.[6] All of these arguments, at their core, reflect a profoundly antidemocratic sentiment: Judges always know best and we should trust them blindly. If we adopt that view, of course, it seems pointless to search for a way to evaluate judicial decisions or judicial opinions.

Such arguments aside, lapses in transparency are often not facially obvious. We can identify them only by exposing judicial statements or explanations as so obviously wrong as to be unworthy of credence. As an example, consider the patent falsehood expressed by recent Supreme Court nominees: Regardless of the political views of the nominating president, the Senate, or the nominee himself or herself, would-be Supreme Court Justices testifying at their confirmation hearings often declare that judges are umpires who apply the law but do not make it.[7]

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[5] Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 589 (1990).

[6] *See, e.g.*, MEIR DAN-COHEN, HARMFUL THOUGHTS: ESSAYS ON LAW, SELF, AND MORALITY 28-32 (2002); Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307 (1995); Daniel Sabbagh, *Judicial Uses of Subterfuge: Affirmative Action Reconsidered*, POL. SCI. Q., Fall 2003, at 411. For a refutation of some of these arguments, see David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

[7] *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) [hereinafter *Confirmation Hearing of John G. Roberts, Jr.*] (statement of John G. Roberts, Jr.) ("Judges are like umpires. Umpires don't make the rules, they apply them."); *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 59 (2009) (statement of Hon. Sonia Sotomayor) ("The task of a judge is not to make law, it is to apply the law."); *id.* at 79 (stating that the job of judges, "like umpires, is to be impartial and bring an open mind to every case before them"). *But see Sen. Patrick J. Leahy Holds a Hearing on the Elena Kagan*

Since at least the time of the Legal Realists,[8] lawyers, judges, and legal scholars have recognized that judges *do* make law, especially in cases that are difficult or ambiguous enough to require Supreme Court adjudication. The contrary assertions by nominees are failures of transparency.

In a judicial opinion, a judge who is not candid about the reasons for her decision will nevertheless attempt to justify it, however unpersuasively. It is not always possible to draw a line between merely unpersuasive justifications and lack of transparency. But, like the nominees' assertions, some opinions are so poorly reasoned or crafted—or contain such blatantly false statements—that it is impossible to view the lapses as due to anything other than disingenuousness. Later in this Article, I will focus on one particular disingenuous move: claiming to apply a precedent but effectively overruling it.

C. *Constitutional Aspiration*

Legal analysis and judicial craftsmanship are the hallmarks of good judicial opinions in both constitutional and non-constitutional cases. But constitutional cases place special demands on judges. These demands create the third essential element of sound constitutional doctrine, which I will call constitutional aspiration.

We generally think of a "constitution" as a written document, but that is not its only—or even its traditional—meaning. Aristotle defined it much more broadly, as a "way of life."[9] The late Princeton political scientist Walter Murphy rephrased Aristotle to define a constitution as "the nation's constitutional text, its dominant political theories, the traditions and aspirations that reflect those values, and the principal interpretations of this larger constitution."[10] A constitution thus *constitutes* a nation. Our constitution is more than the written

Nomination Before the S. Comm. on the Judiciary, 111th Cong. (2010) (statement of Elena Kagan) ("[T]he [umpire] metaphor might suggest to some people that law is a kind of robotic enterprise, that there's a kind of automatic quality to it, that it's easy, that we just sort of stand there and, you know, we go ball and strike, and everything is clear-cut, and that there is . . . no judgment in the process. And I do think that that's not right. And it's especially not right at the Supreme Court level where the hardest cases go and the cases that have been the subject of most dispute go. . . . [J]udges do, in many of these cases, have to exercise judgment. They're not easy calls.").

8 For an argument that at least two decades before the Realists, judges were aware that they were making law, see Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731 (2009).

9 ARISTOTLE, POLITICS 373 (Ernest Barker ed. & trans., Oxford Univ. Press 1995).

10 WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER 13 (2007).

commands to which the government must adhere. It is an embodiment of our aspirations as a people and a nation. It carries a purpose and a history, a hope for the future and a resolution of the past.

To interpret the written document—the Constitution with an upper-case "C"—we must therefore look beyond its text to its deeper meaning. And in a constitutional democracy like the United States, the purpose of much of the Constitution is both to ensure democratic governance *and* to place a check on unfettered democratic rule. This latter purpose is evident in many different parts of the Constitution as well as in its history.

The most well known example of the Constitution's goal of limiting majority rule is that various provisions, including most prominently the Bill of Rights and the Reconstruction Amendments, place explicit limits on what even a majority of the people can do. Less appreciated as a source of limits on majority power are the multiple divisions of authority: between the states and the federal government, among the different branches of government, and between the House and the Senate. The historical evidence tells us that the purpose of all of these divisions, too, was to keep majorities from too easily implementing their will.[11] Other, more subtle divisions aim toward the same goal, such as the division of responsibility in criminal cases between a judge and two different types of juries. The Constitution also filters the desires of the majority through multiple layers—that was one of the original purposes of the electoral college, for example.

We can disagree about which of these devices is the most important, or should be the focus of judicial attention. But my point here is to suggest that sound constitutional doctrine must take into account the goal of protecting political minorities.

The role of the Court in fashioning constitutional doctrine, then, is to stand in the way of the more democratic branches, at least sometimes. Judicial activism, despite its current pejorative connotations, is in fact a crucial part of fulfilling our constitutional goals and aspirations. James Madison described the need for an institution that would "protect the people against the transient impressions into which they . . . might be led."[12] (He was actually describing the Senate, but the future never turns out as we expect, and the judiciary has ended up as the most important institution playing this role.) Almost two centuries later, Alexander Bickel expressed the same sentiment. He praised courts for their "capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and

[11] *See generally* THE FEDERALIST NO. 51 (James Madison); DAN T. COENEN, THE STORY OF *THE FEDERALIST*: HOW HAMILTON AND MADISON RECONCEIVED AMERICA 107-12 (2007).

[12] JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 193 (W.W. Norton & Company 1987) (1966).

cry."[13] And reading the constitution as designed at least in part to empower judicial activism of this sort is not unique to the United States. As one Israeli judge and law lecturer put it, "[w]hen all is said and done, one is inclined to think that a rigid constitutional frame is on the whole preferable even if it serves no better purpose than obstructing and embarrassing an over-active Executive."[14]

In fashioning constitutional doctrine, then, the courts must be sensitive to those whose voices are less audible to the popular branches. The Constitution was written—again in Madison's words—in part "to guard one part of the society against the injustice of the other part"[15] and to avoid what Alexis de Tocqueville later labeled the "tyranny of the majority."[16] Judges should keep these goals in mind when interpreting the Constitution.

D. *Human Understanding*

Finally, sound constitutional doctrine must rest on sound principles of human understanding. By this I mean that all facets of American law must be consistent with the best scientific understanding available. Legal doctrine cannot rely on anecdotes or discredited sources that are inconsistent with science, nor can it rest on religious foundations. The law thus must be publicly accessible through reason rather than privately known through revelation or faith. Religion can comfort and inspire, but it should not govern. Insisting that government rest on reason rather than faith began with the European Enlightenment, which inspired the political theory of the American Founding generation.[17] As one historian put it, "[t]he formation of government under the Constitution . . . was in a way a climax of the Enlightenment."[18] Those who wrote and ratified the United States Constitution believed that scientific understanding should replace "claims to knowledge based on supernatural revelation, sheer authority, or abstruse speculation."[19]

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13 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 26 (Yale Univ. Press 2d ed. 1986) (1962).

14 Gideon Hausner, *Individual Rights in the Courts of Israel*, *in* INTERNATIONAL LAWYERS CONVENTION IN ISRAEL 201, 228 (1959).

15 THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., Signet Classic 2003).

16 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 250 (J.P. Mayer ed., George Lawrence trans., Doubleday & Co. 1969).

17 *See generally* Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 465-69 (1996).

18 RALPH KETCHAM, FRAMED FOR POSTERITY: THE ENDURING PHILOSOPHY OF THE CONSTITUTION 24 (1993).

19 DONALD H. MEYER, THE DEMOCRATIC ENLIGHTENMENT xiii (1976); *see also* HENRY F. MAY, THE ENLIGHTENMENT IN AMERICA 154 (1976) (noting that what united "the men of the . . . Enlightenment . . . was their secularity and modernity").

Hamilton, for example, spoke for his generation when he wrote that government should be based on the new "*science* of politics."[20]

Faith and reason are ultimately appeals to different sources of knowledge and authority, with different standards of proof: To have faith allows one to maintain one's beliefs in the face of overwhelming rational evidence to the contrary. "Faith . . . requires no justification and brooks no argument."[21] As one geologist put it when he abandoned his scientific career in favor of a career based on his religious beliefs:

> Although there are scientific reasons for accepting a young earth, I am a young-age creationist because that is my understanding of Scripture. . . . [I]f all the evidence in the universe turns against creationism, I would be the first to admit it, but I would still be a creationist because that is what the Word of God seems to indicate. Here I must stand.[22]

And it is recourse to this non-rational source of authority that the Enlightenment rejected. This primacy of reason excludes from the public sphere any reliance on the authority of gods, sacred documents, clergy, or similar sources. A grounding in principles of understanding also prohibits recourse to secular fiat: "Because I said so" is not a sound basis for constitutional doctrine, nor is discredited pseudo-scientific evidence. In other words, the ultimate source of authority must be human rather than divine and rest on reason rather than fiat or faith. Constitutional doctrine should incorporate this same epistemological tilt.[23]

II. FOUR PILLARS, FOUR FAILURES

Much of the criticism of the Court has been directed at a few big and controversial cases, like *District of Columbia v. Heller*,[24] which struck down the District of Columbia's handgun ban, and *Citizens United v. FEC*,[25] which invalidated the McCain-Feingold campaign finance regulation. Those cases may have some flaws (some of which I

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[20] THE FEDERALIST NO. 9, at 67 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic 2003) (emphasis added).

[21] RICHARD DAWKINS, THE GOD DELUSION 347 (Houghton Mifflin Harcourt 2008) (2006).

[22] *Id.* at 323 (quoting Kurt Wise, who has degrees in geology and paleontology from the University of Chicago and Harvard, but now directs the Center for Origins Research at Bryan College, which is named after Williams Jennings Bryan and is located in Dayton, Tennessee, where the Scopes trial took place).

[23] For a similar argument, see ROBERT AUDI & NICHOLAS WOLTERSTORFF, RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE 1-66 (1997); Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFF. 259, 278-86 (1989).

