Anthony Kennedy: A Most Principled Justice

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ANTHONY KENNEDY: A MOST PRINCIPLED JUSTICE

Mitchell N. Berman

David Peters

Draft (2/28/18)

ABSTRACT

After three decades on the Court, Justice Anthony Kennedy remains its most widely maligned member. Focusing on his constitutional jurisprudence, critics from across the ideological spectrum have derided Justice Kennedy as “a self-aggrandizing turncoat,” “an unprincipled weathervane,” and, succinctly, “America’s worst Justice.” We believe that Kennedy is not as bereft of a constitutional theory as common wisdom maintains. To the contrary, this Article argues, his constitutional decisionmaking reflects a genuine grasp (less than perfect, more than rudimentary) of a coherent and, we think, compelling theory of constitutional law—the account, more or less, that one of has introduced in other work and dubs “principled positivism.” We develop and defend this contrarian claim by attending to many of Kennedy’s most notorious opinions, from Alden to Zivotofsky, across diverse domains of constitutional law. In so doing, we aim both to support Justice Kennedy against what we consider unduly harsh criticism, and to advance the case for principled positivism as a general theoretical account of the content of American constitutional law.

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INTRODUCTION

Anthony Kennedy is, as far as one can tell, nobody’s favorite Justice. Conservatives will never forgive him for voting to uphold Roe, or for his consistent support of gay rights. Liberals, though thankful for his decisive votes and opinions in these and other areas, recall with indignation the many more occasions—concerning racial equality, gun rights, national power, and much else—that Kennedy provided the decisive vote for outcomes more in accord with his basic conservative commitments.
Of course, these objections are political or ideological in character, and on one plausible set of priors—that perceived ideological purity is incompatible with independence of mind—they should redound more to Kennedy’s credit than to his shame. One might suppose that legal elites who could claim to value “judicial craft” and related virtues would rate Kennedy more highly than political partisans do. Quite to the contrary, however, constitutional scholars and other sophisticated commentators from both left and right consistently give Kennedy scandalously low marks, castigating his reasoning, mocking his writing style, and impugning the motives for his judicial votes. Jeffrey Rosen, writing a decade ago in the New Republic, deemed Kennedy “a self-aggrandizing turncoat,” who “swings left or right in an anxious effort to court the approval of Washington elites.”

The National Review’s Rich Lowry was blunter, calling Kennedy, simply, “America’s worst Justice.” Recently reflecting on the Justice’s “nearly 30 years on the Supreme Court,” Garrett Epps observed in the Atlantic that “Kennedy’s mind has often seemed like a distant and mysterious country, with its own language and folkways beyond the ken of normal Americans.”

This Article takes issue with that prevailing narrative. We argue that Kennedy is not as bereft of a constitutional theory, or as radically adrift, as common wisdom maintains. Indeed, we think that he’s on to something important.

Having said that, let us immediately add cautions and qualifiers. We will not maintain that Kennedy has complete intellectual grasp of a wholly worked out and coherent constitutional jurisprudence, or that he implements what theoretical commitments he does have exceptionally well, or with full consistency. We will not make him out to be the second coming of John Marshall or Robert Jackson or (your preferred Justice here). Our contention, though heterodox, is relatively modest: Kennedy’s constitutional decision-
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making reflects a significant, though imperfect, grasp and embrace of a view of constitutional law that is coherent and worthy of respect and attention.

The jurisprudential view, or constitutional theory, that we attribute to Kennedy is, roughly, the account that one of us (Berman) has elaborated and defended in other work, and dubs “principled positivism.” It will take some time to spell out what principled positivism maintains and how it differs from competing views in the constitutional literature. But you should have at least a rough sense of the view at the outset.

Principled positivism is a theory that aims to explain what determines or constitutes legal rights, duties, permissions, and powers. It’s what we call a “constitutive theory” of (constitutional) law. As a constitutive theory, principled positivism is an account of what makes the case that the law is what it is, hence a contributor to what William Baude has approvingly called the “positive turn” in constitutional theory. In parlance that other constitutional theorists favor, it aims to supply “truthmakers” for true constitutional propositions. Or, speaking somewhat more jurisprudentially, it is an account of what Ronald Dworkin called “the grounds of law,” and of how, in Mark Greenberg’s terms, “facts make law.”

How do facts make our constitutional law? What makes it the case that people have a constitutional right to φ (when they do), or that Congress has the constitutional power to ψ (when it does)? Condensed to a nutshell, principled positivism maintains: (1) that constitutional norms come in two logically distinct types—norms with adequate determinacy to resolve concrete disputes (what we call “rules”), and norms that lack determinacy but have the property of (finite) weight (conventionally termed “principles”); (2) that rules are constituted or determined by the aggregation, or net impact, of the principles (and all other facts that the principles make relevant); and (3)


9 RONALD DWORKIN, LAW’S EMPIRE 4 (1986).

that the principles are grounded in, or emerge from, the inescapably dynamic behavioral and psychological facts that make up our constitutional practice, in a manner analogous to the way ordinary social norms (e.g., wear black to a funeral, pass the port to the left) are made out by behaviors of persons who participate in the relevant practices. In short, principled positivism offers a two-level explanatory story: rules are made out by principles, and principles are made out by the ways that constitutional actors (paradigmatically, but not exclusively, judges) accept, endorse, and champion them when acting in a range of constitutionally meaningful capacities (paradigmatically, but not exclusively, deciding constitutional cases).

With the constitutional theory on offer concisely sketched, we can announce this essay’s dual ambitions: to support Justice Kennedy against what we consider unduly harsh criticism, and to introduce, and give credence to, principled positivism as a general theoretical account of the content of American constitutional law.

Some readers will think this dual strategy curious. One might suppose that, insofar as our goal is to defend Justice Kennedy against his critics, we gain little mileage from showing that his decisions conform (somewhat) to an account of law that, at the time of this writing, boasts as many as two backers. And to the extent that we’re promoting principled positivism as a constitutional theory, one might think that marketing the account as “Justice Kennedy’s preferred theory” could do more to taint than to burnish it. While we recognize the possible perversity of our endeavor, these nonetheless are our twin aims: to offer (qualified) support for Justice Kennedy’s constitutional performance, and to bolster principled positivism as a constitutive theory of constitutional law.

The Article proceeds in five parts. Part I introduces the common wisdom that we will be partially challenging. The crux of the charge can be captured fairly well in a sentence—“Kennedy is a willful judge, little constrained by law.” But we flesh out the charge a bit, and distinguish several types of more-or-less distinct criticisms often leveled against Kennedy’s opinions, in order to facilitate our ability, later on, to assess the charge intelligently. Part II, taking a step sideways, motivates the search for a new constitutional theory by briefly canvassing the existing constitutional and jurisprudential literatures and concluding that they yield a striking dearth of plausible constitutive theories. In short: (1) nonoriginalists don’t offer constitutive theories; (2) one especially prominent strand of contemporary originalism does, but it’s highly implausible; and (3) the main constitutive theories that Anglophone legal philosophy delivers (those associated, respectively, with H.L.A Hart and Ronald Dworkin) are far from compelling.

Part III steps into the breach, sketching principled positivism both as a
general theory of law (the type of thing that legal philosophers such as Hart, Dworkin, and Raz proffer and criticize) and as a parochial account of American constitutional law (the concern of American constitutional theorists from Thayer to Bobbitt to Scalia).

Part IV then assesses a large and representative sample of Kennedy’s most relentlessly criticized opinions through the analytical frame that principled positivism supplies. We argue that his decisionmaking in five domains that range across the constitutional waterfront—federalism, gay rights, abortion, race, and the law of democracy—display that he embraces something like principled positivism, and applies it in a reasonably coherent and defensible manner. To reiterate, we will not conclude that Kennedy is an optimally adept and consistent practitioner of principled positivism. We detect more than a couple of warts, and our study is far from comprehensive. Nonetheless, and contrary to the common narrative, we conclude that Kennedy displays at least a partial grasp of a genuine—and we think compelling—constitutional theory. Part V briefly takes stock, appraising both Kennedy’s constitutional decisionmaking, and principled positivism itself, in light of the judgments reached in Part IV.

I. THE CHARGE

A. A Jurisprudence of “Personal Whimsy”

Criticism of Justice Kennedy is often couched in terms of what he lacks. He does not have: a “judicial philosophy,”10 a “legal philosophy,”11 “a theory of jurisprudence,”12 a “constitutional theory,”13 or a “theory of constitutional interpretation.”14

It’s not clear, however, that these objections should be well taken. Some of what Kennedy is said to lack are not reasonable job descriptions. We think it doubtful, for instance, that our justices should be charged with holding anything fairly describable as “a comprehensive, overarching judicial philosophy.”15 And while other types of theory mentioned are not obviously

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10 THOMAS HENSELY ET AL., THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES 75 (1997); see also LOWY, supra note 2; Epps, supra note 3.
12 Rosen, supra note 1.
15 KNOWLES, supra note __, at 3.
out of the justices’ reasonable purview, they are vague and not obviously held by other justices who do not attract similar criticism. Consider Justice Ruth Bader Ginsburg. Yes, she is non-originalist, pro-nationalist, and sympathetic to unenumerated liberties and rights of equality, especially concerning sex and gender. But those commitments or dispositions hardly make up a “theory of constitutional interpretation,” yet she is rarely chastised for lacking one.

So we have reason to doubt that the best rendering of the common objection maintains that Kennedy lacks something as coherent and well-thought-out as to count as a “theory.” More perspicuously formulated, the charge holds that Kennedy’s decisionmaking is unconstrained by anything beyond his subjective, idiosyncratic, and frequently vacillating preferences, hunches, values, and commitments. Garrett Epps and Dahlia Lithwick captured the idea nearly a dozen years ago when memorably dubbing Kennedy, “The Sphinx of Sacramento,” and complaining that like his outcomes or loathe them, Kennedy’s judgments in key cases—from abortion to gay rights—have “nothing to do with the Constitution.”

Jeffrey Rosen, now President and CEO of the nonpartisan National Constitution Center, leveled a similar criticism when expounding on the “arrogance of Justice Kennedy.” Rather than “a systematic thinker,” Rosen concluded, Kennedy is a “utopian moralist . . . unwilling to accept the radical implications of his own abstractions.” Columnists writing in the National Review have labeled Kennedy an “unprincipled weathervane,” berating him for “making it up as he goes along.”

If you might expect a degree of exaggeration in the popular media, assessments offered in the law journals are no more tempered. Many scholars seem to ascribe to the observation that “[t]he more closely one examines Kennedy’s Supreme Court jurisprudence, the more confused one becomes.” Dean Erwin Chemerinsky has criticized Kennedy for basing decisions on nothing more than “unacceptable value choices” that are “inconsistent. . .

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17 Rosen, supra note 1.
18 Id.
20 Lowry, supra note 2
with fundamental precept[s] of American constitutionalism." Conservative are no kinder. Where Michael Stokes Paulsen charges that Kennedy “trims his jurisprudential sails to what he perceives to be the prevailing political winds,” the Cato Institute’s Ilya Shapiro deems Kennedy’s jurisprudence “agonized, self-aggrandizing incoherence.”

In sum, commentators from across the ideological spectrum widely agree that Kennedy’s reasoning in constitutional cases is driven largely by his own moral values and personal likes and dislikes, little constrained by anything fairly deemed legal. Adopting Anthony Bartl’s snappy encapsulation of the charge, we’ll call this the personal whimsey thesis.

B. Particulars

What’s the evidence for personal whimsey? Which aspects of which opinions do those who wield the charge rely upon? A lot—scores of opinions over three decades. It won’t be feasible to take them on one-by-one. Instead, we present a large and representative sampling of the most widely and vociferously voiced objections, grouping them into four recurring criticism types. Without pretending to exhaustiveness, we think that many or most of the particular complaints about particular moves in particular opinions fall into one of four broad types that we label and characterize as follows:

**Inconsistency:** Kennedy treats premises and arguments inconsistently from case to case; he seems unconstrained by demands that like be treated alike.

**Mysteriousness:** Kennedy invokes premises that have no apparent constitutional or empirical grounding; it’s entirely unclear where he gets his premises from.

**Implausibility:** Kennedy relies upon inferences or premises that are so implausible as to cast doubt that they represent the genuine grounds or bases for his conclusions.

**Obscurity:** Kennedy’s reasoning is so hard to follow as (again) to suggest that he is moved by his personal values and brute preferences that his opinions do not capture or reflect.

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25 BARTL, supra note 4.
We do not maintain that these criticism types are sharply distinct from each other or that every criticism token fits neatly into a single type. Still, we think that this rudimentary typology will facilitate assessment of charges leveled against Kennedy’s performance both because it will enable us to disambiguate objections that are easily conflated and because it may help us to anticipate promising responses to recurring criticism types.

1. Inconsistency. As several of the general complaints quoted earlier suggest, inconsistency is perhaps the single most commonly voiced objection. It is the central charge in the indictments against two of Kennedy’s most heavily criticized majority opinions: those in Lawrence v. Texas, and Gonzales v. Carhart.

In Lawrence, Kennedy authored an opinion finding Texas’s anti-sodomy laws unconstitutional, overturning Bowers v. Hardwick, which had found a similar (though not identical) Georgia statute constitutional seventeen years before. In the opening of his fiery dissent, Scalia contrasted Kennedy’s treatment of the precedential force afforded to Bowers with the precedential force the plurality opinion in Casey, joined by Kennedy, had afforded to Roe. “[W]e should be consistent rather than manipulative in invoking the doctrine,” he complained, but “[t]oday’s opinions in support of reversal do not bother to distinguish—or indeed, even bother to mention the paean to stare decisis coauthored by three Members of today’s majority in [Casey].” Moreover, critics of Lawrence charge that Kennedy also adopted an approach to substantive due process “plainly incompatible with the

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26 For one thing, we put aside frequently expressed scorn for a writing style that many critics find pompous or bombastic, except where the rhetoric is claimed to obscure the reasoning that must support a rule or holding.

27 See supra notes 10-14 and accompanying text.


30 And in Casey, Scalia was at pains to point out the inconsistency of Kennedy’s abortion jurisprudence: “Among the five Justices who purportedly adhere to Roe. . . . two of the three, in order thus to remain steadfast, had to abandon previously stated positions.” Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 997 (1992) (Scalia, J., dissenting) (discussing Kennedy and O’Connor’s previous votes in abortion cases).

deeply-rooted-in-history-and-tradition test that Justice Kennedy signed on to in *Glucksberg* and *Michael H.*”32

A similar critique targeted *Gonzales*, where Kennedy wrote for five justices to uphold a federal partial-birth abortion ban seven years after the Court struck a similar state statute. Justice Ginsburg in dissent complained that the decision “refuses to take *Casey* and *Stenberg* seriously.”33 Commentators agreed, and not only liberals. Charles Fried observed tartly that, “Justice Kennedy fails to come to grips with his own jurisprudence.”34

Although *Lawrence* and *Gonzales* are especially salient targets of the inconsistency objection, they are far from lonely examples. According to his critics: Kennedy “changed his views” on the scope of Congressional power between *Raich* and *Lopez*,35 only to reverse course again with his subsequent vote in *NFIB*.36 His opinion in *Fisher II* is “inconsistent not only with *Fisher I*, but also with his previous opinions regarding race-based decision-making,” including *Grutter*,37 his pivotal concurrence in *Parents Involved* “run[s] directly contrary” to his “prior equal protection jurisprudence,”38 and is “internally contradictory”;39 his “*Weisman* opinion . . . contradicts his argument in *Allegheny*”;40 and so forth.

2. Mysteriousness. The mysteriousness objection is a particular favorite of originalists and other textualists who wonder where Kennedy gets the fundamental legal premises that seem to do so much work in his opinions.

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33 *Gonzales*, 550 U.S. at 170 (Ginsburg, J., dissenting).


36 E.g., David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567, 617 n. 193 (2013) (“Justice Kennedy signed onto an opinion holding that consuming vegetables was quintessential economic activity that could be regulated by Congress—a position he would ridicule in *NFIB*.”).


In *Obergefell v. Hodges*, for instance, Kennedy wrote the majority opinion invalidating state laws that withheld legal recognition of marriage from same-sex couples, emphasizing that the choice to marry is a liberty interest “central to individual dignity and autonomy.”41 Chief Justice Roberts raised the mysteriousness criticism in dissent: “[T]he majority’s approach has no basis in principle or tradition. . . . There is, after all, no ‘Companionship and Understanding’ or ‘Nobility and Dignity’ Clause in the Constitution.”42

Justice Scalia pressed a similar objection in *Boumediene v. Bush*—a case challenging the Bush Administration’s detention of suspected terrorists at Guantanamo Bay.43 Writing for a 5-4 majority, Kennedy relied on “fundamental separation-of-power principles” to reject the government’s argument that “de jure sovereignty is the touchstone of habeas corpus jurisdiction.”44 In dissent, Scalia protested that “The ‘fundamental separation-of-powers principles’ that the Constitution embodies are to be derived not from some judicially imagined matrix, but from the sum total of the individual separation-of-powers provisions that the Constitution sets forth.”45 The “general ‘separation-of-powers principles’” that Kennedy invoked, Scalia complained, can only be “dreamed up by the Court.”46

Conservatives are not alone in objecting to Kennedy’s handiwork on grounds that it relies upon premises of mysterious provenance. Chemerinsky castigated Kennedy’s *Alden* opinion for “recogniz[ing] a principle nowhere stated in the Constitution, state sovereign immunity in state court.”47 Jeffery Toobin complained that Kennedy’s decision in *Citizen United* was premised on “bizarre legal theories.”48 And Dworkin found Kennedy’s interpretation of the First Amendment “simplistic” and “preposterous.”49

3. Implausibility. Every justice advances arguments that critics deem unpersuasive and even, at least occasionally, implausible. Although it’s our impression that Kennedy’s opinions attract more than their fair share of such charges, that’s not something we could remotely establish by discussing a handful of cases or offering a bucketful of quotations. We’ll note a few

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42 Obergefell, 135 S.Ct. at 2615-16 (Roberts, CJ., dissenting).
44 Id. at 755.
45 Boumediene, 553 U.S. at 833 (Scalia, J., dissenting) (internal citations omitted).
46 Id.
implausibility objections that attach to opinions that feature prominently in the personal whimsy charge.