[24] 128 S. Ct. 2783 (2008).

[25] 130 S. Ct. 876 (2010).

will discuss in Part III), but I think most of the controversy has been about the outcomes—about whether the cases were correctly decided. As I suggested earlier, we are unlikely to reach consensus on that question.

But other cases exhibit more basic, and more incontrovertible, failures. I want to focus in this Part on one case in which I believe the plurality opinion—written by Justice Alito and joined by Chief Justice Roberts and Justice Kennedy—failed to satisfy the requirements for *any* of the four elements, and the two remaining Justices making up the majority (Justices Scalia and Thomas) failed two of the four. That case is *Hein v. Freedom from Religion Foundation*,[26] decided in 2007 by a fractured Court with no majority opinion.

In *Hein*, the plaintiff, Freedom from Religion Foundation, challenged various conferences held under the auspices of President George W. Bush's Faith-Based Initiatives program and funded with federal money. The Foundation alleged that the conferences violated the Establishment Clause of the First Amendment because they served as "propaganda vehicles for religion."[27] The Supreme Court never reached the merits of this Establishment Clause claim. Instead, it held that the plaintiffs did not have standing, and thus could not bring the lawsuit at all.

Standing is a constitutional requirement that demands that the plaintiff show how and why the actions of the defendant harmed *her* in particular. The Court long ago held that there is no generalized citizenship or taxpayer standing: A citizen cannot bring a lawsuit alleging that the government has acted unconstitutionally unless the actions directly affected her in some way. The psychological harm that comes from knowing one's government has acted unconstitutionally is not enough.[28] And ordinarily, a claim that some allegedly unconstitutional action has raised the plaintiff's taxes is also not enough to satisfy standing, because the Constitution "does not protect taxpayers against increases in tax liability."[29]

A contemporary example illustrates the point. Some have argued that the new federal health care legislation is unconstitutional because it exceeds Congress's constitutional authority. Standing doctrines tell us who will be allowed to raise that claim in court. States may challenge

[26] 551 U.S. 587 (2007). For a critique of *Hein* based on its likely consequences, see Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle:* Hein v. Freedom From Religion Foundation, Inc. *and the Future of Establishment Clause Adjudication*, 2008 BYU L. Rev. 115.

[27] Freedom from Religion Found. v. Chao, 433 F.3d 989, 994 (7th Cir. 2006), *rev'd sub nom. Hein*, 551 U.S. 587.

[28] *See, e.g.*, Allen v. Wright, 468 U.S. 737, 753-56 (1984); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974).

[29] Flast v. Cohen, 392 U.S. 83, 105 (1968).

the legislation if it requires them to participate in some way,[30] as can individuals who are required to purchase health insurance, but the people whose taxes are being raised to pay for coverage for the uninsured may not do so.

These limitations on standing might create a problem in Establishment Clause cases, because often the only act that is alleged to be unconstitutional is that the government is spending money in support of religion; no one is directly harmed by that act. Some forty years ago, however, the Supreme Court created an exception to the general ban on taxpayer standing. That exception allows any taxpayer to challenge government expenditures on the ground that they violate the Establishment Clause.

In a case called *Flast v. Cohen*,[31] plaintiffs sued the Secretary of Health, Education and Welfare—an executive department that has since been reorganized into two departments, Education and Health and Human Services—for using federal funds to finance instruction at religious schools. The Court held that the plaintiff had standing because she was "attack[ing] a federal statute on the ground that it violate[d] the Establishment . . . Clause[]."[32]

The Court distinguished Establishment Clause challenges from other challenges to federal expenditures on the ground that "one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general."[33] Twenty years later, in *Bowen v. Kendrick*,[34] the Court reaffirmed the *Flast* principle, holding that taxpayers had standing to challenge a federal agency's grants to religious institutions as part of a statute authorizing grants to institutions providing services to adolescents.

The plaintiffs in *Flast*, *Bowen*, and *Hein* were in materially identical situations: Each was challenging executive branch expenditures, funded by a congressional allocation of tax revenues, that allegedly violated the Establishment Clause. Judge Richard Posner, a formidable judge and a political conservative, wrote the lower court

30 The Attorneys General of multiple states have indeed filed a lawsuit challenging the legislation. Complaint, Florida v. U.S. Dep't of Health & Human Servs., No. 3:10-cv-91 (N.D. Fla. Mar. 23, 2010), *available at* http://www.atg.wa.gov/uploadedFiles/Another/About_the_Office/FloridavUSComplaint.pdf.

31 392 U.S. 83 (1968).

32 *Id.* at 85.

33 *Id.* at 103.

34 487 U.S. 589 (1988).

opinion in *Hein*, holding that *Flast* and *Bowen* were indistinguishable and thus that the plaintiffs had standing.[35]

The Supreme Court plurality in *Hein* unfortunately did not see the similarity. The Court reversed the Seventh Circuit, although a majority could not agree on the reasons for the reversal. Justice Scalia, joined by Justice Thomas, would have overruled *Flast* and *Bowen* (I will turn to them later). Justice Alito's plurality opinion, joined by the Chief Justice and Justice Kennedy, instead purported to distinguish *Flast* and *Bowen* on the ground that in allocating funds to the President's budget, Congress did not explicitly earmark any of those funds for the faith-based initiative but instead left it up to the President's discretion how to spend the money.[36] It is this specious distinction that leads me to label the plurality's opinion as a failure of both legal analysis and judicial craftsmanship.

Recall that good legal analysis depends on drawing principled distinctions and explaining why they matter. If Congress gives the executive branch money raised from taxes, and the executive spends that money to support religion, why should the plaintiff's standing to challenge the *executive's* action depend on whether *Congress* specifically authorized the allegedly unconstitutional expenditure? The plurality never explains why this distinction is even relevant, much less significant. It is hard to disagree with Justice Scalia, who called it an "utterly meaningless distinction[]."[37]

The heart of *Flast* and *Bowen* is the recognition that one purpose of the Establishment Clause is to prohibit the government from funding religion. As the Court reiterated only a year before *Hein*, the direct injury to plaintiffs that gives them standing in these sorts of Establishment Clause cases is "the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion."[38] The *Hein* plurality seems to think that the plaintiff suffers no such injury if Congress extracts the money and the executive spends it, despite the fact that both of the earlier cases involved executive branch expenditures.

The plurality opinion also violates the principle of transparency. The plurality's treatment of *Flast* amounts to what might be called a "stealth" overruling:[39] overruling precedent without admitting that it is doing so. As Justice Scalia noted:

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[35] Freedom From Religion Found. v. Chao, 433 F.3d 989, 991-93 (7th Cir. 2006), *rev'd sub nom.* Hein v. Freedom From Religion Found., 551 U.S. 587 (2007).

[36] 551 U.S. 587, 605-10 (2007) (plurality opinion).

[37] *Id.* at 618 (Scalia, J., concurring).

[38] DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 348 (2006) (quoting *Flast*, 392 U.S. at 106).

[39] The first commentator to use the term was Ronald Dworkin, who accused the Justices of overruling a number of cases by stealth, including in *Hein*. *See* Ronald Dworkin, *The Supreme Court Phalanx*, N.Y. REV. OF BOOKS, Sept. 27, 2007, at 92, *available at* http://www.nybooks.com/articles/archives/2007/sep/27/the-supreme-court-phalanx/?page=1.

> [L]aying just claim to be honoring *stare decisis* requires more than beating *Flast* to a pulp and then sending it out to the lower courts weakened, denigrated, more incomprehensible than ever, and yet somehow technically alive.[40]

Stealth overruling is the exact opposite of transparency. Moreover, by engaging in stealth overruling, the plurality accrues three benefits to itself at the expense of the public and the Constitution.

First, a Court that engages in stealth overruling is less likely to be held accountable for its decision. The headlines when a Court overrules an established precedent are very different from the headlines that accompany a routine case applying established precedent. The problem is especially acute in cases involving questions of standing. Standing is an esoteric doctrine, barely understood by lawyers, much less the general public. It is a refusal to decide rather than a decision, and therefore less likely to be reported in the media in the first place.

Second, the Justices who engage in stealth overruling can claim to be judicial minimalists who are faithfully applying precedent. This allows them to portray themselves as Chief Justice Roberts did in his confirmation hearings, telling the Senate Judiciary Committee that he viewed overruling precedent as "a jolt to the legal system": "Precedent plays an important role in promoting stability and evenhandedness. . . . It is not enough that you may think the prior decision was wrongly decided."[41] The plurality opinion in *Hein* essentially overrules *Flast* because the Justices apparently believe it was wrongly decided, but by claiming to apply the precedent, they avoid a charge of activism.

Third, by portraying the later case as an unproblematic application of earlier precedent, the Court muddies the doctrinal waters. It is difficult for lower courts to respond to two apparently identical cases that produce different results; unable to perceive any common principle underlying the cases, they will likely divide among themselves as to the appropriate outcome in future cases. This in turn allows a subsequent Supreme Court to point to the lower-court doctrinal chaos as a valid reason for explicitly overruling the original precedent. Stealth overruling thus simultaneously protects the Court from charges that it is too lightly overturning precedent and sets the stage for it to claim a legitimate reason to overturn that same precedent.

I turn now from the plurality's particularly flawed reasoning to the holding itself, joined by all five judges in the majority. In holding that the plaintiffs had no standing to challenge the faith-based conferences, the Court ignored the last two pillars of sound constitutional doctrine: constitutional aspiration and human understanding.

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[40] *Hein*, 551 U.S. at 636 (Scalia, J., concurring).

[41] *Confirmation Hearing of John G. Roberts, Jr.*, *supra* note 7, at 144.

To the extent that one aspiration of our Constitution is, as I have suggested, to serve as a check on political majorities, barriers to standing should always be narrowly construed. By closing the courtroom doors to those who are challenging executive action, the Court abdicates its role as guardian of the people against the excesses of the government. Rather than examining governmental action to test whether it comports with the Constitution, the Court—by denying standing—allows the government (in this case, the President) unfettered discretion.