Take *Romer v. Evans*, a widely derided 5-4 decision that struck down a state constitutional amendment that had barred the state and its departments or subdivisions from prohibiting discrimination against gays, lesbians, or bisexuals. According to Scalia’s dissent, the “central thesis” of Kennedy’s majority opinion “is that any group is denied equal protection when, to obtain advantage . . . , it must have recourse to a more general and hence more difficult level of political decisionmaking than others.” But this cannot be true as a general rule. If it were, “it would be violated by every law that imposes a regulation of conduct at other than the most local level.”

From the other end of the political spectrum, Justice Souter and academics alike found Kennedy’s reasoning in *Alden* deeply unpersuasive. There, Kennedy authored an opinion that held Congress, acting pursuant to its Article I powers, could not subject nonconsenting States to private suits for damages in state courts. In his dissent, Souter charged that the majority’s historical analysis was supported by “no evidence” at all. Scholars agreed, deeming Souter’s dissent “clearly correct,” and Kennedy’s effort “not only intellectually insupportable . . . but . . . simply wrong.” Daniel Meltzer decried Kennedy’s federalism argument as “nothing short of fanciful.”

Again, examples could be multiplied. Assessing Kennedy’s claim in *Citizens United* that the appearance of corruption will not erode the citizenry’s faith in democracy, Lawrence Lessig complained that Kennedy “hasn’t even offered evidence” to support his conclusion, and argued that “empirical evidence certainly contradicts” it. Dissenting in *Roper v.*

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51 *Romer*, 517 U.S. at 639 (Scalia, J., dissenting).
52 Id. at 639-40.
55 *Alden*, 527 U.S. at 761 (Souter, J., dissenting).
Simmons, Scalia protested that Kennedy reached “[an] implausible result” based “on the flimsiest of grounds.”60 Ginsburg’s Gonzales dissent called Kennedy’s assertion that women who have abortions come to regret their choices, “an antiabortion shibboleth” that enjoys “no reliable evidence.”61 Kennedy’s proposed distinction in Parents Involved—between impermissible explicit classifications based on race and permissible considerations of race without direct categorization—“simply cannot be right.”62 Kennedy’s analysis of the systemic costs of allowing Bivens actions in Abassi is “wholly unsubstantiated,” “staggeringly wrongheaded” and, “for lack of a better word, nuts.”63

4. Obscurity. A final common objection is that, plausibility aside, it’s hard to know just what Kennedy is arguing, or even what his opinions hold. George Thomas expressed the protest concisely: “Kennedy’s own rhetoric tends to obscure the logic that underlies his opinions, even for those who would seek, sympathetically but critically, to draw out his reasoning in the benign interest of simply understanding it.”64

This is a common strand of criticism of Kennedy’s gay rights decisions. Start with Lawrence v. Texas.65 In striking down Texas’s anti-sodomy law, Kennedy did not find—as did O’Connor in her concurrence—that the law violated the Equal Protection Clause.66 But neither did Kennedy declare adult sodomy a “fundamental right,” as orthodox doctrine would require.67 Nevertheless, Kennedy found “the Due Process Clause” gave the petitioners “full right to engage in their conduct without intervention of the

Stevens made a similar point, arguing Kennedy “treats the reader to a string of non sequiturs,” the upshot of which “escapes my comprehension.” Citizens United, 558 U.S. at 409-10 (Stevens, J., concurring in part and dissenting in part). See also, e.g., Ronald Dworkin, The “Devastating” Decision, THE N.Y. REV. OF BOOKS (Feb. 25, 2010).

65 Lawrence v. Texas, 539 U.S. 558
government.”

Scholars proffered explanations, but many found Kennedy’s reasoning hard to parse. Cass Sunstein deemed it “remarkably opaque,” Steven Calabresi found it “almost incomprehensible,” and Edward Whelan thought it “reads like a cruel parody of the modern make-it-up-as-you-go-along judicial decision-making.”

Similar criticism greeted Obergefell. While Kennedy’s opinion more clearly subjected state bans on same-sex marriage to heightened scrutiny, it was not clear whether the laws were evaluated wholly under the Due Process Clause or the Equal Protection Clause. Rather, Kennedy claimed there existed a “synergy between the protections” of the two clauses. Roberts found Kennedy’s discussion of synergies, “quite frankly, difficult to follow.” Scalia thought it a proper object of mockery. Even many fans of Kennedy’s ruling were left scratching their heads.

The obscurity objection is not remotely limited to Lawrence and Obergefell, however. In the eyes of critics: Casey is “unintelligible,” Romer is “imperfectly explained,”

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68 Lawrence, 539 U.S. at 578.
71 Calabresi, supra note 32, at 1525.
72 Whelan, supra note 31.
74 Id. at 2603.
75 Obergefell, 135 S.Ct. at 2623 (Roberts, CJ., dissenting).
76 Obergefell, 135 S.Ct. at 2630 (Scalia, J., dissenting).
77 See, e.g., Ilya Somin, A Great Decision on Same-Sex Marriage -- But Based on Dubious Reasoning, WASH. POST (June 26, 2015); Ariel Schneller, How Justice Kennedy Could Have Baked a Better Fortune Cookie, L.A. TIMES (June 29, 2015) http://www.latimes.com/nation/la-oe-0629-schneller-kennedy-20150629-story.html (“Justice Anthony M. Kennedy arrived at the right conclusion, but his analysis was at times laughable in its freewheeling, extra-legal pontification.”).
Parents Involved is “cryptic,” LULAC is “bizarrely unclear,” Boumediene is “Kafkaesque,” and so forth.

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In sum, the best objection to Kennedy’s constitutional decisionmaking is less no theory, than it is personal whimsy. And because personal whimsy is not his official judicial philosophy, critics must identify more concrete defects of his judicial opinions. We suggest that most of those putative defects fall into four categories. Accordingly, to significantly rebut the charge of personal whimsy, on Kennedy’s behalf, will require substantial progress in making coherent the inconsistent, lucid the mysterious, plausible the implausible, and comprehensible the obscure. That’s the task for Part IV. The next two Parts offer the raw materials that we’ll need to carry it out.

II. AMERICAN CONSTITUTIONAL THEORY: A BRIEF SURVEY

Recall the charges we collected at the start of Part I. We questioned whether the theories that critics reference are things that Supreme Court justices should be expected to have, and thus that Kennedy can fairly be faulted for lacking. Be that as it may, theories of law, or of constitutional interpretation, and the like, are certainly things that those of us who seek to understand and critically assess our practices should want. And they are things that those who hold themselves out as “constitutional theorists” should be in the business of offering, refining and critiquing. This Part offers a short opinionated survey of the state of the literature, summarizing extant constitutional theories in Section II.A, and commenting briefly on jurisprudential theories in Section II.B. Our conclusion—that the current menu of offerings is unsatisfactory—paves the way for the novel account that we sketch in Part III. Once armed with that new theory (“principled positivism”), we will be poised to argue, in Part IV, that, although Kennedy (like his fellow Justices) doesn’t really need any such theory, he might in fact—and to commentators’ surprise—actually have one (albeit inchoately).

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83 This Part, and the first section of the next, are drawn from Berman, Our Principled Constitution, supra note 5.
A. Two Kinds of “Constitutional Theory”

You say you want a “constitutional theory”? Well, say more. What type of constitutional theory are you looking for? Think of a theory as an extended proposed answer to a question. The theory of evolution by natural selection is a proposed answer to some variant of the question, “what explains the variety of life on earth?” What is the theoretical or abstract question concerning constitutional law that you want answered?

Although many possible questions can be identified, we’ll highlight two. The first is: How should (unelected) judges exercise their power of judicial review? The second: what determines, grounds, or constitutes our constitutional law, or makes true propositions of constitutional law true? Call answers to the former “prescriptive (constitutional) theories,” and answers to the latter “constitutive (constitutional) theories.”

The first question is the more familiar of the two, and the ostensible subject of the great majority of well-known constitutional theories. That is to say, most constitutional theories are prescriptive. The second question is less familiar. But it is gaining increasing attention and, we think, for good reason. The theory that we’ll be spelling out here, and later attributing to Justice Kennedy, is constitutive, not prescriptive.

Here’s how this section proceeds. Subsection 1 motivates the idea that a constitutive theory is something that we should want. Subsection 2 explains that most of the more familiar theories of American “constitutional interpretation” or “judicial review,” do not furnish answers to the constitutive question. Subsection 3 shows that a dominant strand of “public meaning” originalism most prominently associated with the late Justice Antonin Scalia is often pitched or construed as providing a constitutive account. Subsection 4 provides grounds to think constitutive public meaning originalism radically defective, and summarizes the state of play.

1. The case for a constitutive theory. Suppose that you and a friend disagree about some matter of constitutional law. You believe, let us imagine, that states are constitutionally free not to recognize plural marriages. Your friend says that they aren’t. Or your friend contends that the President has constitutional power to pardon himself, and you think that he doesn’t. Disagreements of this sort are entirely common. What, in such cases, do we disagree about?

Let us be clear on what we are not disagreeing about—or at least needn’t be. First, we needn’t disagree about the dictates of morality. You and your friend might agree about how states should treat same-sex
marriages, “morally speaking,” disagreeing only about what is required “constitutionally speaking.” Second, we needn’t be disagreeing about what the courts should do. While believing that a self-pardon is unconstitutional, you might well agree with your friend that the courts shouldn’t try to invalidate one, although you rest that conclusion entirely on nonjusticiability concerns, whereas your friend reaches it “on the merits.” So we cannot reduce all constitutional disagreements to disagreements about morality or about what judges should do. If surface appearances are to be credited, you and your friend are disagreeing about “what the law is,” as Chief Justice John Marshall put it in *Marbury*. You agree that there is constitutional law, and disagree about some of its contents.

We call the notion that there is constitutional law “constitutional realism.” As we will use the term, constitutional realism is a simple view, and one we think overwhelmingly common. It maintains that there is constitutional law, that some constitutional rights and powers exist, that some propositions of constitutional law are true. (The “realism” here is that of “moral realism” or “metaethical realism,” and nearly the opposite of that in “legal realism.”)

Imagine an inventory of everything that exists, tangible and intangible. That long list includes electrons, lemurs, and waffle makers, and also games, symphonies, and the Philadelphia Eagles. To believe that “there is law” is to believe that legal norms belong on that list. Another way to say nearly the same thing is that most of us believe that propositions of law (e.g., “a will in this jurisdiction is legally valid only if signed by two witnesses”; “it is legally prohibited to park in front of a fire hydrant”) are “truth-apt”—that is, capable of being true or false—and that at least some are true. Constitutional realism maintains that the reality of law extends to the constitutional domain. Importantly, though, constitutional realism entails no position regarding how much constitutional law there is, or how many disputed constitutional propositions are true. Minimal constitutional realism as such is as compatible with Dworkin’s right-answer thesis as with the

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85 Somewhat more precisely, the realism we have in mind is what Mark van Roojen has helpfully termed “minimal realism,” to contrast with more robust forms of realism that apply to a domain only if truths within that domain are what is sometimes described as “mind-independent” or “stance-independent.” An account of constitutional law is “minimally realist” if it maintains that “there really are ways that things might be [constitutionally] speaking and that our thoughts and sentences do sometimes correctly represent that reality.” Minimal constitutional realism is a “metaphysically unambitious” thesis that builds in only those “assumptions needed to treat [constitutional] language as representational in the same way that talk of redness and roundness is representational.” MARK VAN ROOJEN, METAETHICS: A CONTEMPORARY INTRODUCTION 9-14 (2015).
skeptical claim that nearly all constitutional questions that reach appellate courts are metaphysically underdetermined.

Assuming, then, that you and your friend are constitutional realists, what explains your disagreements about law’s content? Sometimes we disagree about what the law is because we disagree about some non-legal fact. We may disagree about what some historical practice was, or about what some persons intended, or about what some court said, or about what justice requires. Perhaps more frequently, though, we disagree about what the constitutional law is because we disagree about the legal significance of some non-legal fact. We disagree about whether or how much it matters, legally speaking, that historical practice has been what it was, or that the text’s authors intended what they did, or that a court said what it said, or that some given practice will or won’t promote justice. In short, many of our disagreements about constitutional law, and especially our most heated disagreements, concern what makes it the case that our constitutional rights and duties, powers and permissions are what they are. They concern what Dworkin called “the grounds” of our constitutional law.86

What we term a “constitutive theory” of constitutional law aims to explain, in general terms, how constitutional “norms”—rights, powers, rules, prohibitions, and the like—have the contents they do. It is an answer to questions take any of the following forms: What makes out the law? What makes it the case that the law is this rather than that? What are the fundamental determinants of true constitutional norms? What are the truthmakers for true legal propositions? A “constitutive theory” of constitutional law is any theory that purports to have resources sufficient to vindicate any account of constitutional law that is at least minimally realist.

Anyone who finds herself in a constitutional disagreement should want a good constitutive theory of constitutional law. That’s not all we should want,87 but constitutive theories are surely among the important things

86 DWORKIN, supra note 8. Furthermore, we need to know, in addition to the grounds themselves, how those grounds combine to determine the law. We need to know something of the mapping function.

we should want. And we should reasonably expect constitutional theorists to supply them.

2. Pluralist prescriptivism: from the “clear error” rule to “common law constitutionalism.” American academic constitutional theory is not a recent phenomenon. Literature on the topic could fill a library. You might reasonably expect a long menu of constitutive theories to choose from. If so, you’d be mistaken. Almost every prominent contribution—from John Bradley Thayer’s “clear error” theory of judicial review\(^88\) up and through Herbert Wechsler’s “neutral principles,”\(^89\) Alexander Bickel’s “passive virtues,”\(^90\) John Hart Ely’s “representation-reinforcement,”\(^91\) Philip Bobbitt’s “multiple modalities,”\(^92\) Cass Sunstein’s “constitutional minimalism,”\(^93\) Richard Posner’s “constitutional pragmatism,”\(^94\) David Strauss’s “common law constitutionalism,”\(^95\) and others—sports two features. First, on its face, the theory offers not a “constitutive” account of the determinants of our law, but rather a “prescriptive” account of how judges should exercise their power of judicial review. Second, the prescriptivism of these theories is not merely superficial: not only do constitutive theses not appear on the face of these diverse constitutional theories, constitutive implications cannot be teased out with only a modicum of pulling, prodding, and reshaping.

Thayer’s own “clear error” theory of judicial review clearly illustrates. Thayer argued that courts should not hold an act of Congress unconstitutional unless certain of its unconstitutionality beyond reasonable doubt. This is not an account of correct judgments about constitutional law, but rather a standard of review. For another example, take Ely’s admonition that courts should invalidate legislation “under the Constitution’s open-ended provisions” only to reduce barriers to democratic participation. Motivated by the worry that judges will be overly influenced their individual substantive value commitments, it has no implications for what persons who are not judges (i.e., most readers of this Article) could rightly conclude are our

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\(^88\) By common scholarly consensus, Thayer’s 1893 essay marks the birth of American academic constitutional theory.


\(^90\) Bickel, supra note Error! Bookmark not defined., at 201.

\(^91\) John Hart Ely, Democracy and Distrust 87(1980).


\(^93\) Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court ix (1999).


constitutional requirements. Or consider Posnerian pragmatism, which urges judges to make sensible and workable law in the “open area” where “orthodox legal materials run out.”96 Participants to the theoretical disputes plainly do not agree about what those materials are, how they combine, or when they run out. A constitutive theory aims to resolve these puzzlements, and is precisely what Posner and the rest of the aforementioned theorists conspicuously fail to supply.97

These examples are not cherry-picked. Indeed, the British legal philosopher H.L.A Hart was struck by the overwhelmingly prescriptive ambitions of American constitutional theory forty years ago, astutely but ruefully describing “American speculative thought about the general nature of law” as “marked by a concentration, almost to the point of obsession, on the judicial process, that is, with what courts do and should do, how judges reason and should reason, in deciding particular cases.”98

3. Monist constitutivism: Scalian “public meaning” originalism. Early originalists too were (at least nominally) prescriptive. Robert Bork, the father of modern originalism, took Wechsler’s neutral principles as his point of departure, arguing only that Wechsler didn’t go far enough. It’s not sufficient that judges be neutral “in the application of principles. If judges are to avoid imposing their own values upon the rest of us . . . , they must be neutral as well in the definition and the derivation of principles.”99 To satisfy this requirement, Bork exhorted, “[t]he judge should stick close to the text and the [constitutional] history, and their fair implications.”100 This language is unambiguously prescriptive. Other first-generation originalists, from Ed Meese to Antonin Scalia, argued in similar terms.101

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100 Id., at 8.
101 See Edwin Meese III, U.S. Attorney Gen., Speech Before the American Bar Association (July 9, 1985) in Originalism: A Quarter-Century of Debate 47, 54 (Steven G. Calabresi ed., 2007) (insisting “that only the sense in which the Constitution was accepted and ratified by the nation, and only the sense in which laws were drafted and passed, provide a solid foundation for adjudication”); Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 862-63 (1989) (defending originalism as a “lesser evil” than “nonoriginalism” because it is “more compatible with the nature and purpose of the Constitution in a democratic system” and because its “practical defects” are less damning).
But there is one crucial difference. Non-originalist prescriptivists were invariably pluralists. They believe that constitutional adjudication properly takes account of many considerations in a largely unstructured manner. Although pluralism is associated most closely with Philip Bobbitt’s influential contributions from three to four decades ago, the label accurately describes the approach of predecessors dating back to, and including, Thayer. And, as many commentators have noted, it is the overwhelmingly dominant approach to constitutional interpretation today. That is, the majority of constitutional theorists are “pluralist” or “eclectic,” differing largely on matters of emphasis—“pragmatists” highlighting forward-looking policy considerations, “common law constitutionalists” emphasizing judicial precedent, “moral readers” focusing on justice, and so on.