This abdication is even more egregious when, as in *Hein*, the suit is brought by a despised minority against a program that enjoys a large measure of popular support. The Freedom From Religion Foundation describes itself as a "national membership association of freethinkers: atheists, agnostics and skeptics of any pedigree."[42] Most Americans, on the other hand, consider themselves religious. A 2007 Gallup Poll found that 86% of Americans believe in God.[43] In 2008, 53% of respondents said they supported "giving federal money to faith based organizations."[44]

Given this widespread religiosity, it should not be surprising that atheists are *the* most hated and mistrusted minority. That is not an exaggeration: Recent polls show that up to 63% of voters would be less likely to vote for a candidate who admitted to being an atheist; less than half say they would have reservations about voting for a Muslim or a gay candidate.[45] In a 2003 survey, almost 50% of Americans say they would disapprove if their child wanted to marry an atheist; only about a third would disapprove if their child wanted to marry a Muslim or an African American.[46] One set of researchers concludes that "out of a long list of ethnic and cultural minorities, Americans are . . . less likely

[42] *About the Foundation FAQ*, FREEDOM FROM RELIGION FOUND., http://www.ffrf.org/faq/about-the-foundation/what-is-the-foundations-purpose (last visited Oct. 2, 2010).

[43] Frank Newport, *Americans More Likely to Believe in God than the Devil, Heaven More than Hell*, GALLUP NEWS SERVICE, June 13, 2007, *available at* http://www.gallup.com/poll/27877/americans-more-likely-believe-god-than-devil-heaven-more-than-hell.aspx.

[44] *American Voters Oppose Same-Sex Marriage Quinnipiac University National Poll Finds, But They Don't Want Government To Ban It*, POLL RELEASE (QUINNIPIAC UNIVERSITY POLLING INSTITUTE, Hamden, CT), July 17, 2008, at Question 36, *available at* http://www.quinnipiac.edu/x1295.xml?ReleaseID=1194.

[45] PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS & PEW FORUM ON RELIGION & PUB. LIFE, CLINTON AND GIULIANI SEEN AS NOT HIGHLY RELIGIOUS; ROMNEY'S RELIGION RAISES CONCERNS 23-24 (2007), *available at* http://people-press.org/reports/pdf/353.pdf (atheists and Muslims); Jeffrey M. Jones, *Some Americans Reluctant to Vote for Mormon, 72-Year-Old Presidential Candidates*, GALLUP NEWS SERVICE, Feb. 20, 2007, *available at* http://www.gallup.com/poll/26611/some-americans-reluctant-vote-mormon-72yearold-presidential-candidates.aspx (homosexuals).

[46] Penny Edgell, Joseph Gerteis & Douglas Hartmann, *Atheists As "Other": Moral Boundaries and Cultural Membership in American Society*, 71 AM. SOC. REV. 211, 218 (2006).

to imagine that atheists share their vision of American society."[47] Challenges to government support of religion, then, present exactly the David-against-Goliath situation that cries out for judicial oversight.

The problem is compounded when we recognize that as a practical matter, governmental support of religion equates to governmental support of Christianity. About two-thirds of Americans believe that "the United States [i]s a Christian nation."[48] This means that faith-based programs are likely to discriminate not just against atheists, but also against the 5% of citizens who consider themselves affiliated with non-Christian faiths.[49] As one scholar put it, "Christian . . . imperialism . . . pulses through the American social body."[50]

This Christian dominance, moreover, is often invisible to Christians, making Supreme Court sensitivity even more important. A recent breathtaking illustration of this invisibility came during oral argument in *Salazar v. Buono*,[51] in which plaintiffs were challenging the display of a large wooden cross on public land. Justice Scalia denied that the cross was a Christian symbol, suggesting instead that it was a war memorial erected in honor of all those killed in war, because "the cross is the . . . most common symbol of . . . the resting place of the dead."[52] (To which the lawyer for the plaintiffs responded: "I have

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[47] *Id.* at 216.

[48] PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS & PEW FORUM ON RELIGION & PUB. LIFE, MANY AMERICANS UNEASY WITH MIX OF RELIGION AND POLITICS 5 (2006), *available at* http://pewforum.org/publications/surveys/religion-politics-06.pdf; *see also* Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892) (stating that the United States "is a Christian nation"); Vidal v. Girard's Ex'rs, 43 U.S. (1 How.) 127, 198 (1844) ("Christianity [is] part of the common law of the state [in that] its divine origin and truth are admitted . . . [while Judaism is a] form of infidelity.").

[49] PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY, RELIGIOUS AFFILIATION: DIVERSE AND DYNAMIC 5 (2008), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf (percentage affiliated with non-Christian religions). *See generally* Suzanna Sherry, *Religion and the Public Square: Making Democracy Safe for Religious Minorities*, 47 DEPAUL L. REV. 499 (1998) (documenting legal effects of Christian domination).

[50] Stephen M. Feldman, *Principle, History, and Power: The Limits of the First Amendment Religion Clauses*, 81 IOWA L. REV. 833, 872 (1996).

[51] 130 S. Ct. 1803 (2010).

[52] Transcript of Oral Argument at 38-39, *Salazar*, 130 S. Ct. 1803 (No. 08-472). The Court ultimately decided the case on other grounds. Justice Scalia's view of the meaning of the cross did find its way into the plurality opinion, however: "But a Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people." *Salazar*, 130 S. Ct. at 1820. No Jew would ever agree with that statement (the two Jewish members of the Supreme Court dissented). Some Christians might also disagree with the statement because it weakens the significance of a symbol that they consider central to Christianity. Justice Scalia concurred in the result; he would have held that the plaintiff lacked standing to challenge Congress's attempt to evade the Establishment Clause by transferring the parcel of public land to private hands conditioned upon the private owners maintaining the cross. *Id.* at 1824.

been in Jewish cemeteries. There is never a cross on a tombstone of a Jew."[53])

For the Supreme Court in *Hein* to refuse even to consider whether the President's faith-based initiatives conferences might violate the Establishment Clause is to abandon its constitutional role as protector of unpopular minorities against majority tyranny. The constitutional aspiration of tolerance and equality is jettisoned in favor of unthinking approval of majority views.

Finally, the decision in *Hein* represents a failure of human understanding. The founding generation placed its faith in reason, not religion. But denying standing to plaintiffs who challenge the expenditure of federal money for religious purposes, while granting standing to those who raise other sorts of Establishment Clause (or Free Exercise) challenges, necessarily rests on a religious rather than a secular epistemological basis.

Recall that one basic standing rule is that psychological injury is not sufficient to confer standing. But short of imprisoning or fining citizens because of their religious beliefs, *any* conceivable violation of the Establishment Clause (or the Free Exercise Clause, for that matter) causes *only* psychological injury. As Thomas Jefferson noted: "[I]t does me no injury for my neighbour to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg."[54] This is true even for the most extreme examples of potential Religion Clause violations: It causes no tangible injury for the government to forbid a citizen from engaging in the rituals mandated by her religion, or to force her to engage in rituals that conflict with her religion. Any injury she suffers comes from her psychic pain in knowing that she is disobeying her God (and from her personal belief in the consequences that might ensue).

And yet there is no doubt about the standing of both an individual challenging prohibitions on her own religious rituals and one challenging mandated behavior she believes to be religiously forbidden. The Court has regularly granted standing to plaintiffs raising each of these sorts of challenges.[55] Why was there no standing in *Hein*, then?

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[53] Transcript of Oral Argument, *supra* note 52, at 39.

[54] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 165 (Frank Shuffelton ed., Penguin Classics 1999).

[55] *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (prohibiting a Jewish military officer from wearing a yarmulke, required by his religion, is not unconstitutional); Wisconsin v. Yoder, 406 U.S. 205 (1972) (forcing Amish children to attend school after eighth grade violates their religious precepts and is unconstitutional); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (forcing Jehovah's Witnesses to salute flag violates their religious precepts and is unconstitutional). Standing—a constitutional requirement and thus a prerequisite in every case—was not even questioned in any of these cases. It is not a coincidence that although he had standing, the Jewish military officer lost on the merits. *See supra* notes 48-52 and accompanying text (suggesting that Jews and other minorities might not fare well in a "Christian nation"); *see also* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (holding that

The only way to distinguish, for purposes of standing, between the two cases I just described and the psychic pain suffered by an atheist who sees her taxes going to religious organizations is to credit the pain from disobeying God as more real or tangible. And the only way to do that is for the courts to implicitly accept that God is a source of authority—something that runs directly counter to the Enlightenment insistence that governmental authority must depend on reason rather than faith.[56]

Note that this critique of applying ordinary standing doctrines to Establishment Clause challenges does not depend on identifying a particular purpose for either of the Religion Clauses. Their purpose might be to protect citizens from just this sort of psychological injury, to avoid labeling some citizens as outsiders to the community, to keep religion out of the government or the government out of religion, to prevent the internecine religious wars that historically plagued Europe, or any number of other plausible and laudable purposes. Regardless, every injury caused directly by a violation of the Religion Clauses is, at bottom, psychological. Distinguishing among them necessarily rests on the Court's view that psychological injuries based on religious beliefs matter but psychological injuries based on non-religious beliefs do not.

The *Flast* Court, in crafting a separate standing doctrine for Establishment Clause cases, accommodated the unique nature of all Establishment Clause injuries, even if it did not fully recognize what it was doing. The *Hein* Court, in holding that some psychological injuries give rise to standing under the Clause while others do not, instead signaled its own preference for faith-based belief systems.

III. USING THE FOUR PILLARS TO EVALUATE THE COURT

Hein provides a perfect illustration of how each of the four pillars of sound constitutional doctrine can serve as a means of critiquing the Court's opinions. But each pillar can also serve to identify the Court's failures—and successes—independent of our particular outcome

state accommodation of the needs of orthodox Jewish handicapped children violates the Establishment Clause); Braunfeld v. Brown, 366 U.S. 599 (1961) (forcing Jewish merchants to close on Sunday does not violate the Free Exercise Clause); McGowan v. Maryland, 366 U.S. 420 (1961) (forcing Jewish merchants to close on Sunday does not violate the Establishment Clause).

56 That the Constitution itself singles out religion for special treatment does not change the analysis. First, the Constitution contains both the Free Exercise Clause and the Establishment Clause. The first prevents the government from interfering with religion and the second prevents it from supporting religion. Standing under the two clauses should therefore be parallel. Second, to the extent that the two clauses are in tension with one another, any reconciliation should take into account the minority-protective purpose of the Bill of Rights. Whatever the situation at the time of the Founding, it is the irreligious (and, to a lesser extent, adherents to non-Christian or non-traditional religions) who are most in need of the Court's protection.

preferences. In this Part, I begin by focusing on other illustrative cases in which the Court failed to adhere to one or more of the essential principles, and then turn to cases that are controversial but nevertheless can be praised for their analysis, craftsmanship, aspiration, and understanding. In each half of this Part, I try to include cases that have drawn fire from each side of the political spectrum, to demonstrate that evaluation, at least at the basic level, can indeed be independent of the politics of the evaluator.

A. *Failures*

1. Legal Analysis

Perhaps the easiest task is to identify cases in which the Court relies on unjustified distinctions. Sometimes the Court makes it even easier by deciding what Justice Scalia called a "split double header"[57]: two cases, seemingly identical, in which the Court nevertheless reaches opposite results. The question is whether the purported distinctions between the two cases suffice to distinguish them.

In the pair of cases derided by Justice Scalia, *Gratz v. Bollinger*[58] and *Grutter v. Bollinger*,[59] the Court upheld the affirmative action admissions program at the University of Michigan Law School while invalidating the affirmative action plan for undergraduate admissions at the same university. Seven Justices agreed that the two plans were indistinguishable; three would have upheld both and four would have invalidated both.

The primary difference relied on by the two Justices who found the cases distinguishable was that while "[t]he law school considers the various diversity qualifications of each applicant, including race, on a case-by-case basis," "the Office of Undergraduate Admissions relies on the selection index to assign *every* underrepresented minority applicant the same, *automatic* [twenty]-point bonus."[60] The problem with this distinction is that it was belied by the factual record in the case. Despite the claim that the law school considered race on a case-by-case basis, the law school's admission process managed to yield—in *each* of the six years for which the school provided records—an almost perfect congruence between the percentage of applicants and the percentage of

[57] Grutter v. Bollinger, 539 U.S. 306, 348 (2003) (Scalia, J., concurring in part and dissenting in part).

[58] 539 U.S. 244 (2003).

[59] 539 U.S. 306.

[60] *Gratz*, 539 U.S. at 276 (O'Connor, J., concurring, joined by Breyer, J.).

admitted applicants of *each* of the three underrepresented groups.[61] As Justice Scalia noted, these statistics demonstrate that the individualized consideration was a "sham," and that the law school actually followed "a scheme of racially proportionate admissions."[62] And the admissions process allowed the law school to achieve this goal: During the admissions season, admissions officers consulted daily reports tracking the racial make-up of the class.[63] Ultimately, then, the difference between the undergraduate and law school admissions program was merely cosmetic; each program made race *the* critical factor for many admissions decisions.[64] Like the distinction the plurality drew between *Flast* and *Hein*, the differences between the two affirmative action programs could not adequately justify their different treatment.

A pair of 2005 cases involving Establishment Clause challenges to religious displays exhibits a similar whiplash-inducing vacillation. In *Van Orden v. Perry*,[65] the Court held that Texas did not violate the Establishment Clause by allowing a monument inscribed with the Ten Commandments to be displayed on the grounds of the state capitol. In *McCreary County v. ACLU*,[66] the Court held that a Kentucky county did violate the Establishment Clause when it posted a copy of the Ten Commandments at a courthouse. This time, eight Justices would have treated the two displays the same way, with four finding that both violated the Establishment Clause and four finding that neither did so.

There were two primary factual differences between the two displays. First, the Commandments monument had been displayed on the Texas capitol grounds for forty years, while the Kentucky display was of more recent vintage. Second, the Ten Commandments monument was one of seventeen historical monuments scattered over the twenty-two acres of the Texas grounds; the Kentucky display included only eight excerpts from historical documents, in smaller frames and with a religious element, which had been added to the display after the ACLU challenged the original display of the Ten Commandments alone.

Justice Breyer, whose vote resulted in the difference in outcomes, explained the distinction between the two cases in his concurring opinion in *Van Orden*:

> This case . . . differs from *McCreary County*, where the short (and stormy) history of the courthouse Commandments' displays

61 *Grutter*, 539 U.S. at 383-86 (Rehnquist, C.J., dissenting).

62 *Id.* at 347 (Scalia, J., concurring in part and dissenting in part).

63 *Id.* at 391-92 (Kennedy, J., dissenting).

64 Determining that *Grutter* and *Gratz* are indistinguishable does not, of course, tell us which one was correctly decided. I explore that question *infra* Part III.A.2, when I turn to lapses in judicial craftsmanship.

65 545 U.S. 677 (2005).

66 545 U.S. 844 (2005).

> demonstrates the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them. That history there indicates a governmental effort substantially to promote religion, not simply an effort primarily to reflect, historically, the secular impact of a religiously inspired document. And, in today's world, in a Nation of so many different religious and comparable nonreligious fundamental beliefs, a more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that this longstanding, pre-existing monument has not.[67]

But Justice Breyer never explained why the immediate history—or the potential for divisiveness—should matter. The Texas monument was originally placed by private donors who sought (in their own words) to "inspire all who pause to view [it], with a renewed respect for the law of God."[68] The original purpose for the monument, then, was identical to the purpose behind the Kentucky display. As for divisiveness, most individuals coming upon either display would perceive it as a government endorsement of religion.[69] If the differences in the source of the displays, or in the timing or the circumstances of their implementation, matter, Justice Breyer did not offer a persuasive explanation of how and why they do so—a classic illustration of a failure of legal analysis.

Similar lapses in legal analysis may be found within single cases. One striking example—in a statutory rather than constitutional context—is *Exxon Mobil Corp. v. Allapattah Services, Inc.*[70] In *Exxon Mobil*, the Court grappled with the extent to which a federal statute had altered the subject matter jurisdiction of the federal courts. For courts to exercise jurisdiction on the basis of diversity of citizenship under 28 U.S.C. § 1332, "the matter in controversy" must exceed $75,000 and the suit must be between "citizens of different States."[71] The traditional rule required that *each* plaintiff satisfy these two prerequisites independently against each defendant: Each plaintiff must ordinarily seek more than the minimum jurisdictional amount from each defendant and every plaintiff must be diverse from every defendant.[72]

Thus if two plaintiffs injured in the same car accident, for example, joined together, one seeking a million dollars and the other seeking only ten thousand, a federal court would not have jurisdiction over the latter

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67 *Van Orden*, 545 U.S. at 703 (Breyer, J., concurring) (citation omitted).

68 *Id.* at 715 (Stevens, J., dissenting) (quoting the organization that donated the monument).

69 Again, the fact that these two displays should have been treated alike does not tell us which was decided correctly. I explore that question *infra* Part III.A.3, when I turn to constitutional aspirations.

70 545 U.S. 546 (2005).

71 28 U.S.C. § 1332(a) (2006).

72 *See* Clark v. Paul Gray, Inc., 306 U.S. 583 (1939) (minimum jurisdictional amount); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806) (complete diversity).

plaintiff. Similarly, if the two plaintiffs each sought more than $75,000, but one was from the same state as the defendant, there was no jurisdiction over that plaintiff's claim. Under the traditional rule, the remedy in both instances was the same: The court would dismiss the plaintiff who failed to satisfy the diversity requirements, but would go ahead and hear the claims of the plaintiff who did satisfy the requirements.[73] (Let us call this the "multiple passenger" case.) The same principles applied to multiple defendants: If a plaintiff sued more than one defendant, any defendant from the same state as the plaintiff, and any defendant from whom the plaintiff sought less than the minimum jurisdictional amount, would be dismissed. (Let us call this the "multiple driver" case.)

These rules governing multiple parties were originally judicially created, but in 1990 Congress enacted 28 U.S.C. § 1367 to codify the rules governing the joinder of claims and parties. Section 1367(a) grants what it labels "supplemental" jurisdiction over additional claims or parties as long as those claims or parties are factually related to a claim that satisfies all the jurisdictional requirements (hence my example of plaintiffs injured in the same car accident). This grant is subject to exceptions, including the exceptions in § 1367(b). Section 1367(b) deprives federal courts of supplemental jurisdiction over claims by plaintiffs against *defendants* who are joined to the lawsuit pursuant to Rule 20, unless the ordinary jurisdictional requirements for diversity are met. (Rule 20 is the Federal Rule of Civil Procedure that permits the joinder of multiple plaintiffs or multiple defendants or both.) This codifies the prior rule preventing a plaintiff from suing one diverse defendant for more than $75,000 and joining a second defendant who either is not diverse from the plaintiff or from whom the plaintiff seeks less than the jurisdictional minimum. The rules for the multiple driver case thus remain the same.

But § 1367 does not contain any language excluding supplemental jurisdiction over claims brought *by* parties joined together under Rule 20, and thus appears to relax the requirement that each *plaintiff* independently satisfy diversity and jurisdictional amount. In other words, it is possible that the rules for the multiple passenger case have changed. Although the language is clear, the legislative history suggests that Congress did *not* intend to relax the requirements.[74] In *Exxon Mobil*, the Court chose to follow the text rather than the legislative history, holding that federal courts with jurisdiction over one plaintiff's claim could exercise supplemental jurisdiction over an

73 *See* Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 832 (1989).

74 Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943 (1991).

additional plaintiff even if that additional plaintiff did not meet the minimum jurisdictional amount.

The Court, however, distinguished between the two requirements of § 1332. It held that although supplemental jurisdiction extended to plaintiffs who failed to satisfy the minimum jurisdictional amount, it did not extend to plaintiffs who were not diverse from the defendant.[75] Thus, in the multiple passenger case, a passenger who sought less than $75,000 could remain in federal court but a passenger who hailed from the same state as the defendant could not. This distinction makes no sense, as the two requirements—diversity of citizenship and amount in controversy—are inherently linked. Both are specified in § 1332; neither is constitutionally required.[76] And, as noted earlier, the remedy for improper joinder of a party who is not diverse or a party who fails to satisfy the amount in controversy is the same: dismissal of that party.

The Court's proffered explanation for the distinction between the two requirements does not hold up. The Court suggested that while jurisdictional amount can be analyzed claim by claim (and, accordingly, party by party), a non-diverse party contaminates the entire suit and thus "destroys original jurisdiction with respect to all claims, so there is nothing to which supplemental jurisdiction can adhere."[77] If that were true, it would mean that joinder of a non-diverse party would necessarily require a court to dismiss the entire suit, but the Court has explicitly held otherwise, permitting courts to retain jurisdiction by dismissing only the non-diverse party.[78]

The Court also contended that the different purposes of the two requirements dictated that they be treated differently. The purpose of the diversity requirement is to protect against possible state-court bias against outsiders, while the purpose of the amount-in-controversy requirement is "to ensure that a dispute is sufficiently important to warrant federal-court attention."[79] And, the Court reasoned, "[t]he presence of a single nondiverse party may eliminate the fear of bias with respect to all claims, but the presence of a claim that falls short of the minimum amount in controversy does nothing to reduce the

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[75] 545 U.S. at 566-67; *see also id.* at 585 n.5 (Ginsburg, J., dissenting) (noting that the majority "drives a wedge between the two components of 28 U.S.C. § 1332, treating the diversity-of-citizenship requirement as essential, the amount-in-controversy requirement as more readily disposable").