Despite pluralism’s dominance, it is not obvious how a multiplicity of considerations that seem to be made of diverse stuff (meanings encoded in a text, legal intentions of a text’s authors or ratifiers, judicial precedents, non-judicial historical practices, prudential considerations, moral values, etc.) can combine to determine not only what somebody should do (which is familiar enough), but what is already the case. Some scholars have gone further, contending that the combinability of these diverse considerations is not a puzzle waiting to be solved, but a flat impossibility. As the originalist Larry Alexander puts the objection, “any non-lexical ‘combining’ of text and intentions, text and justice, and so forth is just incoherent, like combining pi, green, and the Civil War. There is no process of reasoning that can derive [law] from such combinations.”

102 See Larry D. Kramer, Judicial Supremacy and the End of Judicial Restraint, 100 Cal. L. Rev. 621, 624 (2012) (explaining that Thayer, like everybody else at the time, “essentially believed that the Constitution could and should be interpreted using the same, open-ended process of forensic argument that was employed across legal domains—marshalling (as applicable, and in a relatively unstructured manner) arguments from text, structure, history, precedent, and consequences to reach the most persuasive overall conclusion”). See also, e.g., Wechsler, Neutral Principles, supra note Error! Bookmark not defined., at 16-19 (1959) (arguing that judges exercising judicial review appropriately consider and weigh considerations of text, precedent, policy, history, and justice).


105 Larry Alexander, The Banality of Legal Reasoning, 73 Notre Dame L. Rev. 517, 521 (1998) (footnotes omitted). The quoted passage says “meaning” where we have substituted “law” because that, after all, is what the constitutive question is inquiring after—
Regardless of how forceful this “non-combinability objection” to pluralism is (not very, we’ll argue), the originalists were monists (or nearly so). They maintained that judges should follow some original fixed feature of the constitutionally enacted text, increasingly described as its “original public meaning.” And this prescriptive thesis did plausibly imply a constitutive one. Soon Bork was couching his claims in terms that spoke as much to what the law is (a constitutive thesis) as to what judges should do (a prescriptive thesis). A judge “is bound by the only thing that can be called law,” he argued: “the principles of the text, whether Constitution or statute, as generally understood at the enactment.”

Other originalists followed suit. Steven Calabresi and Saikrishna Prakash would soon declare that: “Originalists do not give priority to the plain dictionary meaning of the Constitution’s text because they like grammar more than history. They give priority to it because they believe that it and it alone is law.” And Scalia himself would later argue that “we are governed not by unexpressed or inadequately expressed ‘legislative goals’ but by the law”; that “the true law is” what an enacted text “states”; and that “it is the text’s meaning . . . that binds us as law.” In Randy Barnett’s terms: “the original meaning of the text provides the law that legal decisionmakers are bound by.”

We read all of these passages to reflect a constitutive thesis that is both monist and originalist. A first-cut encapsulation is: the constitutional law is fully constituted by the original meaning of the constitutional text. On this view, to know what the constitutional text means is thereby to know what the constitutional law is. It is ecumenical among the many ways of conceptualizing or defining that “original meaning”—from the “plain dictionary meaning” that Calabresi and Prakash reference, to the meaning what the law is, and not what the text means. That the latter fully determines the former is a substantive thesis to be addressed momentarily.

108 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 383, 397 & 398 (2012) (internal quotation omitted). Although these passages strongly indicate that Scalia had come to understand originalism as a constitutive thesis, he was never entirely consistent about this. For reflections on the ambiguity in Scalia’s work regarding whether his claims are prescriptive, constitutive, or both, see Mitchell N. Berman, Judge Posner’s Simple Law, 113 MICH. L. REV. 777, 798-807 (2015).
109 Randy E. Barnett, The Gravitational Force of Originalism, 82 FORDHAM L. REV. 411, 417 (2013). The claim in text is not inconsistent with Barnett’s view that “constitutional construction” is required when the text’s meaning is, for example, ambiguous or self-contradictory. Id. at 419.
that legal elites would extract when decoding the text by application of a
potentially large and complex array of original interpretive methods.¹¹⁰

**4. Wanted: a pluralistic constitutivism.** Monist originalists are on to
something: they’ve hit upon an important yet curiously overlooked question.
Yet the account they offer—the answer they supply—confronts all manner
of difficulties. For one, it doesn’t jibe well with any widely entertained
general theory of law. Certainly, ever since Hart demolished John Austin’s
“command theory of law” more than half a century ago, no legal philosophe
has contended that it is a _general_ truth about law that legal norms are fully
determined by what an authoritative text says, means, or asserts. And Hart’s
own influential theory of law, according to which law is the set of norms that
are ultimately “validated” by a convergent practice among legal officials,
especially judges, that Hart dubs a “rule of recognition,” provides scant
support. It is frivolous to claim that judges have converged on accepting the
original public meaning of the text as the sole determinant of constitutional
norms.¹¹¹

Hart aside, Scalian originalism fits poorly with central aspects of our
practice and with many constitutional sophisticates’ considered judgments
about what is in good order. To start, Scalian originalism cannot explain how
judicial decisions can bear constitutively on the content of our constitutional
law. Similarly, Scalian originalism seems, implausibly, to render _non_
judicial historical practice constitutionally irrelevant. Many constitutional
lawyers believe that stable, accepted practices of the political branches can
bear constitutively on what the law is. Consider, for example, the major
constitutional dispute of 1803—no, not _Marbury_, but rather the Louisiana
Purchase. At the time, it was controversial whether the President can
purchase territory for the nation.¹¹² In the eyes of many, the facts that
President Jefferson did so, that the Senate ratified, and that the public
approved contributes (not decisively) to _making it the case_ (and not merely
to evidencing) that such purchases are constitutionally permitted. Scalian
originalism cannot accommodate this possibility. Furthermore, Scalian
originalism is inconsistent with many constitutional decisions that strike

¹¹⁰ See generally _JOHN O. McGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE
GOOD CONSTITUTION_ 2, 116 (2013).

¹¹¹ Accounts of existing practices that differ on particulars but align on this key point
include Kent Greenawalt, _The Rule of Recognition and the Constitution_, 85 _Mich. L. Rev._
621 (1987), _reprinted in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION_, ch. 1
(Matthew Adler & Kenneth Einar Himma eds., 2009); Fallon, _supra_ note 105.

¹¹² See Eberhard P. Deutsch, _The Constitutional Controversy Over the Louisiana
many of us as correct, even on reflection.\textsuperscript{113} All told, constitutive monist originalism confronts huge costs in “plausibility points,”\textsuperscript{114} making it no surprise that many of the most influential and respected scholars who are fairly characterized both as “originalists” and as “theorists” (neither an honorific nor an epithet) reject the monist constitutive variety.\textsuperscript{115} And pluralist originalists are in the same bind as pluralist nonoriginalists when it comes to formulating a constitutive theory.\textsuperscript{116}

So we are left with this quandary. Most theorists and practitioners of American constitutional law are pluralists. We think lots of things matter, constitutionally speaking. Scalia’s originalism—the constitutional law is constituted by all and only the meanings of the constitutional text—is the most conspicuous exception. The view is exceptional and doubtful not because of its originalist or historical focus, exactly, but because of its monistic premises. At the same time, most theorists and practitioners are constitutional realists. We believe that there is constitutional law, even in at least some disputed cases that reach the appellate courts. And on this question, the monist originalists sit pretty, while pluralists either expressly disavow realism,\textsuperscript{117} or offer accounts that make no attempt to vindicate it. The pressing challenge for theorists is to reconcile constitutional pluralism

\textsuperscript{113} Exhibit A is usually Brown. See Jack Balkin, Living Originalism, 105 (2011) (acknowledging that Brown is inconsistent with the original public meaning of the Equal Protection Clause). Other purported examples are discussed in, e.g., David A. Strauss, The Supreme Court 2014 Term—Foreword: Does the Constitution Mean What it Says?, 129 Harv. L. Rev. 1 (2015); Richard Primus, Unbundling Constitutionality, 80 U. Chi. L. Rev. 1079 (2013); Stephen A. Siegel, Textualism on Trial: Article III’s Jury Trial Provision, the “Petty Offense” Exception, and Other Departures from Clear Constitutional Text, 51 Harv. L. Rev. 89 (2013); Berman, Our Principled Constitution, supra note 5, at __.


\textsuperscript{116} It is no accident that one of the most sophisticated originalist theorists, Larry Solum, finds the sledding getting especially rough when working out the character and contours of the constraints that govern what he calls “constitutional construction,” i.e., the process of converting the fixed communicative content of the constitutional text into law. See Lawrence B. Solum, Originalism and Constitutional Construction, 82 Fordham L. Rev. 453 (2013).

\textsuperscript{117} See Bobbitt, Constitutional Interpretation, supra note Error! Bookmark not defined. at 24 (insisting that law “is something we do, not something we have as a consequence of something we do.”).
with constitutional realism. What is needed are theories of constitutional law that marry constitutivism with pluralism.

B. Constitutive Theory and Jurisprudence: Hart and Dworkin

The cupboard is not entirely empty. There are at least two families of theory that marry constitutivism with pluralism: Hartian positivists and Dworkinian interpretivists. Neither theory, we think, is entirely successful. But both are instructive.

1. Hart and “too little law.” Start with Hart. Briefly, Hart maintains that law is the set of norms that are ultimately “validated” by a convergent practice among legal officials, especially judges, that he dubs a “rule of recognition.” Law is the set of norms that are “conclusively identified” or “validated” by tests that legal officials, especially judges, converge in following and accepting from the “internal point of view.”

We endorse a worry about Hart’s theory that Dworkin had first flagged: it entails that there is much less constitutional law than appears correct, even on reflection. Virtually every student of constitutional law has simultaneously harbored two beliefs: (a) that thus-and-such is a constitutional right or power or duty, and (b) that judges, Justices, and other legal officials do not all accept one or another legal premise that serves as essential support for (a). If Hart’s account of law is correct, then your belief in (b) should always cause you to abandon your belief in (a). But few internalize that lesson. We continue to simultaneously believe that some legal propositions are true and that the legal premises that make them true are controversial among officials. Hart’s account does not allow for as much constitutional law as there seems to be.

2. Dworkin and “too much morality.” Dworkin fixes the too-little-law problem, in spades. According to the general jurisprudential theory that he developed most fully in Law’s Empire, law is the set of norms that flow from the principles of personal and political morality that best fit and justify the institutional history of the legal regime. Put another way, “propositions

\[118\] See generally H.L.A. Hart, The Concept of Law, ch. 6 (1961). For the view that this common reading of Hart gets him wrong, see Kevin Toh, Hart’s Expressivism and His Benthamite Project, 11 Legal Theory 75 (2005).

\[119\] Ronald Dworkin, Hart’s Posthumous Reply, 130 Harv. L. Rev. 2096, 2116 (2017) (contending that, on Hart’s account, “it would follow that there is actually almost no law in the United States”).

\[120\] This is only a first cut. It invites quibbles and qualifications. See Berman, Our Principled Constitution, supra note 5. The critical point, though, is that morality grounds the law. Dworkin, Law’s Empire, supra note 8, at 96 (explaining that “rights and responsibilities flow from past decisions and so count as legal, not just when they are explicit in these decisions but also when they follow from the principles of personal and political
of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”

“Law as integrity” rests on the claims that law is an “interpretive concept”—a concept that we engage and refine to make it the best it can be—and that its function is to morally justify the state’s use of coercive force. Those of a positivist sensibility will not find these premises congenial. In the Postscript, Hart flatly rejected Dworkin’s claim about law’s function, observing that positivist theories generally “make[] no claim to identify the point or purpose of law and legal practices as such.” The reason they don’t is that to endorse partisan or ideological claims about law’s purpose threatens to open the door wide to law’s colonization by morality. Sure enough, Dworkin would himself conclude toward the end of his life that the theory he had advanced in Law’s Empire inevitably leads to a “one-system picture” of our normative landscape in which law is just a branch of morality, and our legal obligations and moral obligations can never conflict. These are bracingly unorthodox claims, not likely to prove acceptable to most constitutional lawyers. The gist of the central objection to Dworkin, accordingly, is nearly an inverse of the standard criticism of Hart: where Hart leaves us with too little law, Dworkin assumes too much morality.

morality the explicit decisions presuppose by way of justification”); cf. Ronald A. Dworkin, “Natural” Law Revisited, 34 U. Fla. L. Rev. 165, 165 (1982) (arguing that “judges should decide hard cases . . . by trying to find the best justification they can find, in principles of political morality, for the structure as a whole”) (emphasis omitted).

121 DWORKIN, LAW’S EMPIRE, supra note 8, at 225. Law’s Empire is a work of legal philosophy, not a work of American constitutional theory. When writing in the latter vein, Dworkin advocated what he called “the moral reading” of the U.S. Constitution. See generally RONALD DWORKIN, FREEDOM’S LAW (1996). One of us has observed that “the moral reading” is more plainly prescriptive than constitutive and, more importantly, that the two views are not obviously compatible. See Berman, Our Principled Constitution, supra note 5, at 59-60, n. 84; see also Jeffrey Goldsworthy, Dworkin as an Originalist, 17 CONST. COMMENT. 49 (2000). We’re focusing only on Dworkin’s general-jurisprudential account.

122 See generally DWORKIN, LAW’S EMPIRE, supra note 8, chs. 2 & 3.

123 HART, CONCEPT OF LAW, supra note 118, at 248-49 (deeming it “quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct”).

124 RONALD DWORKIN, JUSTICE FOR HEDGEHOGS ch. 19 (2011).

125 Of course, orthodoxy could be wrong. To reiterate, we’re trying only to convey a sense of the obstacles that the Dworkinian account faces, not to establish that he, or others carrying his baton, can’t surmount them. For recent expansions on Dworkinian themes, see Scott Hershovitz, The End of Jurisprudence, 124 YALE L.J. 1160 (2015); Mark Greenberg, The Moral Impact Theory of Law, 123 YALE L.J. 1288 (2014). For criticisms, see Mitchell N. Berman, Of Law and Other Artificial Normative Systems, in DIMENSIONS OF NORMATIVITY (David Plunkett, Scott Shapiro & Kevin Toh eds., forthcoming 2018).
In short, work in general jurisprudence furnishes two prominent accounts that are both constitutive and pluralist. On the orthodox reading of Hart’s account, legal norms are all and only those that are conclusively “validated” by criteria that legal officials converge in accepting from the internal point of view. On the standard reading of Dworkin, legal norms are all and only those that are “justified” by the set of moral principles that best fit the relevant institutional history. But American constitutional scholars have grounds to find neither entirely satisfactory—the former because it proves under-determinate whenever judicial agreement about “methods of constitutional interpretation” run out, and the latter because it relies upon a deeply moralized account of the point or function of law that seems ill-supported by the American constitutional experience.

III. PRINCIPLED POSITIVISM

The upshot of Part II is that we need more constitutive theories. This Part offers one: “principled positivism.” Section III.A introduces the theory, Section III.B illustrates, and Section III.C provides a summary, in the form of a four-element checklist.

A. The Account Introduced

Principled positivism is an account of law generally, not just an account of American constitutional law.\(^{126}\) This section presents it in three small steps, and then summarizes.

1. Of rules and principles. Drawing on Dworkin, let’s say that there are two types of constitutional norms: “rules” and “principles.” Although the terms are in wide usage, and many commentators agree that they mark some distinction of importance, the precise nature or location of that distinction remains “dogged by confusion and controversy.”\(^{127}\)

It was not always clear whether Dworkin had a tidy definition of principles to offer. He is often read to have associated principles with three criteria or characteristics: Legal principles cannot be posited, lack canonical formulation, and have the dimension of “weight,” which is to say that they may “bear on” the proper legal characterization or treatment of a dispute without even purporting to deliver decisive resolution. For us, this last criterion is the essential one: principles have (finite) weight.

\[^{126}\text{Actually, principled positivism is even broader than that. It is a constitutive account of the larger class of artificial normative systems that encompasses legal systems. See Berman, Our Principled Constitution, supra note 5.}\]

\[^{127}\text{ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 45 (Julian Rivers trans., Oxford Univ. Press ed. 2002).}\]
Rules contrast with principles. Lacking “weight,” they “have all-or-nothing application,”128 which is to say that they “are determinative of the outcomes of whatever transactions come within their terms.”129 They are sufficiently determinate to adequately serve the system’s core conduct-guidance function.130

Consider a representative sampling of constitutional norms: Legally enforced racial segregation in public education is unconstitutional. Congress may abrogate state sovereign immunity when legislating pursuant to its section five enforcement power. Criminal defendants have the right to a speedy and public trial. State legislative districts must be equipopulous. Government must furnish counsel for indigent criminal defendants. These norms differ in many respects—in their subject matter, their Hohfeldian character, their distance from the constitutional text. But they’re all “constitutional rules.”131 A “constitutional rule” can often be stated as an affirmative or negative answer to a well-formulated constitutional question presented for certiorari.

Principles will often be harder or more controversial to identify and formulate. Dworkin considered their lack of canonical formulation a defining characteristic. But paradigmatic and little-disputed examples wear their status as principles on their sleeves: separation of powers, federalism, sovereign immunity, personal liberty, stare decisis, and so on.

2. How principles make rules.132 If there are legal rules and legal principles, what is the relationship between them? The common view—familiar from early Ronald Dworkin to recent Jack Balkin—is that rules and principles subsist more or less in parallel. Long ago, Dworkin characterized his debate with H.L.A. Hart as concerning whether principles “are binding as

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128 Alexander & Kress, Against Legal Principles, supra note 120, at 740.
129 Id. at 747.
130 “Standards” fall on the “rules” side of the rules/principles distinction. While it is true that whether a search is “unreasonable” requires significant evaluative judgment—and thus is a “standard” rather than a “rule”—if a search is unreasonable, then it is unconstitutional—thus making the norm that prohibits unreasonable searches a “rule” rather than a “principle.”
131 We caution that not everything that would be described as a “constitutional rule” by a court or in a hornbook is what we mean by the term. Consider the canonical tiers of scrutiny in equal protection jurisprudence, or the Miranda warnings. These rules, and countless like them, are plainly the product of judicial engineering—“implementing rules,” RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001), “decision rules,” Mitchell N. Berman, Constitutional Decision Rules, 90 V.A. L. REV. 1 (2004), or “constitutional common law.” Henry P. Monaghan, The Supreme Court, 1974 Term- Foreword: Constitutional Common Law, 89 HARV. L. REV. 1 (1975). We’re interested in the rules that a judge might plausibly (if not unproblematically) view herself as discovering, not those she understands herself to construct.
132 With apologies to Greenberg, supra note 9.
law” the same way that rules are or, instead, lie “beyond ‘the law.’” The
issue, he said, was simply whether “the ‘law’ includes principles as well as
rules.” For Balkin, whatever the precise difference between rules and
principles may be, they are alike in that both issue from, or are encoded in,
the constitutional text: “If the text states a determinate rule, we must apply
the rule because that is what the text provides. If it states a standard, we must
apply the standard. And if it states a general principle, we must apply the
principle.” Principles, just like rules, are norm-types that “the text
enacts.”

Principled positivism paints a different picture: rules are determined
by the principles; the principles determine the rules. That’s too crude, for
principles do not determine the rules all by themselves. To a second
approximation, then: rules are determined by principles and the facts that the
principles make relevant. Suppose a principle provides that historical
practices that have proven stable and accepted have legal force (HISTORICAL
PRACTICE MATTERS). The force it exerts on a given constitutional question
will depend on facts about what the relevant historical practices have been.
The gist, though, is that principles are, in a sense, more fundamental than the
rules: the rules are what they are—they have the contents that they have—in
virtue of legal principles, but not vice versa. Call this a “layered” view of the
rule/principle relationship rather than the “parallel” view.

How do principles (and the facts they implicate or make relevant)
determine rules? That’s at least two-thirds of the $64,000 question. We can’t
provide anything approaching a complete answer. It should be enough to
distinguish two broad modes by which principles might conceivably
underwrite, constitute, or deliver rules: by “validation” and by “aggregation.”

On the validation model, the principles would be structured into a test
that functions as a complex if-then statement or as a set of necessary and
sufficient conditions that a putative rule must satisfy to be a valid rule. On
the aggregation model, principles bear for or against possible rules, and bring
about a rule by collectively weighing more forcefully in its favor than in favor
of any competitor. Validation is the mode characteristic of computer
programming and of “lexically-ordered” tests. Aggregation is the mode
characteristic of practical reasoning and of “balancing” tests. Principles
determine rules by aggregation, not by validation.

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134 BALKIN, LIVING ORIGINALISM, supra note 113, at 14.
135 Id.
136 From here out, we employ the convention of writing PRINCIPLES in SMALL CAPS, and
underscoring rules.
To restate the thought: Both rules and principles are types of norms; norms are kinds of forces or, at a minimum, can be fruitfully analogized to forces (they push or press or weigh or favor); and forces can combine to produce other forces that are non-identical to any of the forces that serve as determinants. Frequently and most simply, we model the combination of forces as vector addition. Because principles, as we will see, push or press “in different directions”—that is, toward different normative upshots—vector addition serves as a promising model for the determination of rules by principles as well. We employ the model of vector addition in the remainder of this paper as a simplification that is both tractable and, we hope, close enough. What would make this model “close enough”? The model is close enough if it advances our understanding of matters that it touches upon—matters such as the nature of law, the legally proper resolution of particular constitutional disputes, and the performance of a long-tenured, much-criticized, and exceedingly important Supreme Court Justice.

3. How practices make principles. And what about the principles? What determines or constitutes them? Where do they “come from”? In virtue of what is a given constitutional principle what it is?

To answer this question we must mark an important distinction that we skipped past when introducing constitutional principles. Principles come in (at least) two types: “derivative” and “fundamental.”

Suppose that what the text says matters. Well, of course it does. That (more or less) is a constitutional principle: WHAT THE TEXT SAYS MATTERS. Suppose too that one of the many things the text says is: “religious freedom matters.” The norm that corresponds to that proposition also is a principle: it

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137 One significant simplification appears if we analogize legal principles to reasons. Philosophers of practical reasoning increasingly accept that reasons do not only aggregate, but can interact in more complex ways. A reason (or combination of reasons) can enable or disable other reasons, or can serve to intensify or attenuate. Joseph Raz inaugurated this very promising line of inquiry over forty years ago when positing what he called “exclusionary reasons.” See JOSEPH RAZ, PRACTICAL REASON AND NORMS § 1.2 (1975). For the state of the art, see generally WEIGHING REASONS (Errol Lord & Barry Maguire eds. 2016); JONATHAN DANCY, ETHICS WITHOUT PRINCIPLES ch. 3 (2004).

An important lesson follows. If principled positivism were to become accepted as a general constitutive account of law, many of our current debates within constitutional theory could be recast as debates, not only about the contents of our constitutional principles at the moment, but about the actual structure and dynamics of their normative interaction. For example, originalists might argue not only that some fixed object of inquiry—say, original communicative contents, or legal intentions at enactment—is particularly forceful in our system, but also that it operates to defeat or preempt some or all other principles of our system.
has the dimension of weight,\textsuperscript{138} and it participates in the determination of more determinate norms—“rules” such as states must exempt religiously motivated conduct from burdens imposed by generally applicable laws unless there is a compelling justification to withhold the exemption. So we have two principles on our plate: RELIGIOUS FREEDOM MATTERS and WHAT THE TEXT SAYS MATTERS. These principles vary in several respects. For our purposes, the important difference is that the former is derivative of, or depends upon, the latter, whereas the latter isn’t dependent upon the former and, as far as one would guess, doesn’t depend upon any other legal principles. WHAT THE TEXT SAYS MATTERS is a fundamental constitutional principle; RELIGIOUS FREEDOM MATTERS is (on this hypothetical) a derivative constitutional principle.

When we discuss principles without qualification, it is usually fundamental constitutional principles we have in mind. That’s very much what we have in mind now. So let’s reformulate the question that animated this subsection: how are fundamental constitutional principles determined?

The short answer: they are grounded in “social facts”—facts about people’s behaviors and psychological states—in roughly the same way that obtains across the social world.\textsuperscript{139} Mores, fashion, the use of money, market prices, word meanings, rules of prescriptive grammar, etiquette, games, religion—all are “the result of human action, but not of human design. They are evolutionary phenomena, in the original meaning of the word—they unfold.”\textsuperscript{140} Think of a simple social norm—say, that you ought to wear black at a funeral. Or consider a rule of prescriptive grammar—say, that you ought not to split an infinitive. These rules too are grounded in social facts. A social norm is produced by the way that certain people “take it up” by

\textsuperscript{138} Alexander and Kress argue that principles cannot be posited because their weight cannot be posited or promulgated. See Alexander & Kress, supra note 120, at __. We think that principles can be promulgated \textit{qua} norm that possesses the dimension of weight or importance, but that the act of promulgation cannot fix the principle’s magnitude on that dimension. A principle’s weight ebbs and flows over time with its use and endorsement. See Mitchell N. Berman, \textit{For Legal Principles, in Moral Puzzles and Legal Perplexities: Essays on the Influence of Larry Alexander} (Heidi Hurd ed., 2018) (forthcoming).

\textsuperscript{139} Grounding is a non-causal relationship of “metaphysical determination and dependence.” Gideon Rosen, \textit{Metaphysical Dependence: Grounding and Reduction, in Modality: Metaphysics, Logic, and Epistemology} 109 (Bob Hale & Aviv Hoffmann eds., 2010). Plausibly: mental phenomena, such as beliefs, intentions, and consciousness itself, are grounded in physical brain states; and chemical and mechanical properties (e.g., solvency, hardness, conductivity) are grounded in micro-physical facts or properties. To say that social facts ground the norms of fashion is to say that the former are metaphysically more fundamental than the latter, and participate in making the latter the case.

\textsuperscript{140} \textit{Matt Ridley, The Evolution of Everything} 4 (2015).
believing and stating that it is normative, by using it as a guide for their own conduct, by criticizing themselves and others for deviance, and so on.\textsuperscript{141} This is the standard view of the common law.\textsuperscript{142}

Legal principles arise by their being “taken up” by the right participants in the system in the right ways.\textsuperscript{143} Who the right participants are and what the right ways are will vary across systems. Very generally, though, the grounding facts involve the ways that those who subscribe to the system govern and justify their own judgments and behaviors, and the ways they critically assess those of others.

4. Summary: Hart + Dworkin = principled positivism. Principled positivism is naturally conceived as an offspring of Hart and Dworkin. With Dworkin, it treats a distinction between determinate legal norms (“rules”) and weighty legal norms (“principles”) as central to the constitutive account of law. But, with Hart, it maintains that the fundamental weighty norms are determined entirely by social facts, not by moral facts. It is a positivist account that gives the Dworkinian distinction between weighted and non-weighted legal norms its due.\textsuperscript{144}

Principled positivism maintains that the norms that are sufficiently determinate and general to adequately serve the system’s conduct-guidance mission are determined by—they gain the contents they have “in virtue of”—the interaction of other more fundamental norms of the system whose function is not to guide conduct, but rather to participate in the production of the norms whose production and maintenance furnish the system’s raison d’être. In broad if imperfect conformity with prevailing usage, we are calling upper-level, fairly determinate, norms “rules,” and lower-level, rule-determining, norms “principles.” Rules are determined by principles, and principles are grounded in social facts. In legal systems, the principles sit directly on top of the grounding social facts, while the rules sit on top of the principles.

\begin{itemize}
\item \textsuperscript{141} See, e.g., Brennан et al., \textit{Explaining Norms} (2013).
\item \textsuperscript{142} See, e.g., Strauss, \textit{The Living Constitution}, supra note Error! Bookmark not defined. at 37 (“The early common lawyers saw the common law as a species of custom. The law was a particular set of customs, and it emerged in the way that customs often emerge in a society. . . . [The common law] can develop over time, not at a single moment; it can be the evolutionary product of many people, in many generations.”).
\item \textsuperscript{143} See Gerald J. Postema, \textit{Classical Common Law Jurisprudence (Part I)}, 2 Oxford U. Commonwealth L.J. 155, 166 (2002) (arguing that, for “common lawyers . . . , the law in its fundamental was understood to be not so much ‘made’ or ‘posited’—something ‘laid down’ by will or nature—but rather, something ‘taken up,’ that is, used by judges and others in subsequent practical deliberation”).
\item \textsuperscript{144} Contra Hart, \textit{Concept of Law}, supra note 118, at 261-62 (arguing that the rule/principle distinction is “incoherent” unless taken to represent differences of degree).
\end{itemize}
Obviously, rules can change abruptly and purposively because the enactment of an authoritative text is a purposive and datable event. But they also change organically because their determinants—the principles—are made out by facts about human behavior that are always in flux. Principles are thus much like trails: “They continually change—widen or narrow, schism or merge—depending on how, or whether, their followers elect to use them.”

Thus, our constitutional rules change organically because our underlying principles do. They can’t help it, and we can’t stop it.

Recall our imagined constitutional disagreements. Suppose you’re right about the constitutionality of plural marriage. We can restate your being right as a rule: states are constitutionally permitted to withhold legal recognition from plural unions. If there is such a rule, it will exist in virtue of the balance of applicable constitutional principles—very likely, that principles concerning federalism, historical practice, and gender equality bear more forcefully on this issue, in the aggregate, than do principles of autonomy or religious liberty. Similarly, if your friend is right that presidential self-pardons are constitutional, that might be thanks principally to principles concerning separation of powers or the intentions or understandings of framers and ratifiers.

B. Illustrations

What we’ve said so far is pretty abstract. It will be helpful to illustrate the account with, well, illustrations.

In the following models, principles are depicted by arrows, and rules by circles. The width (height) of the arrow depicts its relative weightiness, power, or importance within our system of constitutional law. Relative weights or importance are invariant across contexts. The length depicts the extent to which the principle is activated given the facts relative to the particular rule dispute. It varies across contexts. For example, if the constitutional text says p very plainly, then textual principles will activate very forcefully in direction of p; if a particular rule q would substantially threaten the ability of the states to exercise independent and substantively meaningful regulatory authority, the principle states matter will press forcefully against q, which is to say, toward ¬q. The total force that any given principle exerts in favor of a rule is some function of its power and the extent of its activation. Compare: the gravitational force that a celestial body exerts on an object is a function of its mass (invariant) and the intervening distance (variant).

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145 ROBERT MOOR, ON TRAILS: AN EXPLORATION 17 (2016). And the Justices of our Supreme Court are like the matriarchs of an elephant herd. See id. at 106-07.

146 Compare: the gravitational force that a celestial body exerts on an object is a function of its mass (invariant) and the intervening distance (variant).
serves to depict more clearly information that the length and width, combined, already contain.) The relative size (and intensity of shading) of the contending rules communicate the relative net impact of the principles.

This way of representing the rules threatens to imply that rulishness is necessarily only a matter of degree—that, in the interests of accuracy, assertions of the form “the rule is $\varphi$” should always be replaced with claims of the form “the rule is more $\varphi$ than $\psi$. ” We disavow that implication of the figures; on our view, the underlying metaphysics involves thresholds or functional equivalents. Finally, it hardly needs saying that the figures (just like the discursive analyses) massively simplify. Among other things, we routinely leave out principles that may have some bearing on the rule-determination at issue in order to reduce visual clutter and to better focus the reader’s attention on the principles that, in our judgment, are doing most of the work.

1. Anti-commandeering. Does Congress have constitutional power to require state executive or administrative agents to enforce or help to administer a federal regulatory scheme? When, in Printz v. United States,\(^{147}\) the Court addressed itself to the issue two decades ago, Justice Souter found it a close question.\(^{148}\) We think so too.

It’s close because a large number of our principles are implicated, but the bearing or activation of each is reasonably contested. Judicial precedents cut in different directions.\(^{149}\) Some important framers intended that the federal government would possess some commandeering power, but others intended otherwise or had no views on the subject. An unfettered power of commandeering is hostile to state independence, but the total absence of any such power threatens to impede Congress’s ability to accomplish important national ends. To the (limited) extent that such power augments presidential power at the expense of Congress, the principle NON-CONCENTRATION OF POWER weighs against. There are historical precedents for federal commandeering of state agents, but nothing resembling a lengthy and settled practice. All told, the picture can be approximated by the following snapshot:

\(^{147}\) 521 U.S. 898 (1997).
\(^{148}\) Id. at 971 (Souter, J., dissenting).
Not everybody will view the issue as comparably close. But disagreements in both directions are readily explained by different views regarding both the weights of the principles that are implicated, and the extent to which they are activated. One who sides with the *Printz* majority is apt to believe, say, that commandeering poses a greater threat to the independence and autonomy of the states than this figure represents (i.e., the *STATES MATTER* arrow should be depicted as driving even further westward). One who sides with the dissent may agree that the legal intentions of the framers was that Congress should have this power, but believe that this principle is a weightier one than shown above (i.e., the eastward-pointing *AUTHORS’ LEGAL INTENTIONS* arrow should be depicted as wider). These are the types of disagreement that express endorsement of principled positivism can help make salient.

2. Natural-born citizens. John McCain, the 2008 Republican candidate for President, was born outside the territorial United States, to U.S. citizen parents, then stationed in the Panama Canal Zone. Was he constitutionally eligible to serve as President? The constitutional text provides that “No person except a natural born Citizen . . . shall be eligible to the Office of President.” \(^{150}\) The constitutional question arises because naturalization law recognizes two distinct types of birthright citizenship—citizenship in virtue of parentage (*jus sanguinis*), and citizenship in virtue of birth on native soil (*jus soli*)—and it is uncertain just what the now-obscure phrase “natural born” meant at the time, or was intended to mark.

\(^{150}\) U.S. Const. Art. II, § 1, cl. 5.
Nonetheless, elite legal judgment and general popular opinion were remarkably uniform and resolute in 2008: any person who was a citizen at birth (and meets Article II’s other requirements) is constitutionally eligible to be president. The judgment held across the political spectrum, from Laurence Tribe and Neal Katyal to Ted Olsen and Paul Clement.\(^{151}\) When, eight years later, the question would reemerge in the person of Canadian-born GOP presidential hopeful Ted Cruz, doubts about his constitutional eligibility were barely voiced. How can we make sense of this broadly held conviction that people like McCain and Cruz are eligible?

Because this is the unusual constitutional question that has escaped judicial resolution (or contamination), constitutive public meaning originalists should be able to endorse their standard monist line without the pangs of conflict or unease that the existence of non-originalist judicial precedents might sometimes occasion. The originalist account, rendered in our model, should look something like this:

![Diagram](image)

But this picture faces a severe problem: the evidence of original meaning and original intent is much too equivocal. The most recent and thorough examination of the historical materials, conducted by Thomas Lee, concludes that the relevant eighteenth-century actors likely intended and expected the constitutional language to cover three categories of citizens: “(1) persons born within the United States; (2) persons born outside of the United States to U.S. citizens in government service; and (3) persons born abroad to U.S. citizen fathers who had resided in the United States but went abroad

temporarily for a private purpose, like merchant. 152 Lee specifically concludes that the authors of the clause, concerned that U.S. citizens born and raised abroad might have divided loyalties, intended and understood the language to exclude such persons from the presidency. And he rejects, as one strand of scholarship maintains, that the framers intended that Congress could alter this rule by statute. 153 In short, Lee’s originalist inquiry is good news for McCain, not for Cruz. Of course, Lee isn’t the last word on the subject, and we’re not affirming that his historical conclusions are correct. Our more modest contention is that originalists aren’t entitled to confidence in the eligibility of all persons who were U.S. citizens at birth.