[76] Article III makes no mention of jurisdictional amount, and the Court has held that complete diversity is an interpretation of § 1332 but is not constitutionally required. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967).

[77] *Exxon Mobil*, 545 U.S. at 554.

[78] *Newman-Green*, 490 U.S. at 832. It is possible that *Exxon Mobil* is a stealth overruling of *Newman-Green* (which is not mentioned in *Exxon Mobil*). Lower courts have not thought so, and have continued to dismiss non-diverse parties. In any event, characterizing *Exxon Mobil* as stealth overruling rather than as poor legal analysis hardly rescues it.

[79] *Exxon Mobil*, 545 U.S. at 553-54 (diversity); *id.* at 562 (amount in controversy).

importance of the claims that do meet this requirement."[80] This reasoning overlooks the rather obvious possibility that a jury might rule differently on claims by (or against) different parties; the presence of an in-state plaintiff does *not* eliminate the possibility that the jury might still discriminate against the out-of-state plaintiff. Moreover, to the extent that the Court reads § 1367 as changing Congress's prior directives regarding jurisdictional prerequisites, there is no indication in the text or the legislative history that Congress intended to distinguish between diversity and amount-in-controversy, regardless of whether their purposes differ.

Like the distinctions between earmarked and non-earmarked executive spending, between a point system and a holistic affirmative action program, or between an old outdoor monument and a new indoor wall display, then, the distinction the Court drew in *Exxon Mobil* is inadequately justified and probably unjustifiable. It serves as another example of a failure of legal reasoning.

2. Judicial Craftsmanship

There is no shortage of cases illustrating lack of judicial candor. From cases that purport to rest on originalist analysis but then give short shrift to history,[81] to a case that claims to rely on broad principles but explicitly announces that it is essentially a ticket for this train only,[82] to cases that that play fast and loose with precedent, there is a plethora of recent lapses in judicial craftsmanship. In this subpart, I focus on the most egregious: those, like *Hein*, which can be characterized as stealth overruling of prior precedent.

Since 2005, the Court has engaged in stealth overruling at least twelve times. The cases run the gamut of subject matter, and both liberal and conservative Justices engage in the practice. And as with

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[80] *Id.* at 562.

[81] For an examination of two such cases, see DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 99-100 (2009) (discussing *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997)). Another example is the small portion of the majority opinion in *District of Columbia v. Heller*, in which Justice Scalia, after relying on extensive historical analysis to conclude that the Second Amendment protects an individual right to bear arms, casually asserts without any historical support that:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

128 S. Ct. 2783, 2816-17 (2008).

[82] *See* Bush v. Gore, 531 U.S. 98, 109 (2000) ("Our consideration is limited to the present circumstances . . . .").

failures of legal analysis, they include both statutory and constitutional cases. There are three criminal cases, two favoring the defendant and one favoring the government;[83] four cases making it more difficult for plaintiffs to bring suit in federal court;[84] one case making it easier for plaintiffs to bring suit in federal court;[85] two cases striking down federal statutes as violative of the First Amendment's Free Speech Clause;[86] one case upholding a school principal's action against a First Amendment challenge;[87] and one case upholding restrictions on abortion.[88] Readers may identify others that I have missed. In this subpart, I consider three of these as illustrations of lapses in judicial

[83] Graham v. Florida, 130 S. Ct. 2011 (2010) (holding that imposing life without parole on juveniles who have committed a crime other than homicide violates the Eighth Amendment); Arizona v. Gant, 129 S. Ct. 1710 (2009) (holding that search of car incident to arrest violates Fourth Amendment, despite holding of *New York v. Belton*, 453 U.S. 454, 460 (1981), that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile"); Oregon v. Ice, 129 S. Ct. 711 (2009) (holding judge permitted to find facts allowing consecutive rather than concurrent sentencing, despite holding of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"). *Graham* is discussed in more detail *infra* notes 104-12 and accompanying text.

[84] Ashcroft v. Iqbal, 129 U.S. 1937 (2009) (reinterpreting Federal Rule of Civil Procedure 8 to require plaintiffs to plead with more specificity than had been required by prior cases including *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002)); Summers v. Earth Island Inst., 129 S. Ct. 1142 (2009) (holding that environmentalist plaintiffs have no standing; the opinion made no mention of *Bennett v. Spear*, 520 U.S. 154 (1997), which interpreted standing generously in a case brought by anti-environmentalists); Hein v. Freedom from Religion Found., 551 U.S. 587 (2007); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (holding same as *Iqbal*). *Iqbal* is discussed in more detail *infra* notes 94-103 and accompanying text.

[85] Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006) (holding that Article I, Section 8, clause 4 of the U.S. Constitution (Bankruptcy Clause) abrogates state sovereign immunity even without congressional action, despite holding of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), that Congress is not permitted to abrogate state sovereign immunity under Article I, Section 8, clause 3 of the U.S. Constitution (Commerce Clause)).

[86] Davis v. FEC, 128 S. Ct. 2759 (2008) (holding part of Bipartisan Campaign Reform Act (BCRA) to be unconstitutional, despite *McConnell v. FEC*, 540 U.S. 93 (2003), upholding BCRA)); FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007) (same). That these cases *were* instances of stealth overruling became even clearer in early 2010, when the Court overruled *McConnell* in *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (discussed in more detail *infra* notes 153-62 and accompanying text).

[87] Morse v. Frederick, 551 U.S. 393 (2007) (holding that suspension of student for displaying non-disruptive banner outside school grounds at school-endorsed function did not violate student's free speech rights, despite holding of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969), that student expression may not be suppressed unless it will "materially and substantially disrupt the work and discipline of the school;" although subsequent cases extended school authority to prohibit speech that compromised the privacy of other students, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988), or vulgar speech that was inappropriate for the age of the audience, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986), Frederick's banner was neither).

[88] Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding federal statute that was functionally indistinguishable from state statute invalidated in *Stenberg v. Carhart*, 530 U.S. 914 (2000)). *Gonzales v. Carhart* is discussed in more detail *infra* notes 126-36136 and accompanying text.

craftsmanship: two of the four cases making it more difficult for plaintiffs to bring suit and one of the controversial criminal cases. I also return to *Gratz* and *Grutter* to shed further light on which of the two was a better example of sound constitutional doctrine.

Let us begin with the requirements for bringing suit. One of the animating principles behind the Federal Rules of Civil Procedure is that cases should generally be decided on their merits rather than on procedural technicalities. To achieve that goal, the Rules make it easy for plaintiffs to bring suit and difficult for defendants to obtain a dismissal. The Supreme Court, before 2007, consistently interpreted the Rules governing pleading and motions to dismiss[89] so as to prevent premature termination of suits in which the plaintiff did not yet have—but might obtain through discovery—sufficient evidence of wrongdoing to prevail at trial. In *Conley v. Gibson*,[90] for example, the Court stated that the only purpose of the complaint was to give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests,"[91] and thus that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim."[92] As recently as 2002, the Court reiterated this standard, adding that dismissal is not appropriate even if it "appear[s] on the face of the pleadings that a recovery is very remote and unlikely."[93]

In *Bell Atlantic Corp. v. Twombly*[94] and *Ashcroft v. Iqbal*,[95] the Court purported to adhere to this standard but in fact ratcheted up the plaintiff's burden of pleading and made it considerably easier for defendants to obtain a dismissal without any discovery. Explicitly jettisoning the "no set of facts" language of *Conley*,[96] the Court in *Twombly* also required the plaintiffs to show that their factual allegations gave rise to more than a "speculative" right to relief.[97] Because the defendants' acts (parallel conduct by competitors) were as likely to stem from lawful motives as from an unlawful antitrust conspiracy, the Court held that the plaintiffs "ha[d] not nudged their claims across the line from conceivable to plausible."[98] In *Iqbal*, the Court applied *Twombly* to dismiss a claim that government officials had

89 *See* FED. R. CIV. P. 8(a), 12(b)(6).
90 355 U.S. 41 (1957).
91 *Id.* at 47.
92 *Id.* at 45-46.
93 Swierkiewicz v. Sorema, 534 U.S. 506, 515 (2002) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)); *see also* Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993).
94 550 U.S. 544 (2007).
95 129 S. Ct. 1937 (2009).
96 *Twombly*, 550 U.S. at 562-63.
97 *Id.* at 555.
98 *Id.* at 570.

intentionally discriminated against the plaintiff on the basis of his race, religion and national origin. Rejecting the plaintiff's explicit claim of discriminatory motive as "conclusory," the Court held that the acts complained of—singling out Muslim Arabs for law enforcement attention and harsh treatment after the events of September 11—were merely "consistent with" purposeful discrimination but did not sufficiently "plausibly suggest [a] discriminatory state of mind."[99]

Together, these two cases essentially require a plaintiff to demonstrate in the complaint that it is more likely than not that defendants' acts were unlawful. This places a very high burden on plaintiffs in any case in which the evidence—such as evidence of illicit motive—is in the hands of the defendants and is thus unavailable to plaintiffs without discovery.[100] There is no doubt that this constitutes a significant change from earlier doctrine, well beyond the explicit overruling of *Conley*'s "no set of facts" language.[101] Even if the Court believed that increasing the burden on plaintiffs was necessary to prevent frivolous lawsuits,[102] *Twombly* and *Iqbal* represent failures of judicial craftsmanship because of the Court's unwillingness to acknowledge that it was altering existing doctrine. A more candid approach would have been to overrule the prior line of cases. In some ways, *Twombly* and *Iqbal* are worse than other instances of stealth overruling, because the Court had available an additional method for openly altering doctrine: Pursuant to its authority under the Rules Enabling Act,[103] it could have proposed amendments to the Federal Rules of Civil Procedure.

If *Twombly* and *Iqbal* represent judicial lapses in cases producing politically conservative results, *Graham v. Florida*[104] demonstrates that

99 *Iqbal*, 129 S. Ct. at 1951-52.

100 Indeed, several studies have shown a marked increased in dismissals of civil rights cases after *Twombly* and/or *Iqbal*. Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AMER. U. L. REV. 553 (2010); Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008).