Originalism cannot make sense of a second striking datum: people who opine on the question—including legal elites—routinely give reasons for their pro-eligibility judgments that would be of doubtful relevance were originalism true. Common arguments include: (1) that excluding children born to American service members stationed abroad would be unfair or inequitable to the children or to their parents; (2) that such an exclusion would create bad incentives and thus be unwise policy; (3) that an ordinary reader today would not suspect that a “natural born citizen” was anything other than a “citizen at birth”; (4) that discriminations among citizens of this sort are ugly, unjust, or un-American; and (5) that recent (extra-judicial) practice seems to have settled the issue in favor of broad eligibility. 154

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We’re not claiming that these difficulties disqualify originalism, or come anywhere close. We do, however, think it instructive that principled positivism accommodates with ease both these facts that trouble originalism. It favors the following picture:

A picture like this would explain the constitutional judgments that people reach and the reasons they give for their judgments. Furthermore, it shows those judgments and explanations to be warranted and not hostage to conclusive refutation in the pages of the *Law and History Review*. Those are two or three points in favor of the account.\(^{155}\) Moreover, the case highlights a signal difference between constitutive and prescriptive constitutional theories. We have been inquiring into *what the law is*. That question, the answer to which depends upon the right constitutive account, is entirely intelligible even though many observers believe the dispute nonjusticiable.\(^{156}\)

\(^{155}\) For a discussion on the methodology of reflective equilibrium used here and a response to those who criticize it, see Berman, *Our Principled Constitution*, supra note 5, at Part II.

\(^{156}\) This is assuming against the Diceyan account in which a norm belongs to constitutional law only if it is enforced by the courts (and that it amounts merely to a “constitutional convention” otherwise). *See A.V. Dicey, Introductory to the Study of the Law of the Constitution* (10th ed. 1959). The view is criticized in Mitchell N. Berman, *Constitutional Law, in Cambridge Companion to Philosophy of Law* (John Tasioulas ed. forthcoming).
How does principled positivism fare against a potential originalist *tu quoque*? Consider *naturalized* American citizens such as former California Governor Arnold Schwarzenegger or former U.S. Secretary of State Madeleine Albright. Are they constitutionally eligible to be President? Most readers will think: “Of course not.” And originalists and (other) textualists can embrace that conclusion with confidence. But principled positivists might be thought to face more difficulty, for surely some principles of equality, fairness, and good policy that we invoked to favor eligibility for non-naturalized citizens born abroad would favor eligibility for naturalized citizens too. So you see the challenge: Because we are more confident that naturalized citizens are ineligible than the (modestly) equivocal character of the determining principles should license, Schwarzenegger and Albright are supposed to cause principled positivism a loss in plausibility points similar to what McCain and Cruz cause constitutive originalism.

We think not. Perhaps a single-minded “moral reader” or “justice seeker” might be torn about this case. But a pluralist needn’t. Principled positivism faces no embarrassment here, and it’s illuminating to see why not. The most distinctive feature about this situation is that LEGAL INTENTION, CURRENT (NAÏVE) MEANING, and ORIGINAL MEANING are all strongly activated, and align in the same direction (against eligibility). Even if some other principles (concerning equality or fairness, say) press in the opposite direction (toward eligibility), nobody knowledgeable about our system should doubt that the first three, in combination, strongly outweigh the others.157

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157 Perhaps, moreover, the first trio does more than outweigh. When we proposed to model the interaction of principles as vector addition, we cautioned that the interaction could be more complex, and specifically mentioned possible complications in the form of multipliers, disablers, silencers, and the like. See supra note 137. This case presents a conceivable illustration. Perhaps, say, when original meaning, contemporary meaning, and legal intentions align, other principles (or *some* other principles) are thereby “disabled” or “silenced”—that is, rendered inoperative or inert. (Recent Supreme Court decisions might operate similarly.) We needn’t resolve this issue for purposes of this Article. We’re just putting in on the table for consideration. See also Berman, *Our Principled Constitution*, supra note 5 (discussing the minimum age eligibility for the presidency).
C. Summary: Four Core Elements.

It is cumbersome to work with a whole theory, in all of its detail. The discussion to follow will be made more manageable if we can fairly reduce principled positivism to a relatively small and digestible set of theses or propositions. As a theory of American constitutional law, principled positivism displays four central features: it is realist (rather than anti-realist or a-realist), pluralist (rather than monist), aggregative (rather than lexical), and organic (rather than static or manufactured).

1. Realism. Principled positivism assumes what we have called “constitutional realism.”\(^\text{158}\) This follows trivially from the facts that it is a constitutive theory, and we have defined a constitutive theory as an account that seeks to vindicate constitutional realism by explaining the contents of our law. In affirming realism, principled positivism contrasts with two sets of views. First, and most obviously, it contrasts with “anti-realist” views that

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\(^{158}\) Cf. Louis D. Bilionis, *Grand Centrism and the Centrist Judicial Personam*, 83 N.C. L. REV. 1353, 1364 (2005) (“One can have more than ample regard for the contestability of constitutional assertions, their historical contingency, and their limited capacity to determine conclusions. . . and nonetheless believe in and articulate ‘a set of shared constitutional first principles.’”) (quoting *POWELL, A COMMUNITY BUILT ON WORDS*, at 205)
affirmatively deny the (minimal) reality of constitutional norms, as reflected, for example, in Bobbitt’s insistence that law “is something we do, not something we have as a consequence of something we do.” Second, it contrasts with positions that, while not denying constitutional realism, do not purport to provide resources to vindicate it, or to explain the contents of our constitutional norms. Purely prescriptive constitutional theories that lack constitutive ambitions or entailments do not espouse constitutional realism.

2. Pluralism. The legally fundamental determinants of constitutional law, and the legally fundamental truthmakers of constitutional propositions, are plural, not singular. Most versions of originalism identify only a single consideration or directive that “stands on its own bottom”—something like what the text says is the law or what the framers intended is the law. Principled pluralism is pluralistic “at the most fundamental level.”

More particularly, the determinants are instances of a norm type that is distinguished by its character of “weight,” and conventionally termed a “principle.”

3. Aggregationism. The derivative determinate norms that adjudication seeks to discover, announce, and apply—what we conveniently call “constitutional rules”—are determined by the underlying constitutional principles in a certain way: many principles may bear constitutively on the rule all at the same time. Constitutional rules are determined by the aggregative force of all (applicable) constitutional principles. This may seem obvious. If we have a plurality of principles, how else? The “how else,” recall, is by lexical rule, on the model of Hart’s rule of recognition (as it is generally understood).

4. Organicism. Constitutional rules can change in gradual, undirected fashion (and not only by purposive formal means) because they are determined by principles which are themselves grounded in legal practices, which are a type of social fact. Law is a human artifact. Like other social practices (social norms, language, systems of exchange, religious beliefs and rituals, on and on), it is grounded in facts about human behaviors, speech acts,
and psychological states. Because those grounds change organically, so too
does the law. Living constitutionalism at a fundamental level is inescapable.

IV. A (QUALIFIED) DEFENSE

This Part advances a hedged and provisional defense of Kennedy’s
constitutional adjudication against the charge of personal whimsy. It
proceeds in two steps. Section IV.A mounts a prima facie case that Kennedy
is, to some significant degree, a principled positivist. Nothing here is
conclusive. But we think it’s more than enough to support a working
hypothesis that Kennedy operates from a set of background jurisprudential
assumptions or commitments that comprise a coherent and plausible theory—
more or less, the one spelled out in Part III.

Section IV.B then examines a large portion of the decisions that have
most fueled the common attacks on Kennedy’s performance in constitutional
disputes to see whether or to what extent they can be made more intelligible
and defensible on the hypothesis that Kennedy endorses or accepts the basic
tenets of principled positivism. It concludes that many (but not all) are
largely or entirely defensible as reasonable (though contestable) applications
of the general account.

A. Kennedy is a Principled Positivist

The next section engages to some depth with particular Kennedy
opinions situated within their doctrinal contexts. This section presents
evidence, drawn from a wide range of opinions, that Kennedy believes or
espouses realism, pluralism, aggregationism, and organicism—and thus, in
short, that he’s a principled positivist.

1. Kennedy is a constitutional realist. Of course he is. Almost
everyone is. And no federal judge will confess otherwise. But that’s only
because constitutional realism is such an undemanding thesis, staking no
position on how many contested constitutional questions have legally right
answers. Principled positivists will differ regarding when law runs out and
judicial discretion to make law interstitially begins. They are apt to believe,
however, that there’s more law than either orthodox Hartians or judicial
pragmatists do—that law runs out less quickly.

That appears to be Kennedy’s view. Throughout his judicial career,
Kennedy has consistently expressed his belief that there are correct and
incorrect answers to constitutional questions, including many of the hard
questions that confront and divide appellate courts. This was his position in
Texas v. Johnson, where the Court struck down a Texas law that criminalized
the burning of the American flag. While joining Justice William Brennan’s majority opinion, Kennedy penned a separate concurrence explaining that the case “illustrates better than most that the judicial power is often difficult to exercise,” because “sometimes we must make decisions we do not like.” Nevertheless, Kennedy continued, “[w]e make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result.”

A decade later, Kennedy’s concurrence in City of New York v. Clinton made much the same point. There, Kennedy joined a majority opinion that found the Line Item Veto Act violated the Presentment Clause. Kennedy acknowledged that the statute’s objective—“to restrain excessive spending”—was “of first importance.” But, the statute “must be found invalid” because “[t]he Constitution’s structure requires a stability which transcends the convenience of the moment.” Rejecting a pragmatic approach, Kennedy concluded that, even if the “controls over improvident spending . . . prove insufficient,” that “cannot validate an otherwise unconstitutional device.”

2. Kennedy is a (principled) pluralist. Kennedy’s enthusiasm for principles is well known. Take the principle HUMAN DIGNITY, a central player in Kennedy opinions on diverse subjects from gay rights to the death penalty, abortion to voting rights. Entire articles have been written that explore the use Kennedy makes of this one principle (or cluster of

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162 491 U.S. 397 (1988)
163 Texas, 491 U.S. at 420 (Kennedy, J., concurring).
164 Id. at 420-21 (emphasis added).
166 City of New York, 524 U.S. at 449 (Kennedy, J., concurring)
167 Id.
168 Id. at 452-53.
169 See, e.g., Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015) (maintaining that constitutionally protected “fundamental liberties . . . extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and belief.”).
170 See Roper v. Simmons, 543 U.S. 551, 560 (“[T]he Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.”).
171 See Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (”These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”).
172 See Rice v. Cayetano, 528 U.S. 495, 517 (2000) (“One of the principal reasons race is treated as a forbidden classification is that it deems the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”).
principles)\textsuperscript{173} across doctrinal categories.\textsuperscript{174} Others have lionized Kennedy as a champion of “fundamental principles of liberty and equality.”\textsuperscript{175}

As valuable and frequently insightful as these studies are, the focus on particular principles risks obscuring the broader picture. In case after case, constitutional domain after constitutional domain, Kennedy’s constitutional opinions are densely populated by a large and diverse menagerie of constitutional principles. They range from the broad and familiar principles of “federalism,” “separation of powers,” “personal freedom,” and “human dignity,”\textsuperscript{176} to the narrow or even oddball: “the principle . . . that navigable waters uniquely implicate sovereign interests”\textsuperscript{177}; “the fundamental principle . . . that different branches of government ‘converse with each other on matters of vital common interest’.”\textsuperscript{178} “the well-established principle that when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts”;\textsuperscript{179} another “fundamental principle . . . that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more”;\textsuperscript{180} and others.

To be sure, every justice invokes principles. But (to paraphrase the naturalist JBS Haldane) Kennedy’s fondness for them appears inordinate.\textsuperscript{181} Yet more significantly, Kennedy understands principles to be legally fundamental: their existence—their legal force—and their contents do not depend upon what the text means or what particular historical persons intended or believed.

The disagreement between Kennedy and Scalia in Boumediene exemplifies their divergent commitments on precisely this point. Recall that Kennedy rejected the Bush Administration’s position that “\textit{de jure} sovereignty is the touchstone of habeas corpus jurisdiction,” because “that

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\textsuperscript{173} See Berman, \textit{Our Principled Constitution}, supra note 5 (discussing principle clusters).
\textsuperscript{175} BARTL, \textit{supra} note 4, at 9.
\textsuperscript{176} Roper v. Simmons, 543 U.S. 551, 578 (2005).
\textsuperscript{180} Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017).
\textsuperscript{181} When asked by a group of British theologians “what one could conclude as to the nature of the Creator from a study of his creation, Haldane is said to have answered, ‘An inordinate fondness for beetles.’” G. E. Hutchison, \textit{Homage to Santa Rosalia or Why Are There So Many Kinds of Animals?}, 93 THE AMERICAN NATURALIST 145, 146, n.1 (1959).
position would be. . . contrary to fundamental separation-of-powers principles.”182 In dissent, Scalia complained that Kennedy’s invocation of “fundamental” principles “distorts the nature of the separation of powers and its role in the constitutional structure.”183 That is because, according to Scalia, such principles “are to be derived . . . from the sum total of the individual separation-of-powers provisions that the Constitution sets forth.”184 “It is nonsensical to interpret those provisions themselves in light of some general ‘separation-of-powers principles’ dreamed up by the Court.”185 But for Kennedy, the “fundamental” principles are neither “dreamed up,” nor dependent upon specific textual provisions. Rather, they exist as “freedom’s first principles,” and “[t] is from these principles that the judicial authority” derives.186 Such principles exist whether or whatever the textual source.

3. Kennedy is an aggregationist. We have just said that Kennedy treats constitutional principles as fundamental in character. They are explanatorily prior to (i.e., they “determine” or “ground”) the relatively determinate rules (e.g., states may not exclude same-sex couples from the institution of legally-recognized marriage, nonconsenting states are constitutionally immune from suit by private parties in their own state courts) that, as a constitutional realist, Kennedy sees Supreme Court Justices as trying to discover. But how do principles determine rules? For Kennedy, as for principled positivists, rules are determined or constituted by the multiplicity of principles that combine additively, not lexically. A rule emerges as the outcome of a “battle” among potentially multiple principles. Frequently, cases are hard because different principles are pressing, with greater or lesser force, in opposed normative directions. Furthermore, rulings are often narrow because the broader the announced rule, the greater the likelihood that it fails accurately to capture the balance of activated principles.

We will see this dynamic at work next section in several of Kennedy’s most maligned opinions. For now, a few examples from Kennedy’s lesser-known (though not uncontroversial) opinions should exemplify. In *Harmelin v. Michigan*, Kennedy’s concurring opinion derived “The Eighth Amendment does not require strict proportionality between crime and sentence” from DEMOCRACY, FEDERALISM, and SEPARATION OF POWERS.187 In *Powers v. Ohio*, prosecutors may not use race-based peremptory challenges

183 *Boumediene*, 553 U.S. at 833 (Scalia, J., dissenting).
184 Id.
185 Id.
186 *Boumediene*, 553 U.S. at 797.
regardless of defendant’s race is a function of PERSONAL DIGNITY and JUDICIAL INTEGRITY. And in Zivotofsky v. Kerry, the President has preclusive power over recognition reflects the net effect of a diverse lot of principles: WHAT THE TEXT SAYS, JUDICIAL PRECEDENT, HISTORICAL PRACTICE, and PRAGMATISM, among others.

4. Kennedy is an organicist. Although not a capital punishment abolitionist, Kennedy has authored two prominent majority opinions holding the death penalty unconstitutional—as applied to minors, and as punishment for any sexual assault not resulting in death. Both opinions relied heavily on “evolving standards of decency,” generating a small flurry of commentary extolling (or deriding) Kennedy as a “living constitutionalist.” We are confident that he is. But living constitutionalism comes in many flavors, and the Eighth Amendment death penalty cases are compatible with most. Many originalists have emphasized just this point. If, for example, the original meaning had been “prohibit what is objectively cruel,” then a judicial posture that attends to “evolving standards of decency” might be justifiable on the assumption that evolving community standards are the best (if fallible) guide to what is objectively cruel.

What is distinctive of Kennedy, and central to principled positivism, is the idea that our principles depend upon, are constituted by or grounded in, actual practices and mental states of constitutionally relevant actors (from Supreme Court justices to elected officials and opinion leaders to ordinary citizens), and thus change as those facts change. This was, famously, the second Justice Harlan’s view. As he argued in his influential Poe dissent:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon the postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the

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traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.\footnote{Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).}

\textit{Poe} concerned due process. But the thought is far more general. “One need not be a rigid partisan of Blackstone,” Harlan would emphasize eight years after \textit{Poe}, “to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation.”\footnote{Desist v. U.S., 394 U.S. 244, 263 (1969) (Harlan, J., dissenting).}

Justice Kennedy, along with Justices O’Connor and Souter, endorsed Harlan’s \textit{Poe} dissent explicitly and enthusiastically in their \textit{Casey} joint opinion.\footnote{See Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992) (plurality opinion). This was Part II of the opinion, generally regarded as having been written by Kennedy. JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 54 (2008).} Kennedy has championed this organic dynamism in opinions on diverse subjects ever since. Over time, our principles grow and shrink, morph and splinter, as members of the constitutional community—judges, legislatures, and others—engage in a “recurring dialogue” that drives the “elaboration and the evolution” of the law.\footnote{Blakely v. Washington, 542 U.S. 296, 326-27 (2004) (Kennedy, J., dissenting).} As “new insights and societal understandings” emerge, the constitutional community gains “a better informed understanding” of principles that “once passed unnoticed and unchallenged.”\footnote{Obergefell, 135 S. Ct. at 2602, 2603.} As “judicial exposition . . . , in common-law fashion, clarify[es] the contours” of our constitutional principles,\footnote{J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 885 (2011).} they “acquire[] over time a power and an independent significance” that “become part of our constitutional tradition.”\footnote{Minnesota v. Carter, 525 U.S. 83, 100 (1998) (Kennedy, J., concurring); see, e.g., id (“Even if, at the time of Semayne's Case, a man's home was not his castle with respect to incursion by the King in a criminal matter, that would not be dispositive of the question before us. The axiom that a man’s home is his castle, or the statement attributed to Pitt that the King cannot enter and all his force dares not cross the threshold, see Miller v. United States, 357 U.S. 301, 307 (1958), has acquired over time a power and an independent significance justifying a more general assurance of personal security in one's home, an assurance which has become part of our constitutional tradition.”).}

was Justice Harlan’s. It appears to be Kennedy’s. Law, on this view, “is neither autonomous nor fixed.”

B. Personal Whimsy through a Principled Positivist Lens

This section examines the extent to which the conceptual frame and apparatus that principled positivism supplies, and that Kennedy appears to endorse and to practice in less controversial opinions, can make intelligible and defensible his performance in those opinions that have attracted the most fierce criticism.

Which are those? That’s the problem. There’s no agreed-upon list. Were there a canonical “dirty dozen,” it might be sensible (if tedious) to analyze each case, one by one. But there isn’t. If you poll fifty constitutional lawyers and scholars for their personal rankings of the ten “worst” Kennedy opinions—by which we mean the ten opinions most supportive of personal whimsy—you’ll get a few dozen to choose from. (Our list of the opinions most likely to make a community-wide “ten worst opinions” list appears in the margin, along with twenty more in the “others receiving votes” category. 202)

201 Post, supra note 200, at 11. See also Bilionis, Grand Centrism, 158, at 1354 (attributing to Kennedy “a jurisprudence whose project is the self-conscious maintenance of public faith in a substantive constitutional center of clean, simple, shared American values. It is a jurisprudence that holds that there are such shared American values, that constitutional adjudication can be guided by them, and that the Supreme Court must nurture them and keep them popularly accessible”).


Instead of assessing the most maligned opinions one by one, we
survey Kennedy’s performance in five domains of constitutional law:
Federalism, gay rights, abortion, affirmative action, and the law of
democracy. We think that more will be learned by zooming out from the
supposedly worst decisions to understand what Kennedy is doing in nearby
cases, and we’ve selected these fields because, collectively, they cover both
structure and rights, include a disproportionate number of opinions that are
likely to show up on informed observers’ “bottom ten” lists, and were
targeted by critics from the left and from the right in nearly equal measure.

This approach will necessarily leave out entire doctrinal areas worthy
of study, including, most conspicuously, expressive and religious liberties,
and criminal justice. Resources are limited, and we have given reasons for
focusing our attention as we have. Still, we want to clearly acknowledge this
survey’s limitations. Careful consideration of other areas could end up
making Kennedy look less good than we perceive him to be (or not). In any
event, the incomplete character of our investigation would worry us more if
we ended up concluding, based on the cases we do examine, that the
objections are entirely without merit. That’s not our conclusion.

So much for this Part’s coverage. Now a word in anticipation of its
strategy. Given the foregoing evidence of Kennedy’s embrace of the four
planks of principled positivism, the reader may already anticipate how
possible defenses of Kennedy against some of the charges that we canvassed
in Part I might run. For example, much of Kennedy’s supposed inconsistency
takes the form of the claim that, given that he treated consideration P as
decisive in Case A, he was inconsistent to flout it in Case B. But
aggregationism problematizes that line of argument: Case A might be as
notable for the presence of Principle P as for the absence of Principles Q and
R. Or a consideration may be activated in two cases, but to significantly
varying degrees. Similarly, many criticisms that we have filed under the
heading “mysteriousness” are due to the fact that it’s not clear just where an
invoked principle “comes from.” But this is just what organicism ensures:

J., concurring in part and concurring in the judgment); Schuette v. Coal. to Defend
Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means
Necessary (BAMN), 134 S. Ct. 1623, (2014) (same); City of Boerne v. Flores, 521 U.S. 507
(1997) (congressional enforcement power); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S.
(due process); Maryland v. King, 133 S. Ct. 1958 (2013) (Fourth Amendment); Ziglar v.
Abbsi, 137 S. Ct. 1843 (2017) (constitutional remedies).

So, for example, Scalia complained in his Lawrence dissent that while Kennedy
credited the “precedential force” of Roe in Casey, Kennedy failed to give due credit to the
precedential force of Bowers in deciding Lawrence. See discussion and accompanying text
supra note 31.
like other evolutionary phenomena, our fundamental principles cannot be traced to distinct sources. They’re more like soccer (whose origins are lost to the mist of time) than basketball (invented by Dr. James Naismith in 1891). Furthermore, a better understanding of the analytical framework might make some of Kennedy’s more cryptic reasoning more comprehensible. And it might even induce some of his critics to chalk up some portion of the obscurity that remains to bad writer or clunky thinker, rather than the far more damning personal whimsy.

The goal of this section is to investigate the extent to which potential defenses such as those we’ve just mentioned can be made out. We’ll submit that Kennedy’s performance in most of his most notorious opinions, read and reconstructed sympathetically (but not sycophantically), reflect a reasonably consistent and broadly defensible approach to constitutional decisionmaking.

1. Federalism. Kennedy has proven a staunch supporter of “states’ rights” throughout his three-decade career on the Court. As a member (usually a necessary one) of important pro-state decisions, he has attracted criticism from commentators less solicitous of state interests. But those are ordinary disagreements, not bases to allege personal whimsy. If any of Kennedy’s federalism opinions would find itself on a community-wide bill of indictment, that would be his majority opinion in *Alden v. Maine*, which held that Congress may not use its Article I powers to subject nonconsenting states to private suits for damages in state courts. It provoked a storm of outrage—Chemerinsky, for example, called the decision “the height of judicial hypocrisy” based on nothing more than “a value choice” that Kennedy and his fellow conservatives “cannot possibly justify.”

We think the condemnation largely unwarranted. We believe that Kennedy’s overall decisionmaking in the federalism arena displays both a fair grasp of a sound framework for analysis, and a plausible (if eminently contestable) appreciation for the shape, contours, and weights of our constitutional federalism principles. We further believe that *Alden* represents a plausible (if eminently contestable) decision given how the principles appear to him.

204 He has voted with the conservative majority to limit federal power in every major federalism case: on Congress’s commerce and spending powers (*Lopez, Morrison*, and *NFIB*), commandeering of state authorities (*New York* and *Printz*), and state sovereign immunity (*Seminole Tribe* and *Alden*). These are the headliners, not a comprehensive list.


Suppose, as the previous Section argued, that Kennedy is a principled positivist. What should we expect to see in his federalism decisions? First, given his pronounced pro-states leanings, we should expect him to reliably espouse one or more weighty principles favoring states’ rights or interests. Second, insofar as he’s a pluralist, we might expect him to acknowledge other federalism principles that favor nationalist interests. Third, insofar as he’s an aggregationist, we might predict that he would conceptualize federalist principles as coming into conflict, and might occasionally conclude that they dictate legal outcomes that are more moderate or nationalist than other defenders of states’ rights favor. And fourth, insofar as he’s an organicist, he might recognize that the shape and force of the relevant federalist principles has shifted over time. All those predictions are borne out.

Kennedy’s concurrence in *Lopez* exemplifies. There, the Court held, 5-4, that the Gun-Free School Zone Act (GFSZA), a federal statute criminalizing the possession of firearms near schools, exceeded Congress’s power under the Commerce Clause.\(^207\) Kennedy joined Chief Justice Rehnquist’s opinion for the Court. He also concurred separately (joined by Justice O’Connor) precisely to caution against intimations in the majority opinion that, in the name of protecting state prerogatives, threatened undue harm to federal prerogatives.

The heart of Kennedy’s concurrence is that our federalism principles are multiple, not univocal. On the one hand, states are independent sovereigns that play a central role in protecting individual liberty and in satisfying material and other needs of their citizens. On the other, the national government has power sufficient to the needs of a nation state. “The Commerce Clause grants Congress extensive power and ample discretion to determine its appropriate exercise.”\(^208\) To assign intentionally imprecise and capacious labels, call these principles STATES MATTER and EFFECTIVE NATIONAL POWER, respectively. They form part of “the constitutional design” and are, in a sense, “enduring.”\(^209\) But they are not static. They “evolve” as the Court’s jurisprudence responds to changes in the economy and society, and to efforts by the political branches to preserve and adjust a responsible “federal-state balance.”\(^210\) Development of these principles has not followed “a coherent or consistent course.”\(^211\) But there are “essential principles now in place respecting the congressional power to regulate transactions of a

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\(^{208}\) *Lopez*, 514 U.S. at 568 (Kennedy, J., concurring).

\(^{209}\) *Id.*

\(^{210}\) *Id.* at 574, 577-78.

\(^{211}\) *Id.* at 568.
commercial nature.” 212 They include a judicial commitment “to sustaining federal legislation on broad principles of economic practicality.” 213

If our plural and partially conflicting constitutional principles fundamentally determine our constitutional powers and rights, the constitutionality of the statute turns upon the relative force or impact of the complementary principles loosely denominated STATES MATTER and EFFECTIVE NATIONAL POWER. In Kennedy’s judgment, STATES MATTER activated forcefully against the GFSZA. “While the intrusion on state sovereignty may not be as severe in this instance as in some of our recent Tenth Amendment cases, the intrusion is nonetheless significant.” 214 As the majority opinion emphasized: if the GFSZA stands, “it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.” 215 Contrariwise, “[a]bsent a stronger connection or identification with commercial concerns that are central to the Commerce Clause,” EFFECTIVE NATIONAL POWER did not weigh heavily in the statute’s favor. 216 Moving from the balance of principles to a ruling on the statute, without interposing a judicially created “test” or “doctrine” of broader generality, Kennedy jumped straight to his (constitutionally realist) bottom line: “The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power.” 217

Kennedy reiterated his pluralism on matters of federalism one month later in Term Limits, joining the four liberals to hold that states lack constitutional power to impose term limits on their representatives in Congress. 218 Justice Thomas dissented, for himself, Chief Justice Rehnquist, and Justices O’Connor and Scalia. “Nothing in the Constitution,” Thomas protested, “deprives the people of each state of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress.” 219 “Because the people of the several States are the only true source of power, . . . [w]here the Constitution is silent about the exercise of a particular power . . . the Federal Government lacks that power and the States enjoy it.” 220 As he had in Lopez, Kennedy penned a separate concurrence, this time to object that the dissent’s “course of argumentation runs counter to

212 Id. at 574.
213 Id. at 571.
214 Id. at 583.
215 Lopez, 514 U.S. at 564.
216 Lopez, 514 U.S. at 583 (Kennedy, J., concurring).
217 Id. at 580.
219 Term Limits, 514 U.S. at 845 (Thomas, J., dissenting).
220 Id. at 847-48.
fundamental principles of federalism.”  Those principles are plural: “That the States may not invade the sphere of federal sovereignty is as incontestable . . . as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States.”

Given Kennedy’s embrace of multiple federalism principles, we should expect that he’d see them pulling in different directions on the issue raised in *Alden*: STATES MATTER suggests immunity; EFFECTIVE NATIONAL POWER suggests abrogability. And given his state-protective dispositions, we should find ourselves neither surprised nor outraged if he concludes that, on net, these two principles weigh more heavily for, than against, a rule of state sovereign immunity. Much simplified, that’s what happened.

That characterization simplifies because STATES MATTER and EFFECTIVE NATIONAL SUPREMACY weren’t the only principles that the dispute in *Alden* implicated. One obvious additional principle is WHAT THE TEXT SAYS MATTERS. Kennedy acknowledged that this principle weighed against immunity, but abjured reliance “on the words of the Amendment alone.” What the framers intended to codify (even if the language chosen did not effectively capture and communicate that intention) also matters. So too does historical practice. No single principle is determinative nor do all the principles point in the same direction. But the principles STATES MATTER and EFFECTIVE NATIONAL POWER are the main drivers. The former, Kennedy reasons, is activated substantially:

> an unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States for compensatory damages, attorney’s fees, and even punitive damages could create staggering burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design. The potential national power would pose a severe and notorious danger to the States and their resources.

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221 *Term Limits*, 514 U.S. at 838 (Kennedy, J., concurring).

222 *Id.* at 841.

223 *Id.* at 730.

224 That is because, what the text *means* and what the authors of that text *intended to achieve* by enacting that text are not one and the same. Rather, they are distinct clusters of principles that carry independent weight. See Berman, *Our Principled Constitution*, supra note 5 at ___. The principles may be aligned, but, as Kennedy recognizes in *Alden*, needn’t be.

225 *Alden*, 527 U.S. at 750.
At the same time, EFFECTIVE NATIONAL POWER does not strongly press for a non-abrogation rule because many means remain available to secure state compliance with federal law. So the sum of the activated principles weigh in favor of a robust sovereign immunity rule that Congress lacks power, under Article I, to subject nonconsenting states to private suits. The following picture conveys:

This strikes us as a reasonable analysis for the author of the Lopez and Term Limits concurrences to proffer. But if not, why not? What grounds have we to infer personal whimsy? The objection that Souter pressed most vigorously in dissent sounds in implausibility. Kennedy, Souter argues, is wrong on the history: the original legal intention of the framers may have been to constitutionalize a “common law” principle of sovereign immunity in state courts that is defeasible by federal statute, but surely was not to constitutionalize a “natural law” version of the principle that Congress could not abrogate by exercise of its Article I powers. Kennedy’s reasoning should not be taken seriously, this objection goes, because it relies upon implausible historical premises.

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226 Id. at 755-757, 759 (discussing alternate means of enforcement).
227 Alden, 527 U.S. at 795 (Souter, J., dissenting) (“It is clear enough that the Court has no historical predicate to argue for a fundamental or inherent theory of sovereign immunity as limiting authority elsewhere conferred by the Constitution or as imported into the Constitution by the Tenth Amendment.”).
We find Souter’s analysis of the relevant history mostly persuasive. But we think that he and fellow critics exaggerate its force. The objection holds great sway on the supposition that the *Alden* majority derives its rule of non-defeasible state sovereign immunity from the supposed constitutional principle that the framers’ legal intentions matter, along with the supposed historical facts that the framers intended to codify just that rule. Because the framers did not intend to codify indefeasible sovereign immunity, the objection goes, the majority’s rule is entirely unsupported. There is merit to this criticism, but less, we think, than first meets the eye, for *LEGAL INTENTION* is a less dominant note in Kennedy’s opinion than Souter appreciates.

Kennedy’s central contention is not that the framers intended that Congress would lack power to abrogate state sovereign immunity in state courts, but rather that they intended that states would be independent sovereigns with power and status sufficient to enable them both to serve as bulwarks against excessive concentration of power in the national government, and to satisfy needs of their citizens that can be met more effectively by subnational governments. This principle of independent state authority has retained its vitality over time: “[O]ur federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.”

It requires robust immunity from suit in the waning days of the twentieth century as a modest counterweight to the vast expansion of national regulatory power, at state expense, in our post-*Wickard*, post-*Garcia* world.

The suggestion that the rule of state immunity derives not from what the text says or what the framers intended, but from somewhat freestanding and evolving principles of state authority provokes the second objection to *Alden*: mysteriousness. Chemerinsky put the complaint succinctly: “The primary problem with Kennedy’s argument is that it has a principle nowhere

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228 Cf. *Alden*, 527 U.S. at 763, n.2 (Souter, J., dissenting) (“I am assuming that the Court does not put forward the theory of the ‘fundamental aspect’ as a newly derived conception of its own, necessarily comprehended by the Tenth Amendment guarantee only as a result of logic independent of any intention of the Framers.”).

229 *Alden*, 527 U.S. at 748.

230 Modeled differently, Souter’s critique models the majority’s analysis roughly as follows: *FRAMERS’ INTENT + [facts about what the framers did intend] → states have immunity from private suit, not abrogable by Article I powers*. But Kennedy has a different analytical structure in mind, one that is less vulnerable to competing readings of eighteenth-century history: *STATES MATTER + [facts about the existing balance of power between the national government and the states] → states have immunity from private suit, not abrogable by Article I powers*. 
But Kennedy’s response must be obvious: of course the decision relies on principles not found “in the Constitution.” It’s not “in” the constitutional text that fundamental principles are found! (Who does Chemerinsky think Kennedy is—Justice Thomas?) So while Chemerinsky is right to observe that Kennedy relies upon principles “nowhere found ‘in the Constitution,’” that is an ineliminable aspect of an approach that is organicist—an approach in which the most fundamental constitutional norms are grounded directly in practices of legal actors, including judges and ordinary citizens. That’s what organicism will get you.

Put differently, Souter maintains that Kennedy’s opinion “turns on history.” That’s true, but not exactly as Souter intends. For Kennedy, the history that matters is not fixed in the late eighteenth century. Rather, as Ernie Young observed, “[p]articular pieces of historical evidence—such as statements by the Framers in the ratification debates or The Federalist—are employed to confirm the presence of the broad principle.” “But it is the principle itself,” and not any precise piece of historical evidence, “that does most of the work in deciding the case.” Thus, the evolving “history of legal and political theory...illuminate[s] the meaning of the constitutional plan” and delivers the “principle of sovereign immunity as reflected in our jurisprudence.” Kennedy’s decision in Alden, then, reflects his more general embrace of the “organic development of social institutions.”

So we are not moved very much by the common complaints that Alden is implausible or mysterious. What criticism is left? The most obvious holds that Kennedy gets the force of the relevant principles wrong. Recall that the force a principle exerts for or against a putative legal rule or ruling is a function of two variables: the principle’s relative weight or importance within the system, and the extent to which it is activated or implicated given the facts. If Kennedy gave short shrift in Alden to constitutionally relevant federal interests, it could be because he deemed those interests less weighty than they are, or because he deemed those interests less implicated, which is say, less threatened or impeded.