101 Other commentators agree. *See, e.g.*, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849 (2010); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010); Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH U. J.L. & POL'Y 61 (2007); Randal C. Picker, Twombly, Leegin, *and the Reshaping of Antitrust*, 2007 SUP. CT. REV. 161; *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 305 (2007). The new requirements also seem inconsistent with the Forms that accompany the Federal Rules of Civil Procedure, meant to illustrate the minimal pleading requirements. *See* FED. R. CIV. P. Form 11.

102 That there are too many frivolous lawsuits, and that increasing pleading burdens weeds out the frivolous suits while allowing the weak but potentially meritorious suits to proceed, are controversial propositions for which there is, at best, mixed empirical support.

103 28 U.S.C. § 2072 (2006).

104 130 S. Ct. 2011 (2010).

the same failure can occur in cases producing liberal results.[105] Prior to *Graham*, the Supreme Court had taken two different approaches to the Eighth Amendment's ban on cruel and unusual punishments, depending on whether the challenged punishment was incarceration or death. Except for a single case in 1983[106] (now described by commentators as an "outlier"[107]), the Court has refused to invalidate prison sentences as disproportionate to the crime. It upheld life in prison for the theft of a few golf clubs in *Ewing v. California*[108] and life without parole for cocaine possession in *Harmelin v. Michigan*.[109] In death penalty cases, by contrast, the Court has made proportionality a centerpiece of its jurisprudence, insisting that capital punishment be reserved for those "whose extreme culpability makes them 'the most deserving of execution.'"[110] Using this analysis, the Court has categorically prohibited the imposition of the death penalty on those whose crimes are insufficiently heinous or those whose responsibility is diminished.[111]

In *Graham*, the defendant had been sentenced to life without parole for an armed home invasion committed while he was on probation for a previous violent robbery. The home invasion occurred thirty-four days before his eighteenth birthday. Under the Court's existing two-track analysis, the sentence should have been upheld. In particular, the defendant's age should not have mattered: Although the Court had previously drawn distinctions between juveniles and adults, it had done so only in the context of death sentences under the rubric of punishment disproportionate to culpability. But in *Graham*, the Court announced—in a single paragraph devoid of legal analysis—that "the appropriate

105 The results partially line up with the political predilections of the Justices, although not completely. *Twombly* was a 7:2 decision, with only Justices Stevens and Ginsburg dissenting; Justice Souter wrote the majority opinion. The four liberal Justices—Stevens, Souter, Ginsburg, and Breyer—dissented in *Iqbal*, while three of the four most conservative Justices—Scalia, Thomas, and Alito—dissented in *Graham*.

106 Solem v. Helm, 463 U.S. 277 (1983) (invalidating a sentence of life without parole for passing a worthless check).

107 *See, e.g.*, Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1160 (2009); *see also* Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 184 (2008) (noting that proportionality challenges are "essentially non-starters").

108 538 U.S. 11 (2003).

109 501 U.S. 957 (1991); *see also* Hutto v. Davis, 454 U.S. 370 (1982) (upholding sentence of forty years for possession of marijuana with intent to distribute); Rummel v. Estelle, 445 U.S. 263 (1980) (upholding life sentence for obtaining money under false pretenses, a non-violent crime).

110 Roper v. Simmons, 543 U.S. 551, 568 (2005) (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

111 *See* Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (holding that state cannot impose death penalty for rape of a child, but only for homicide); *Roper*, 543 U.S. 551 (holding that state cannot impose death penalty for crimes committed by juveniles); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that state cannot impose death penalty on mentally disabled offenders).

analysis [was] the one used in [death penalty] cases that involved the categorical approach."[112] Through this *ipse dixit*, the Court erased the previous distinction between the death penalty and other sentences, and effectively overruled the line of cases eschewing proportionality review. It then went on to invalidate not only Graham's sentence, but the imposition of life-without-parole sentences on all juveniles except those convicted of homicide. Like *Hein*, *Twombly*, and *Iqbal*, then, *Graham* represents an egregious lapse in judicial craftsmanship; and, like those cases, it is bound to create chaos in the lower courts as criminals of all kinds—especially juveniles—challenge their sentences as disproportionate to their crimes.

Finally, I turn to the pair of affirmative action cases, *Gratz* and *Grutter*. I have already suggested that the programs involved in the two cases are virtually indistinguishable, and thus that the Court should have either upheld both or invalidated both. But which result would have been the most consistent with precedent? It is black-letter law that *all* race-conscious governmental actions, including those that benefit minorities, are subject to strict scrutiny, which requires a "searching judicial inquiry."[113] But the Court's review of the law school's affirmative action program in *Grutter* was less than searching. It deferred to the law school's determination on three crucial points: It deferred to the law school's "educational judgment" that racial diversity was essential to the educational mission; it deferred to the law school's assertion that alternative methods of obtaining diversity would have a detrimental effect on that mission; and it deferred to the law school's promise that the school would terminate the race-conscious program as soon as possible.[114] Not since *Korematsu v. United States*[115] has the Court been so deferential to the government's judgment that a race-based classification is necessary to a compelling state interest.

The Court also took the word of admissions personnel that, despite their consultation of daily reports on the racial make-up of each class, they "never gave race any more or less weight based on the information contained in these reports."[116] While that sort of deference might be appropriate in most cases, a "searching" inquiry might focus more on the actual operation of the program than on the testimony of those who

[112] 130 S. Ct. 2011, 2023 (2010).

[113] Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989); *see also* Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

[114] 539 U.S. at 328, 340, 343.

[115] 323 U.S. 214 (1944). *See generally* Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (arguing that strict scrutiny is "'strict' in theory and fatal in fact").

[116] *Grutter*, 539 U.S. at 336.

implemented it. The evidence—as I suggested earlier—demonstrates that the program operated to guarantee racial proportionality.[117]

Had the Court applied its traditional strict scrutiny, then, it would have invalidated both affirmative action programs. *Grutter* is another example of stealth overruling, and thus of a failure of judicial craftsmanship.

What makes all of these lapses worse is that they are unnecessary. Unlike failures of legal analysis—which are difficult if not impossible to rectify, because the distinctions the Court purports to rely on are often unjustifiable—the Court could easily have reached the same outcome in each of these cases by explicitly altering precedent. In *Hein*, the Court could have overruled *Flast*, as two Justices urged. *Twombly* and *Iqbal* could have jettisoned more of *Conley* than just its language. The majority opinion in *Graham* could have rested on replacing the two-track jurisprudence with a focus on "evolving standards of decency," as three Justices suggested.[118] And in *Gratz* and *Grutter*, the Court could have applied intermediate scrutiny rather than strict scrutiny to racial distinctions drawn to benefit minorities, as four Justices advocated and an earlier but subsequently overruled decision had held.[119]

3. Constitutional Aspiration

Despite lapses in legal analysis and judicial craftsmanship, the Court has largely fulfilled its role as a guardian against majority tyranny. Indeed, some of the harshest criticism against the Court—from both the Left and the Right—has been directed at its "activism," its willingness to stand in the way of the democratic branches. From Guantanamo detainees to gun owners, those whose voices have arguably been ignored by legislative majorities have generally fared well in the Supreme Court.

One group, however, has not shared in the Court's solicitude: religious minorities, especially atheists. When the Christian majority flaunts its power, whether by coercive laws or by public and official declarations or displays, the Court has generally been unsympathetic to constitutional challenges. It regularly upholds public religious displays

117 *See supra* notes 61-63 and accompanying text.

118 *See* Graham v. Florida, 130 S. Ct. 2011, 2036 (2010) (Stevens, J., concurring, joined by Ginsburg and Sotomayor, JJ.).

119 *See* Gratz v. Bollinger, 539 U.S. 244, 298-302 (2003) (Ginsburg, J., dissenting, joined by Souter and Breyer, JJ.); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 245-47 (1995) (Stevens, J., dissenting); Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990), *overruled by Adarand Constructors*, 515 U.S. 200.

against Establishment Clause challenges,[120] and has refused to require governments to include minority religions in such displays.[121] Legislatures are permitted to open their sessions with a "Judeo-Christian" prayer by a chaplain paid by the government.[122] The Court has upheld Sunday closing laws and tax exemptions for churches.[123] It denied standing not only in *Hein*, but in a case challenging a government gift of land to a religious institution and a case challenging the reference to God in the Pledge of Allegiance.[124] State and federal money is permitted, and often required, to flow to religious institutions.[125]

Perhaps some day, the Court will treat religious minorities the way it treats racial and ethnic minorities. Perhaps some day, governmental favoritism toward religious believers will be viewed the way governmental favoritism toward one gender is viewed, and non-believers will be entitled to the same financial and symbolic support as believers. But for now, the Court does not live up to constitutional aspirations when it relegates non-believers—and, to a lesser extent, non-Christians—to the status of barely tolerated outsiders.

4. Human Understanding

The cases just discussed, because they privilege the religious over the secular, tend to run afoul of the principle that government should operate on the basis of reason rather than faith. But there are other ways to transgress the requirement that law rest on sound understanding, including reliance on anecdotes, shibboleths, or discredited sources in the face of contrary scientific consensus based on sound evidence. In *Gonzales v. Carhart*,[126] the Court made exactly that error.

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120 *See, e.g.*, Van Orden v. Perry, 545 U.S. 677 (2005); Lynch v. Donnelly, 465 U.S. 668 (1984); *see also* Salazar v. Buono, 130 S. Ct. 1803 (2010) (reversing lower court invalidation of federal statute authorizing land swap enacted to avoid injunction that required removing cross from federal land).

121 Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009).

122 Marsh v. Chambers, 463 U.S. 783 (1983).

123 Walz v. Tax Comm'n of N.Y., 397 U.S. 664 (1970) (tax exemptions for churches); Braunfeld v. Brown, 366 U.S. 599 (1961) (Sunday closing); McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday closing).

124 Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (Pledge of Allegiance); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464 (1982) (land gift).

125 *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Agostini v. Felton, 521 U.S. 203 (1997); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983).

126 550 U.S. 124 (2007).

Carhart upheld the federal Partial-Birth Abortion Ban Act of 2003,[127] which banned a particular abortion method variously called "dilation and extraction" (D&X), "intact dilation and evacuation" (intact D&E), or "partial-birth abortion." The statute lacked any exception for a D&X procedure deemed medically necessary to protect a woman's health; that lack had doomed an earlier state ban on the same procedure.[128] The majority in *Carhart*, however, relied on two propositions to uphold the universal ban. First, the Court held that the government had a legitimate interest in prohibiting D&X abortions in order to protect women from the mental-health consequences of regret over an insufficiently informed decision.[129] Second, the Court held that the statute did not need a health exception, because there was "documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women."[130] Neither of these holdings had any basis in fact, and indeed were contrary to the best scientific evidence.

The Court conceded that it had "no reliable data" from which to conclude that some women come to regret having had an abortion, stating only that it "seems unexceptionable to conclude" that they do, and that "[s]evere depression and loss of esteem can follow."[131] In fact, almost all scientific evidence is directly contrary to the Court's conclusion: Women's mental health is not compromised, and is likely improved, by the termination of an unwanted pregnancy, regardless of the circumstances.[132] Nor did the Court supply any evidence that a D&X abortion differs from any other abortion in this respect, maintaining that it is "self-evident" that a woman's regret will be greater when she learns of the details of the procedure.[133] The entire discussion is also inconsistent with the scientific understanding of the psychology of regret.[134]

The Court's reliance on medical disagreement was equally flawed. As the lower courts found, Congress disregarded the unanimous views of nine health professional organizations that in some cases D&X is safer than alternative procedures.[135] It relied instead on the testimony

127 18 U.S.C. § 1531 (2006).

128 *See* Stenberg v. Carhart, 530 U.S. 914 (2000). Because *Carhart* failed to distinguish *Stenberg* on this ground, *Carhart* is also an example of stealth overruling.

129 550 U.S. at 159-60.

130 *Id.* at 162.

131 *Id.* at 159.

132 Justice Ginsburg's dissent in *Carhart* provides support for rejecting the "antiabortion shibboleth" of a post-abortion trauma syndrome. *Id.* at 183-84 & n.7 (Ginsburg, J., dissenting).

133 *Id.* at 159-60.

134 *See* Chris Guthrie, Carhart, *Constitutional Rights, and the Psychology of Regret*, 81 S. CAL. L. REV. 877 (2008).

135 *See* Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 490 (S.D.N.Y. 2004), *aff'd sub nom.* Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278 (2d Cir. 2006); Planned Parenthood Fed'n

of six physicians who did not perform D&X abortions and had little or no experience with other surgical abortion procedures, including several who did not perform *any* abortions and one who was not even in the field of obstetrics and gynecology.[136] The Court's characterization of this state of affairs as "medical disagreement" would be laughable were its consequences not so significant.

In short, *Carhart*'s holding is based on demonstrably false factual findings that fly in the face of scientific knowledge. It is therefore a paradigmatic failure of human understanding. In the twenty-first century, we should expect better from the Supreme Court.

B. *Successes*

It is more fashionable to criticize the Supreme Court than to praise it, but if we aspire to even-handedness we should give credit where credit is due. In this subpart, I examine two cases on opposite ends of the political spectrum that seem to me to live up to all four pillars of sound constitutional doctrine. I begin with the easy example of *Lawrence v. Texas*[137] and then turn to the more difficult *Citizens United v. FEC*.[138]

In *Lawrence*, decided in 2003, the Court struck down a Texas law criminalizing homosexual sodomy. It explicitly overruled *Bowers v. Hardwick*,[139] which in 1986 had upheld a Georgia ban on all sodomy: "*Bowers* was not correct when it was decided, and it is not correct today."[140] The case perfectly exemplifies all four pillars of sound constitutional doctrine.

The legal analysis in *Lawrence* was impeccable: Drawing on cases from *Griswold*[141] to *Casey*,[142] Justice Kennedy's majority opinion demonstrated that the Court's precedents carved out a sphere of liberty and autonomy in intimate personal choices that necessarily encompasses the freedom to define one's personal relationships, including the sexual aspect of those relationships. Unlike the

of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1021 (N.D. Cal. 2004), *aff'd*, 435 F.3d 1163 (9th Cir. 2006), *rev'd sub nom.* Gonzales v. Carhart, 550 U.S. 124 (2007). *See generally Carhart*, 550 U.S. at 177-79 (Ginsburg, J., dissenting) (canvassing expert evidence considered by lower courts).

136 *Planned Parenthood Fed'n of Am.*, 320 F. Supp. 2d at 1019; *see also* Carhart v. Ashcroft, 331 F. Supp. 2d 805, 1011 (D. Neb. 2004), *aff'd sub nom.* Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005), *rev'd*, 550 U.S. 124 (2007).

137 539 U.S. 558 (2003).

138 130 S. Ct. 876 (2010).

139 478 U.S. 186 (1986).

140 *Lawrence*, 539 U.S. at 578.

141 Griswold v. Connecticut, 381 U.S. 479 (1965).

142 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

dissenters—and unlike the Court in *Bowers*—the majority thus read the precedents as creating a coherent body of doctrine rather than an exhaustive list of unrelated rights.[143] It therefore eschewed any artificial (and unjustified) distinction between sexual conduct and other personal and intimate choices.[144]

The success of both the legal analysis and the judicial craftsmanship of the majority opinion in *Lawrence* is best illustrated by comparing it to Justice O'Connor's concurring opinion. Justice O'Connor agreed that the Texas statute was unconstitutional, but attempted to distinguish *Bowers* rather than overruling it. The attempt was not successful. Justice O'Connor argued that because the Georgia statute at issue in *Bowers* criminalized *all* acts of sodomy—both homosexual and heterosexual—it was constitutional and distinguishable. She would have invalidated the Texas statute as a violation of the Equal Protection Clause (rather than relying on the Due Process Clause as the majority did) because it singled out homosexual sodomy; using rational basis review, she reasoned that "moral disapproval" of homosexuals is not a legitimate state interest.[145] There are two problems with this reasoning. First, the *Bowers* Court had explicitly rejected the argument, made by those challenging the law, that "majority sentiments about the morality of homosexuality" were insufficient to uphold the law.[146] Second, the plaintiffs in *Bowers* included a married heterosexual couple; the Court refused to reach their claim, characterizing the case as raising *only* the question "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[147]

The Court in *Lawrence* thus necessarily had to confront the question of whether to overrule *Bowers*. The majority's forthright overruling was vastly preferable to Justice O'Connor's attempt to distinguish between the Texas and Georgia statutes, as a matter of both legal analysis and judicial craftsmanship. Indeed, *only* Justice O'Connor saw a difference between the two cases; the three dissenting Justices thought that *Bowers* dictated upholding the Texas statute, but, unlike the majority, they would not have overruled *Bowers*.

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143 For a similar portrayal of even the Court's earliest privacy precedents as a "forest" rather than as "isolated trees," see Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees:* Roe v. Wade *and its Critics*, 53 B.U. L. REV. 765 (1973).

144 Prior to *Lawrence*, commentators criticized the Court for drawing this very distinction. *See*, *e.g.*, Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); Mark John Kappelhoff, Note, Bowers v. Hardwick: *Is There a Right to Privacy?*, 37 AM. U. L. REV. 487 (1988).

145 *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring).

146 Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

147 *Id.* at 188 n.2, 190.

And it is the overruling of *Bowers*—and the reasons for doing so—that make *Lawrence* such an admirable example of constitutional aspiration. Like atheists, gays and lesbians are extremely unpopular minorities in many parts of the United States. They have often been targets of physical violence as well as discrimination.[148] Like earlier cases involving race or gender, the Court's holding in *Lawrence* reflects the reality that anti-gay legislation reflects nothing more than majority prejudice. Justice Scalia's dissent unwittingly proves the point. He would prefer to let gays "promot[e] their agenda through normal democratic means," but his description of "mainstream" culture and its pervasively homophobic attitudes shows exactly why judicial intervention is necessary.[149] Far from "tak[ing] sides in the culture war,"[150] as he would have it, the majority fulfilled its role as a safeguard against majority tyranny. It upheld the constitutional aspiration of a culture of tolerance against the popular majority's culture of prejudice.

As for human understanding, *Lawrence* is notable more for what it does not say than for what it does. The Court did not succumb to popular but scientifically discredited prejudices about homosexuality. It recognized that condemnation of homosexuality may rest on "profound and deep convictions" based in part on religious beliefs, but refused to allow the majority to "use the power of the State to enforce these views on the whole society."[151]

The majority opinion in *Lawrence*, then, is easy to defend—and virtually impossible to criticize[152]—using the four principles I have identified. Controversial as it may be on *political* grounds, it represents sound *constitutional* doctrine. Lest readers confuse the two, I turn from *Lawrence*, praised by liberals and condemned by conservatives, to *Citizens United v. FEC*, which provoked exactly the opposite reactions.

Citizens United concerned the constitutionality of limits on corporate political expenditures, a thorny issue that the Court had been struggling with for almost three decades. As the case came to the Court,

148 For accounts of violence, see, for example, BETH LOFFREDA, LOSING MATT SHEPARD: LIFE AND POLITICS IN THE AFTERMATH OF ANTI-GAY MURDER (2001); *Hate Crime Statistics*, U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/hq/cid/civilrights/hate.htm (last visited Oct. 4, 2010). For accounts and examples of discrimination, see, for example, *Romer v. Evans*, 517 U.S. 620 (1996) (striking down a state constitutional provision, adopted by popular amendment, that singled out gays for discriminatory treatment); ANTI-GAY RIGHTS: ASSESSING VOTER INITIATIVES (Stephanie L. Witt & Suzanne McCorkle eds. 1997); Suzanna Sherry, *Democracy Uncaged*, 25 CONST. COMMENT. 141, 151 n.24 (2008) (cataloguing state constitutional provisions against gay marriage).

149 *Lawrence*, 539 U.S. at 602-03 (Scalia, J., dissenting).

150 *Id.* at 602.

151 *Id.* at 571.

152 There is really only one plausible critique of *Lawrence*, and that is to reject the whole idea of constitutional aspiration: to argue that the Constitution does not contemplate judicial protection of political minorities. But that argument is inconsistent with the structure and history of the Constitution, as well as with the history of judicial review.

federal law prohibited corporations from using their general funds to support candidates for federal office through direct contribution, through independent expenditures that expressly advocate the election or defeat of a candidate ("express advocacy"), or through "electioneering communication," defined as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate" and is made within thirty days of a primary or sixty days of a general election.[153] Citizens United—a corporation that wished to distribute a movie critical of candidate Hillary Clinton within thirty days of the primary election, through cable television's video-on-demand—challenged the electioneering restriction as a violation of the First Amendment.