231 Chemerinsky, supra note 22, at 1294.
232 527 U.S. at 763 (Souter, J., dissenting).
234 Id. Of course, this doesn’t relieve Kennedy of the obligation to show his work—to explain how and why the principles that he espies control as they do—and Young gives him low marks on that score. Id. at 1665. For our riff on this criticism, see infra Part V.
235 Id.
236 Alden, 527 U.S. at 757 (emphasis added).
237 Young, supra note 233, at 1604.
Along with many other critics, we think that both these things are true—in *Alden* and more generally. First, we think that the rule *Alden* discerns and announces threatens or impedes national supremacy more than Kennedy believes. Furthermore, by our lights, Kennedy undervalues the importance of federal interests routinely, and across doctrinal contexts: Kennedy misdescribes and substantially underweights the nationalist principles at stake in *NFIB*, his *Boerne* opinion displays insufficient appreciation for Congress’s special role in enforcing the Reconstruction Amendments; and his unfortunate opinion for the Court in *Abassi* reflects a stark under-appreciation for the importance of principles that we’ve been calling EFFECTIVE NATIONAL POWER. In short, we think that our principles of national power have somewhat broader contours and greater weight than Kennedy does. But we also think that this is the stuff of ordinary constitutional disagreement, not grounds to prosecute for personal whimsy.

2. Abortion. One year after his 1988 arrival on the Court, Kennedy joined Chief Justice Rehnquist’s plurality opinion in *Webster v. Reproductive Health Services* that announced the intention of four justices to reconsider *Roe*. Two years later, Justice Thurgood Marshall, a liberal member of the *Roe* majority, retired and was replaced by the staunch conservative Justice Clarence Thomas, leading most Court-watchers to expect that the Court had five solid votes (Rehnquist, Scalia, White, Thomas, and Kennedy) to overrule *Roe* at the next available opportunity. The next opportunity arose that very

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238 See, e.g., Meltzer, supra note 58, at 1012 (pointing out that the “Court fails to acknowledge” how the rule in *Alden* “harm[s] legitimate national objectives.”); Chemerinsky, supra note 22, at 1301-05 (explaining the limits of alternate mechanisms to enforce the provisions of the FLSA that Kennedy trumpeted in the *Alden* opinion).

239 See Berman, Our Principled Constitution, supra note 5, at n.230. We agree that Kennedy’s vote in *NFIB* is inconsistent with his vote in *Raich* and find the *NFIB* dissent’s attempt to distinguish away *Raich* scandalously bad. Id. But the puzzle might be more Kennedy’s vote in *Raich* than it was his subsequent abandonment of *Raich* in *NFIB*. See Michael D. Ramsey, American Federalism and the Tragedy of Gonzales v Raich, 31 U. QUEENSLAND L.J. 203 (2012) (arguing that Kennedy committed a “critical misstep” by joining Stevens’s majority opinion in *Raich*, and speculatively attributing that mistake to Kennedy’s hostility to drug use).


241 See Vladeck, supra note 63.

242 492 U.S. 490 (1989) (plurality opinion). The Missouri statute upheld in *Webster* directly conflicted with the trimester framework of *Roe*, and the plurality concluded that that framework “has proved ‘unsound in principle and unworkable in practice.’” Id. at 518 (quoting Garcia v. SAMTA, 469 U.S. 528, 546 (1978)).
term, in *Casey*—a case challenging provisions of the Pennsylvania Abortion Control Act.  

In the event, conservative hopes were dashed. In a shocking joint opinion, Kennedy, O’Connor, and Souter wrote to uphold what they characterized as *Roe*’s “central holding”: that women have a constitutionally protected interest in terminating an unwanted pregnancy. At the same time, they replaced *Roe*’s rigid trimester framework with a less onerous “undue burden” test.

The dissenters in *Casey* reacted with fury. Scalia, in particular, was at his angriest, damning Kennedy and his co-authors with *personal whimsy* in unequivocal terms: “[T]he best the Court can do to explain how it is that the word ‘liberty’ must be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice.” In our view, occasional wince-worthy rhetoric aside, and making allowances for the infelicities that (sometimes) attend co-authorship, the joint opinion is a credible effort.

O’Connor, Kennedy, and Souter agreed that abortion regulations implicate two principal principles: a principle that the state must respect the liberty and autonomy interests of the pregnant woman, and of women who may become pregnant, and a principle that the state may act to promote, and express respect for, the life of the unborn. This latter principle follows from a more general principle that the people of a state may act through the law to express and advance their deeply held moral commitments. So abortion restrictions present two principles in conflict: a principle of *LIBERTY*, and a principle of *DEMOCRACY*. (This is to put things grossly, but greater nuance isn’t needed at this point.)

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244 Kennedy is reported to have initially voted to overrule *Roe* at the Justices’ conference in Casey. Edward P. Lazarus, Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court 470 (1998).
245 *Casey*, 505 U.S. at 853, 874.
246 Id. at 983.
247 Id. at 869 (“[A] woman’s liberty to determine whether to carry her pregnancy to full term”).
248 Id. at 871 (“[T]he State's ‘important and legitimate interest in protecting the potentiality of human life.’”) (quoting *Roe* v. Wade, 410 U.S. 113, 162 (1973)).
The authors of the joint opinion suggest that they may have differing (or unsettled) views about which principle would outweigh the other were this a matter of first judicial impression. But it wasn’t. *Roe* had already held that bans on abortion from conception are unconstitutional. The fact of that holding implicates a third principle: STARE DECISIS. Thus, on the facts of *Casey*, three weighty principles bore on the decision. The authors of the joint opinion all agreed that the aggregate weight of these three principles dictated that banning abortion is unconstitutional, whatever their views of the relevant balance might have been had they been writing on a blank judicial slate. This judgment is reflected in the dynamic depicted on the left edge of the image below.

But that wasn’t the end of the story. There are not only two possible constitutional rules: states may criminalize abortion from conception, and restrictions on abortion are constitutionally prohibited during the first trimester. There are countless possibilities. O’Connor had floated a distinct one in her 1983 dissent in *City of Akron v. Akron Center for Reproductive Health*: regulations on abortion are permissible, even during the first trimester, if they do not impose an undue burden on the ability of a woman
to terminate a pregnancy.\textsuperscript{249} The \textit{Casey} joint opinion concluded that the aggregate weight of the principles favored O’Connor’s \textit{undue burden} rule over \textit{Roe’s trimester} rule because the former gains more in the coin of \textit{DEMOCRACY} than it loses in the coins of \textit{LIBERTY} and \textit{STARE DECISIS}, combined. This judgment is reflected in the dynamic depicted on the right side of the image above. (The top side shows that the case does not present a cycling problem: just as the net weight of principles favors the \textit{undue burden} rule over \textit{Roe’s trimester} rule, so too does it favor \textit{undue burden} over a \textit{pro-life} rule that conservative critics of \textit{Roe} favor.) Put differently, the “\textit{undue burden}” standard optimizes the applicable constitutional principles better than either the “compelling interest” test that \textit{Roe} endorsed or the complete elimination of the abortion right.

That’s our interpretation of the joint opinion’s reasoning. In support of his \textit{personal whimsy} charge, Scalia threw the entire kitchen sink of objections—\textit{inconsistency} (Kennedy and O’Connor “abandon[ed] previously stated positions”),\textsuperscript{250} \textit{mysteriousness} (their “new mode of constitutional adjudication” is “nothing more than philosophical predilection”),\textsuperscript{251} \textit{implausibility} (the joint opinion’s analysis of \textit{stare decisis} is “contrived”),\textsuperscript{252} and \textit{obscurity} (there is no way to know what is or is not an “\textit{undue burden},” because the standard is a “verbal shell game”).\textsuperscript{253} Many conservative commentators agreed.\textsuperscript{254}

It would consume too much space to tackle all these objections, and others have done so adequately.\textsuperscript{255} We’ll concentrate on what we think is the nub: that if justices abandon text and longstanding (fairly specific) traditions

\textsuperscript{250} \textit{Casey}, 505 U.S. at 997 (Scalia, J., dissenting).
\textsuperscript{251} \textit{Id.} at 1000.
\textsuperscript{252} \textit{Id.} at 993.
\textsuperscript{253} \textit{Id.} at 987.
\textsuperscript{254} \textit{See} Michael Stokes Paulsen, \textit{The Worst Constitutional Decision of All Time}, 78 NOTRE DAME L. REV. 995, 1040 (2003) (“The decision wrongly holds that the Constitution of the United States enshrines as a nearly absolute right the prerogative of a woman to abort her unborn child for essentially any reason. There is no basis—absolutely no basis—in the language of the Constitution for such a holding.”); Nagle, \textit{supra} note 78, at 22 (“[E]ven in these stunningly expansive passages, the justices do not fully or precisely describe the vision that drives their decision to reaffirm the essentials of \textit{Roe}”).
as the sole grounds or determinants of our constitutional law, then they are left with nothing other than their own personal value judgments to guide them.\footnote{As Scalia’s dissent put it: “[T]he best the Court can do to explain how it is that the word ‘liberty’ must be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice.” \textit{Casey}, 505 U.S. at 983 (Scalia, J., dissenting).} Although a reasonable concern, this version of the objection draws far too stark a divide between the genuine alternatives. Organicists recognize that our fundamental constitutional principles change over time as the commitments of participants in constitutional practice do. By their nature, evolving commitments and practices are apt to be disputed. But that does not entail that informed observers cannot get them right, or that their claims about the contents and relative weights of our evolving principles can be nothing other than projections of their personal preferences. (Compare: an astute observer of fashion, etiquette, or grammar can correctly discern what the rules of any of those domains have become, even while decrying them.) And though it’s plain that Americans disagree mightily over the bottom-line moral permissibility of abortion, and about the moral status of the fetus at various stages of gestation, the judgment by the authors of the \textit{Casey} joint opinion—that matters “central to personal dignity and autonomy” are covered by our constitutional principles of liberty, and that such matters encompass decisions related to procreation—is far from wacky.

Eight years after \textit{Casey}, the Court had the first of two encounters with legislative bans on abortion procedures that medical professionals call “dilation and evacuation” (D&E) and “dilation and extraction” (D&X) and that abortion opponents call collectively “partial-birth abortion.” In \textit{Stenberg v. Carhart},\footnote{\textit{Stenberg}, 530 U.S. 914 (2000).} the Court by a 5-4 margin struck down a Nebraska statute that made performance of a “partial birth abortion”\footnote{\textit{Id.} at 922. While the statute proffered a definition of what constituted a “partial birth abortion,” it did so without reference to a specific procedure. So, as O’Connor’s concurrence explained, “the D&E procedure is included in this definition,” and “it is not possible to interpret the statute’s language as applying only to the D&X procedure,” as Kennedy’s dissent insisted. \textit{Stenberg}, 530 U.S. at 949 (O’Connor, J., concurring); \textit{Stenberg}, 530 U.S. at 960 (Kennedy, J., dissenting) (“Nebraska seeks only to ban D&X.”).} a crime reasoning that the “Nebraska law... does not directly further an interest ‘in the potentiality of human life’ by saving the fetus in question from destruction, as it regulates only a \textit{method} of performing abortion.”\footnote{\textit{Stenberg}, 530 U.S. at 930 (emphasis in original).} Kennedy dissented and took issue with the majority’s characterization of the state’s interest, arguing “Nebraska was entitled to find the existence of a consequential moral difference” between abortion procedures.\footnote{\textit{Stenberg}, 530 U.S. at 962 (Kennedy, J., dissenting).} According to Kennedy, the decision...
“contradicts *Casey*’s assurance that the State’s constitutional position in the realm of promoting respect for life is more than marginal.”261

Congress responded to *Stenberg* by passing the Partial-Birth Abortion Act, which proscribed “partial-birth abortion” nationwide.262 By 2007, a challenge to the Act reached the Supreme Court in the form of *Gonzales v. Carhart*. By this time, O’Connor had retired and been replaced by the pro-life Samuel Alito, producing five votes to uphold the ban. Kennedy wrote the majority opinion, reasoning that the ban does not unduly burden either pre- or post-viability abortions because other methods of abortion remain available—including most D&E procedures, which the Court interpreted the Act not to cover.263 Furthermore, the ban does not have the purpose of placing a substantial obstacle in the path of women choosing an abortion because it is animated by the legitimate purpose of promoting respect for life.

Now it was the liberals’ turn to cry foul. The chief objection, voiced first in Justice Ginsburg’s impassioned dissent, was *inconsistency.*264 Kennedy starts the analysis portion of the majority opinion by establishing the terms of debate: “Whatever one’s views concerning the *Casey* joint opinion, it is evident [that] a premise central to its conclusion [is] that the government has a legitimate and substantial interest in preserving and

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261 *Id.* at 964.
262 *See* *Gonzales v. Carhart*, 550 U.S. 124, 150 (2007). The federal statute, like the Nebraska statute, spoke in terms of a “partial-birth abortion,” rather than a specific medical procedure. But, according to the majority, the federal statute defined the procedure more specifically than did its Nebraska counterpart so as to proscribe only D&X—referred to by the majority as intact D&E—and not all D&E procedures. *Id.* at 150 (“The Act prohibit intact D&E; and, notwithstanding respondents’ arguments, it does not prohibit the D&E procedure in which the fetus is removed in parts.”); *see also* *id.* at 136 (explaining the nomenclature).
263 Kennedy emphasized that “[t]he Act exclude most D&E” procedures. *Id.* at 151. Ginsburg’s dissent questioned the validity of this distinction. *Gonzales*, 550 U.S. at 181 (Ginsburg, J., dissenting) (“[T]he Court emphasizes that the Act does not proscribe the nonintact D&E procedure. But why not, one might ask.”).
264 *Gonzales*, 550 U.S. at 190-91 (Ginsburg, J., dissenting). A second objection attached itself to Kennedy’s ruminations that “some women come to regret their choice to abort the infant life they once created and sustained,” that “[s]evere depression and loss of esteem can follow,” and hence that a legislative ban on intact D&E might benevolently save a woman who elects to have an abortion from discovering, with “grief more anguish and sorrow more profound . . . that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.” *Gonzales*, 550 U.S at 159-60. Many readers condemned what they viewed as baseless and offensive speculation. *See*, e.g., Ronald Dworkin, *The Court & Abortion: Worse Than You Think*, THE N.Y. REV. OF BOOKS, (May 31 2007). http://proxy.library.upenn.edu:3406/articles/2007/05/31/the-court-abortion-worse-than-you-think/#fnr-3. We share that assessment. But we don’t think it does much work in Kennedy’s analysis. It was a gratuitous unforced error.
promoting fetal life.”

Ginsburg agrees that *Casey* recognized the state’s interest in preserving and promoting fetal life. “But,” she insists, “the Act scarcely furthers that interest: The law saves not a single fetus from destruction, for it targets only a method of performing abortion.” Thus, she observes, the majority here “admits that ‘moral concerns’ are at work . . . untethered to any ground genuinely serving the Government’s interest in preserving life.” And that, Ginsburg concludes, is a striking departure from *Casey*. By allowing such moral concerns to justify restrictions on the abortion right, “the Court dishonors our precedent.”

We are not persuaded by this criticism. We agree with Ginsburg that a ban on intact D&E that allows standard D&E does little to protect fetal life. And it is certain both that Kennedy’s majority opinion does occasionally characterize *Casey* as having positioned a state interest in protecting fetal life against the pregnant woman’s liberty interests, and that *Casey* did say those things. But that’s not all that *Casey* said, or that *Gonzales* said that *Casey* said. *Casey* itself made clear that DEMOCRACY militated for the state’s ability (speaking for the majority of its citizenry) to express respect for fetal life: “The woman’s liberty is not so unlimited . . . that from the outset the State cannot show its concern for the life of the unborn.”

Kennedy is consistent when, in *Gonzales*, he asserts that *Casey* “confirms the State’s interest in promoting respect for human life.” Indeed, because the post-*Roe* decisions “had ‘undervalue[d]’ the State’s interest in potential life,” a “central premise” of *Casey* was that “[t]he Government may use its voice and regulatory authority to show respect for he life within the woman.” And, according to Kennedy, that is what banning a procedure

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265 *Gonzales*, 550 U.S at 145.
266 *Id.* at 145-46.
267 *Gonzales*, 550 U.S at 181 (Ginsburg, J., dissenting).
268 *Id.* at 182.
269 *Id.* (citing *Casey* and *Lawrence*).
270 See, e.g., *Gonzales*, 550 U.S at 145 (quoting *Casey*) (“And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.”).
271 Planned Parenthood v. *Casey*, 505 U.S. 833, 869 (1992); see also *Id.* at 877 (“[T]he State may . . . express profound respect for the life of the unborn.”). See also *Gonzales*, 550 U.S at 146 (quoting *Casey*) (“[T]he State may . . . express profound respect for the life of the unborn.”).
272 *Gonzales*, 550 U.S at 163.
273 *Id.* at 157 (quoting *Casey*, 505 U.S. at 873 (plurality opinion)).
that Congress found “disturbing” achieved: “The Act expresses respect for the dignity of human life.”