The case implicated a lengthy and complicated set of precedents. In the seminal 1976 case of *Buckley v. Valeo*,[154] the Court characterized campaign spending—whether contributions or independent expenditures—as expression protected by the First Amendment. *Buckley* upheld limits on direct contributions as a way to prevent corruption, but invalidated limits on independent expenditures by individuals. The Court expressly rejected a claimed governmental interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections": "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[155]

The ban on independent expenditures by corporations was not directly addressed in *Buckley*. Cases before and after *Buckley*, however, conferred on corporate political expression the same protection accorded individual political expression: Political expression, the Court reasoned in 1978, is "indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."[156]

Fourteen years after *Buckley*, in *Austin v. Michigan Chamber of Commerce*,[157] the Court upheld a state ban on corporate expenditures supporting or opposing candidates, on the ground that such a ban was necessary to prevent "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the

153 2 U.S.C. §§ 431(17)(A), 434(f)(3)(A), 441b(a), 441b(b)(2) (2006). The statutory history is explained in *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

154 424 U.S. 1 (1976).

155 *Id.* at 48-49.

156 First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978); *see also* NAACP v. Button, 371 U.S. 415, 428-29 (1963). See generally the cases cited in *Citizens United*, 130 S. Ct. at 899-900.

157 494 U.S. 652 (1990).

corporate form."[158] In the Bipartisan Campaign Reform Act of 2002 (BCRA, popularly known as McCain-Feingold), Congress amended federal campaign laws to ban electioneering communications in addition to the existing prohibition on express advocacy. Relying on *Austin*, the Court upheld the BCRA against a facial challenge in *McConnell v. FEC*.[159]

Judged from the perspective of judicial craftsmanship and legal analysis, the Court initially did not treat *McConnell* well. Despite *McConnell*'s endorsement of the BCRA in principle, in the next two cases the Court invalidated parts of the BCRA as applied, drawing legitimate protests by the dissent that the Court had "effectively" overruled *McConnell*.[160] These two cases are perfect examples of stealth overruling.

But the Court redeemed itself in *Citizens United*, forthrightly confronting *all* of the precedents in a well-reasoned and candid opinion. Tracing the history of judicial review of campaign finance laws, and of protection of corporate speech, back to its origins, Justice Kennedy's majority opinion carefully documented its claim that the outliers were the two (and only two) cases singling out corporate speech as less worthy of First Amendment protection: *Austin* and *McConnell*. The Court recognized the inconsistency between *Austin*'s "distortion" rationale and *Buckley*'s rejection of any governmental interesting in "equalizing" the influence of different groups' political expression. And it therefore expressly overruled both *Austin* and *McConnell*, rather than pretending to reconcile the precedents.

At the same time, the Court went no further than necessary in pruning precedents. It continued to adhere to *Buckley*'s distinction between contributions and independent expenditures, and it upheld the disclaimer and disclosure provisions of the BCRA. Those provisions require that electioneering communications funded by anyone other than a candidate must carry a disclaimer identifying the source of the communication and stating that the communication is not authorized by the candidate;[161] and that anyone who spends more than $10,000 on electioneering communications in any year must file a disclosure statement with the FEC.[162] These provisions, to which the plaintiffs in *Citizens United* strenuously objected, serve to limit the potential for corporate abuse of the electoral process: Corporations may bankroll electioneering and advocacy, but they must do so openly.

158 *Id.* at 660.

159 540 U.S. 93 (2003).

160 FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 504 (2007) (Souter, J., dissenting); *see also* Davis v. FEC, 128 S. Ct. 2759, 2778 (2008) (Stevens, J., dissenting) (arguing that district court's rejection of constitutional challenge represented "adherence to our decision in *McConnell*").

161 2 U.S.C. § 441d(a)(3) (2006).

162 *Id.* § 434(f)(1).

The majority opinion in *Citizens United* is thus a model of legal analysis and judicial craftsmanship. Whether it also embodies sound principles of constitutional aspiration and human understanding depends on examining the deeper premises on which it rests: that corporations are entitled to First Amendment protection, that campaign expenditures are equivalent to speech, and that the government may not "equalize" citizens' voices. Unlike the deist bias of *Hein* or the purportedly factual premises in *Carhart*, these premises are not clearly inconsistent with constitutional aspiration or human understanding. But neither are they as obviously mandated by those principles as was the ruling in *Lawrence*.

For that reason, there is room for disagreement; ultimately, evaluation of *Citizens United* must turn on whether, in pursuit of contestable first premises, the Court should turn its back on precedent that is more coherent and longstanding than *Austin* and *McConnell*. It is one thing to overrule precedent—especially foundational, consistent, and longstanding precedent—when doing so undeniably serves the cause of constitutional aspiration. It is quite another to do so when there is legitimate disagreement about whether the precedent furthers or hinders constitutional aspirations. The remainder of my discussion of *Citizens United*, then, will briefly suggest both that its underlying premises are based on longstanding precedent and that those premises are at least arguably consistent with principles of constitutional aspiration and human understanding. Given those two propositions, *Citizens United* should count as an example of sound constitutional doctrine.

First, it is possible to argue that corporations should not be entitled to First Amendment protection.[163] That would entail overruling precedents protecting corporate speech right that go back at least to 1936; the precedents treating corporations as persons generally, under the Due Process Clause of the Fourteenth Amendment, go back even further.[164] Moreover, depriving corporate entities of free speech rights would undermine the democracy-enhancing purposes of the First Amendment. Newspapers, and to a lesser extent non-profit corporations whose very purpose is to cause or forestall political change, are at least as vital in our age of voters' "rational ignorance"[165] as they were to the

[163] Many commentators have so argued. *See, e.g.*, C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's* The Value of Free Speech, 130 U. PA. L. REV. 646 (1982); Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735 (1995).

[164] *See, e.g.*, Grosjean v. Am. Press Co., 297 U.S. 233, 244 (1936); Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189 (1888); Cnty. of Santa Clara v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886).

[165] The theory of rational ignorance, which has some empirical support, is that many voters deliberately—and quite rationally, given time constraints—remain ignorant of the details of political controversies, choosing their representatives on the basis of a few salient issues and then

Founders' generation. To the extent that we aspire to maximum democratic participation in the face of human limitations, then, conferring rights of political speech on at least some corporations is consistent with constitutional aspirations and human understanding. Excluding corporations from the First Amendment might allow the government to censor media and political corporations. Although federal law currently exempts both types of corporations from campaign restrictions, the exemptions are a matter of statutory grace. And the exemptions, besides undermining the anti-distortion rationale that underlies the BCRA, create either arbitrary distinctions or overwhelming line-drawing problems in an age when any corporation (or any individual) can turn itself into a purveyor of news on the Internet.[166]

Second, one might reject *Buckley*'s characterization of campaign expenditures as speech.[167] *Buckley*, however, has been the law for almost thirty years—it was decided only three years after *Roe v. Wade*, a case that many opponents of *Buckley* consider sacrosanct—and serves as the basis for dozens of subsequent Supreme Court cases and countless state and lower federal court cases. Rejecting this part of *Buckley* would also distort the meaning of freedom of expression beyond recognition. Campaign *contributions* may not be speech (even if "money talks"), but it is difficult to characterize *expenditures* as anything but speech. How else can an individual or a corporation speak in the electoral context except by purchasing media advertising?

Third, one might embrace the proposition rejected in *Buckley*, that the government can restrict the speech of some citizens in order to enhance the voices of others.[168] Again, taking this approach requires overturning *Buckley* and all its progeny. It is also inconsistent with other parts of free speech jurisprudence that are closer to the core of the

letting the representatives decide other issues. *See, e.g.*, ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 297-300 (1957); JOHN R. HIBBING & ELIZABETH THEISS-MORSE, STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK 114-21 (2002); SAMUEL L. POPKIN, THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS (1991); Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 928 (2006).

166 For a more expansive defense of corporate speech rights, see Martin H. Redish & Howard M. Wasserman, *What's Good For General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235 (1998).

167 Commentators have made this argument. *See, e.g.*, Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 291-92 (1992); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

168 Again, many commentators have made this argument. *See, e.g.*, CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 228-30 (1997); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1425 (1986); Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73 (2004).

anti-censorship principle of the First Amendment.[169] It would, for example, permit the government to decide which voices to restrict and which to enhance, giving governmental officials a dangerous discretion.[170] In particular, it allows a majority to restrict the speech of political minorities, contrary to the checking function of the Constitution. The rationale behind the equalization theory would also support restrictions on offensive speech on the ground that such speech "silences" those who are offended,[171] again giving free rein to majority prejudices.

Lawrence and *Citizens United* are about as far apart politically as any two Supreme Court cases. Although in both cases the Court invalidated laws as infringing on individual rights, the first is often cited as an example of liberal activism and the second as an example of conservative activism. (And in both cases, "activism" is used pejoratively.) Nevertheless, when judged against the four pillars of sound constitutional doctrine, both are praiseworthy, suggesting again that my approach fosters apolitical evaluation of the Court.

And it is no surprise that Justice Kennedy wrote the majority opinion in both cases. One point of my approach is to separate constitutional doctrine from ideology. A "swing-vote" Justice is the least likely to be driven by a consistent political ideology; the reason he swings is that he usually does not approach cases with a preformed political bias. This is not to suggest that Justice Kennedy's opinions always represent sound constitutional doctrine, nor that other Justices' opinions are always unsound or always ideological. But if we were to expand the universe of cases reflecting sound constitutional doctrine—particularly in controversial disputes—beyond the two I have examined, it would not be surprising to find opinions by Justice Kennedy (and Justice O'Connor, despite her lapses in several of the cases I have discussed) well represented among them.

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169 For a description of the anti-censorship principle, see Suzanna Sherry, *The First Amendment and the Freedom to Differ*, *in* THE BILL OF RIGHTS IN MODERN AMERICA 49 (David J. Bodenhamer & James W. Ely, Jr. eds., rev. & expanded ed. 2008); *see also* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

170 *Cf.* Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1110-11 (1999) (making a similar argument about mandated public access to privately owned media sources).

171 *See, e.g.*, MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 93-96 (1993) (arguing that hate speech should be restricted because it "silences" its targets); Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 499 (2009) (advocating for restrictions on hate speech because it "intimidate[s] targeted groups from participating in the deliberative process"). For a careful and powerful rejection of this rationale for restrictions on speech, see Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991).

CONCLUSION

We cannot expect the Supreme Court to get every constitutional case right (whatever "right" means in this context). Nor can we eliminate disagreement about constitutional interpretation, both on and off the Court. But in our constitutional democracy, we can expect—and should demand—that the Court produce sound constitutional doctrine. Evaluating the soundness of constitutional doctrine apart from the political valence of its outcomes, however, requires that we develop and elaborate standards by which to judge the Court's analysis. I hope that this Article serves as a first step in that direction.