That clarified, we can understand Kennedy’s Gonzales opinion in terms of the three core Casey principles: LIBERTY, DEMOCRACY, and STARE DECISIS. The last exerts little force here, according to Kennedy, because Stenberg is distinguishable and because Casey establishes the framework for analysis without dictating a particular conclusion. Thus, whether the legislative ban is or isn’t an “undue burden” depends upon the relative force of the first two principles. Kennedy concludes that DEMOCRACY favors the constitutionality of the ban more than LIBERTY favors its unconstitutionality. This is because the cost to liberty interests of upholding the Act is measured by its actual impact (small), whereas the cost to democracy of striking down it down is measured, in part, by the ban’s expressive significance to its proponents (large). The balance of principles looks something like this:

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274 Id. at 157, 158.
275 Gonzales, 550 U.S at 166-67 (“The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman’s health, given the availability of other abortion procedures that are considered to be safe alternatives.”). As was the case in Alden, we think Kennedy’s Gonzales decision understates the cost of the countervailing principle. Whereas there Kennedy found the rule concerning state sovereign immunity posed no great threat to NATIONAL SUPREMACY; here, he concludes that the ban does not implicate or activate principles concerning LIBERTY. In both cases, we see these principles activating more than Kennedy acknowledges. See supra notes 238-239 (discussing Alden and NATIONAL SUPREMACY); Gonzales, 550 U.S at 172 (Ginsburg, J., dissenting) (arguing the federal statute implicates women’s liberty interests more than the Court appreciates because it “forces women to resort to less safe methods of abortion”).
276 In both Stenberg and Gonzales the laws vindicated the governments’ “critical and legitimate role in legislating on the subject of abortion, as limited by the woman’s right.” Stenberg, 530 U.S. at 956-57 (Kennedy, J., dissenting).
The rules announced in *Casey* and *Gonzales* illustrate Kennedy’s recognition that “the principles do not contradict one another,” and that all should be given effect. Kennedy’s attempt to do so strikes us as broadly defensible, though obviously disputable. Given that both the liberal and conservative camps of the Court may fairly be criticized for slighting genuine constitutional principles that bear on abortion regulations, Kennedy’s position is not obviously more subjective than those of his colleagues.

3. Gay and lesbian rights. Whereas Kennedy has been a secondary voice (though most frequently a decisive vote) on federalism and abortion, he has been the leading player on gay rights. By common accounting, the Supreme Court has decided three pivotal gay rights cases during Kennedy’s thirty-year tenure—*Romer*, *Lawrence*, and *Obergefell*—and Kennedy authored the majority opinion in all. Each has attracted withering criticism: *Romer* “defies logic”; *Lawrence* is “a tissue of sophistries.”

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278 Both wings of the Court undervalued one of the principles activated in these opinions. In *Casey*, the conservatives in dissent refused to countenance a woman’s protected liberty interest. Compare *Casey*, 505 U.S. at 980 (Scalia, J., dissenting) (“The issue is whether [abortion] is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion . . . because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.”), with *Casey*, 505 U.S. at 871 (plurality opinion) (“The woman’s right to terminate her pregnancy before viability . . . is a . . . component of liberty we cannot renounce.”). In the partial-birth abortion ban cases, the liberals ignored the State’s interest in protecting, promoting, and expressing respect for, prenatal life. Compare *Gonzalez*, 550 U.S. at 181 (Ginsburg, J., dissenting) (arguing the federal Act “scarce[ly] furthers” any legitimate state interest), with *Casey*, 505 U.S. at 871 (plurality opinion) (prior decisions have “given [state interests] too little acknowledgement and implementation.”).
280 Graglia, *supra* note 53 at 426. See also Tymkovic, *supra* note Error! Bookmark not defined.
embroidered with a bit of sophomoric philosophizing”,281 and Obergefell “has no more basis in the Constitution than did the naked policy preferences adopted in Lochner.”282 We assess here whether that criticism is warranted, focusing on the big three.

Romer arose as a challenge to an amendment to the Colorado state constitution that provided that discrimination on the basis of sexual orientation was permissible and could be made impermissible only by subsequent amendment.283 Kennedy wrote the opinion for the Court striking it down. Notice how the opinion starts:

One century ago, the first Justice Harlan admonished this Court that the Constitution “neither knows nor tolerates classes among citizens.” Plessy v. Ferguson, 163 U.S. 537, 559, (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law’s neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado’s Constitution.284

This is the key: the amendment offends against a principle of NON-SUBORDINATION or ANTI-CASTE. That’s not the only principle of relevance; HISTORICAL PRACTICE MATTERS is also lurking about, for instance. But it is surely doing the majority of the work. It’s a difficult case and not a clearly reasoned opinion.285 So we’re simplifying. That said, the simplified idea is that the amendment is unconstitutional because its practical consequences, and its intended and probable social meaning, are to reinforce subordinate social status of gay, lesbian, and bisexual members of the polity. That offends a weighty principle, and is not outweighed by other principles pointing in the opposite direction.

That, we think, is the crux of Kennedy’s reasoning. It confronts two main objections, of implausibility and inconsistency, respectively. First, the

281 Nelson Lund & John O. McGinnis, Lawrence v. Texas and Judicial Hubris, 102 MICH. L. REV. 1555, 1557 (2004); see also Whelan, supra note Error! Bookmark not defined. (calling Lawrence “unfettered moral philosophizing” and “meta-nonsense”).
284 Id. at 623.
285 Cf. Daniel Farber & Suzanna Sherry, The Pariah Principle, 13 CONST. COMMENTARY 257, 257 (1996) (“Romer means no more and no less than what it says (or at least tries to say)”).
reasoning is so shoddy as to undermine the candor of its author. Second, the result is incompatible with Bowers.

To respond to the charge of implausibility, we need to be as precise as possible about its target. The main target is what Scalia, in a blistering dissent, deems “the central thesis of the Court’s reasoning,” to wit, “that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others.” This is a sharp-edged thesis—in our terminology, a “rule.” And thus construed, Scalia objects, it is completely implausible in “any multilevel democracy,” such as our own: “For whenever a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decisionmaking, . . . the affected group has (under this theory) been denied equal protection.” Yet, he continues, in many cases the conclusion that the discrimination offends the Constitution seems utterly implausible.

To take the simplest of examples, consider a state law prohibiting the award of municipal contracts to relatives of mayors or city councilmen. Once such a law is passed, the group composed of such relatives must, in order to get the benefit of city contracts, persuade the state legislature—unlike all other citizens, who need only persuade the municipality. It is ridiculous to consider this a denial of equal protection, which is why the Court’s theory is unheard of.

We think Scalia’s argument is good, taken on its own terms. It is implausible to maintain, in a rulish way, that it is unconstitutional to withdraw issues that particular affect some persons or groups to a higher level of decisionmaking. But it is not obvious that Kennedy’s “central thesis” is best read as Scalia construes it. What Kennedy wrote was that “A law declaring that in general it shall be more difficult for one group of citizens than for all

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286 Romer, 517 U.S. at 653 (Scalia, J., dissenting) (“Today's opinion has no foundation in American constitutional law, and barely pretends to.”).
287 Id. at 636 (Scalia, J., dissenting) (“In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, see Bowers v. Hardwick, 478 U. S. 186 (1986)”).
288 Id. at 639.
289 Id. Note that, in the sentences immediately following his formulation of the majority’s “central thesis,” Scalia twice characterizes it as a “principle.” Id. It’s important for the rest of his argument, however, that Scalia treat the thesis he attributes to Kennedy as a determinate norm (what we’re calling a “rule”), and not as a norm with weight (what we’re calling a “principle”). Were Kennedy’s supposed central thesis recharacterized as a principle, then it couldn’t be disproven by Scalia’s counter-examples.
290 Id.
others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”

And that seems right. A legal declaration of this sort would be a denial of equal protection of the laws in the most literal sense. But that doesn’t entail that this law quite amounts to such a declaration or that it constitutes a denial of equal protection in the legal sense. That depends on the balance of all relevant principles. And the central principle, Kennedy clearly announced at the get-go, is (roughly) ANTI-CASTE.

Once we realize that the shape of a constitutional rule is determined by the aggregate bearing of multiple principles, Scalia’s example can be seen to bolster Kennedy’s case more than to undermine it. For the striking thing about those on the short end of Scalia’s imagined stick—the relatives of municipal officeholders—is that they don’t constitute a socially inferior class or caste. It is more than plausible that the combined force of ANTI-CASTE and EQUAL POLITICAL ACCESS (to put a name to the principle that both the Colorado state constitutional Amendment 2 and Scalia’s hypothetical state law infringe or offend against) establish that the former is unconstitutional even if the latter isn’t.

So we do not find the implausibility charge compelling. The inconsistency objection has greater force: Romer is hard to square with Bowers. “If it is constitutionally permissible for a State to make homosexual conduct criminal,” Scalia reasoned, “a fortiori it is constitutionally permissible for a State to adopt a provision not even disfavoring homosexual conduct, but merely prohibiting all levels of state government from bestowing special protections upon homosexual conduct.”

Of course, a charitable response on Kennedy’s behalf is that avoiding this inconsistency was not so pressing as to outweigh the combined force of ANTI-CASTE and EQUAL POLITICAL ACCESS, and that whether Bowers could withstand the force of principles weighing in favor of a right to engage in homosexual sodomy could await a more appropriate occasion. But we agree with the many

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291 Romer, 517 U.S. at 633.

292 Our take resonates with Akhil Amar’s defense of Kennedy’s Romer opinion. See Amar, Attainder and Amendment 2, supra note 4. Amar concluded that the “sociology and the principles underlying the Attainder Clause”—what he deemed a “nonattainder principle” that “tap[s] into basic principles of separation of powers and equal protection”—explains Kennedy’s invalidation of Amendment 2. Id. 203-04, 210. Amar’s “nonattainder principle,” then, is analogous in shape and effect to what we have deemed an ANTI-CASTE principle. Perhaps the main difference is that whereas Amar, a textualist, ties his principle to a specific provision of the Constitution (the Attainder Clause), a principled positivist such as Kennedy is not quite so limited (and may also believe that, in some analyses, the text serves more as decoration than as engine).

293 Romer, 517 U.S. at 640-41 (Scalia, J., dissenting).
commentators who maintain that the failure of Kennedy’s opinion even to mention Bowers warrants criticism.294

In any event, a more appropriate occasion to reconsider Bowers did arise several years later, in Lawrence.295 And Kennedy took it, writing for five justices to overrule the earlier decision.296 We reckon that Lawrence is an easy case for almost any principled positivist who, like Kennedy, believes that our constitutional regime includes robust principles that broadly concern liberty and that evolve organically.297 Without pretending to an unrealizable degree of precision or nuance, here are three more-or-less distinct principles, and associated labels: LIBERTY (people should be free to pursue happiness as they conceive it), AUTONOMY (the state should promote the development of people’s capacities and opportunities to lead autonomous and meaningful lives), and EQUAL DIGNITY (the state should treat all people with equal respect, and not act to demean or denigrate).298 Assuming these count among our constitutional principles, their force on these facts is not elusive: People have powerful liberty interests in having sex with consenting others, and in building relationships that involve acts of sexual intimacy.299 Furthermore, the effect and social meaning of a ban on gay and lesbian sex are extraordinarily demeaning and denigrating.300 Pointing the other way is


296 Justice O’Connor concurred, for a sixth vote to vindicate Lawrence’s constitutional rights. But she would have rested solely on equal protection grounds, thus not formally upsetting Bowers. Lawrence, 539 U.S. at 579 (O’Connor, J., concurring in the judgment).

297 Lawrence’s pronouncements on liberty are sweeping. See e.g., Lawrence, 539 U.S. 562, 567, 571-72 (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”). Kennedy’s endorsement of organicism is equally full-throated: “As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.” Id. at 579.

298 In discussing Kennedy’s abortion decisions, we lumped the cluster of similar but distinct principles under a single heading entitled LIBERTY. See supra Part IV.B.2. Here, we engage in a modest degree of splitting. The reason for this is that the existence of similar, mutually reinforcing, but non-identical principles of LIBERTY, AUTONOMY, and DIGNITY is significant in the gay rights cases, as it wasn’t in the abortion cases.

299 Lawrence, 539 U.S. at 572 (There is “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”).

300 Lawrence, 539 U.S. at 575 (“Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects” because “[w]hen homosexual conduct is made criminal by the law of the
STARE DECISIS. But that is “not an inexorable command”—i.e., it’s a *principle*—and it would be bizarre if those who believe that LIBERTY, AUTONOMY, and DIGNITY represent genuine principles of American constitutional law at the start of the twenty-first century did not also conclude that, on this issue, they outweigh STARE DECISIS by a significant measure.

Sure, you might have a very different constitutive theory. You might deny that the ground floor of our constitutional order consists of multiple, dynamic principles. But that is a jurisprudential disagreement, if a fairly deep one. It’s not an objection adequate to underwrite *personal whimsy*—at least so long as we intend not to defame everyone with whom we strongly disagree. Yet *personal whimsy* is the charge that Scalia levels in his characteristically heated dissent, and that many commentators reiterate. To support that strong thesis, Kennedy’s critics press *obscurity, implausibility, and inconsistency*.

The *obscurity* charge targets Kennedy’s supposed incomprehensible justification for the final rule. Scalia carped that “principle and logic have nothing to do” with the Court’s decision and that most of Kennedy’s opinion has “no relevance to its actual holding.” 302 Scholars leveled the same criticism. Sunstein called the majority opinion “remarkably opaque.” 303 Nelson Lund and John McGinnis complained that it “simply abandons legal analysis. Freed from the chains even of rational argument, the *Lawrence*

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301 *Id.* at 577.
302 *Lawrence*, 539 U.S. at 586, 605 (Scalia, J., dissenting).
303 Sunstein, *supra* note 70 (asking rhetorically “What Did Lawrence Hold?”).
Court issued an ukase wrapped up in oracular riddles.304 Although the opinion is unlikely to win its author any writing awards, we think the gist of the opinion clear enough: prohibiting gay and lesbian adults from engaging in consensual sex acts is a grievous insult to principles of liberty, autonomy, and dignity. What’s so hard to figure out?305

A superficially more promising objection sounds in implausibility. Orthodox substantive due process doctrine holds that a restriction on a liberty interest that does not qualify as a fundamental right must be upheld so long as rationally related to any legitimate state interest. Because Kennedy did not say that the sex acts that Texas criminalized were fundamental rights, and because he concluded that “the Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual,”306 observers inferred that the Court held that the law was subject to, and failed, the rational basis test of hornbook fame.307 But that amounted to the contention—wholly implausible in the eyes of many—that promoting majoritarian moral norms is not even a legitimate interest. Scalia: “I turn now to the ground on which the Court squarely rests its holding: the contention that there is no rational basis for the law here under attack. This proposition is out of accord with our jurisprudence—indeed, with the jurisprudence of any society we know—that it requires little discussion.”308

Even if the proposition is absurd, we think it less clear than Scalia does that it did ground the Court’s holding. Kennedy’s concluding sentence is ambiguous. Scalia interprets it to mean “the statute furthers no legitimate state interest, full stop.” And he thinks that a crazy claim because promoting the community’s moral values is surely a legitimate interest. But an alternative interpretation of Kennedy’s conclusion is available: “the statute furthers no legitimate state interest sufficient in importance to justify this

304 Lund & McGinnis, supra note 281 at 1574; see also id. at 1614 (“[F]ew decisions in its entire history are so poorly reasoned”).
305 Criticizing Kennedy’s opinions in both Lawrence and Roper v. Simmons, Posner charges that “[t]hey are startlingly frank appeals to moral principles that a great many Americans either disagree with or think inapplicable to gay rights and juvenile murderers.” Richard A. Posner, Foreword: A Political Court, 119 HARV. L. REV. 31, 84 (2005). We believe, to the contrary: that Kennedy appropriately appeals to these principles qua constitutional principles, not qua moral principles; that it is not clear that a great many Americans do disagree with the relevant principles; and that the Court does not owe deference to popular disagreements regarding how or whether genuine constitutional principles apply to given facts (i.e., regarding how principles are activated).
306 Lawrence, 539 U.S. at 578.
307 Scalia called this “an un-heard form of rational-basis review.” Lawrence, 539 U.S. at 586 (Scalia, J., dissenting).
308 Id. at 599.
intrusion.” So construed, we think the contention is not only plausible but plainly true.

Scalia thinks this interpretation unavailable because our settled doctrinal tests don’t allow for this type of sliding-scale balancing. In contrast to European-style proportionality review, our doctrine delivers only three tracks for analysis, and because the majority did not maintain that the liberty interests at stake qualify for “intermediate” or “strict” scrutiny, then the challenged law can be invalidated only if it is irrational to believe that it promotes even a barely legitimate interest.

But the tiers of scrutiny are judge-crafted “decision rules” designed to “implement” our constitutional law. They are not accurate renditions of what our constitutional principles serve up. And however binding those tests are on lower court judges, it is not clear that they are understood to fully bind the justices themselves. Kennedy had already demonstrated willingness, in his Lopez concurrence, to resolve constitutional disputes by attending directly to the balance of underlying principles, neither applying existing judge-crafted doctrine nor announcing new doctrine. That’s plausibly what he’s doing here.

If Lawrence is neither obscure nor implausible, the inconsistency objections remain. There are two: (1) even if there might be adequate grounds to disregard stare decisis and overturn Bowers, doing so is inconsistent with the test laid out in Casey, and (2) Kennedy’s substantive due process analysis is “incompatible” with the “deeply-rooted-in-history-and-tradition” standard of Glucksberg—an opinion Kennedy joined.

No doubt there is some merit to these objections. The question is whether they have so much merit as to significantly undermine or question Kennedy’s integrity or competence. We don’t think so. That Kennedy credited the precedential force of Roe but not Bowers is understandable when one recalls that stare decisis is “a series of prudential and pragmatic considerations”—that is, a principle—and not a set of necessary and

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309 See supra note Error! Bookmark not defined.

310 This idea has been most clearly articulated and endorsed in the jurisprudence of Justice Stevens, who understands the tiered system of review as “an explanatory rather than an analytical device,” binding on the Court. Andrew M. Siegel, Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation, 74 FORDHAM L. REV. 2339, 2349 (2006).

311 Lawrence, 539 U.S. at 592 (Scalia, J., dissenting) (“[I]t . . . should surprise no one, that the Court has chosen today to revise the standards of stare decisis set forth in Casey. It has thereby exposed Casey’s extraordinary deference to precedent for the result-oriented expedient that it is.”).

312 See Calabresi, supra note 32.
sufficient conditions—that is, a rule.\textsuperscript{313} The degree to which a principle is activated depends on the facts of a specific case. As for the inconsistency with Glucksberg, it is doubtful that Kennedy ever embraced the strict “deeply-rooted-in-history-and-tradition” standard announced there, even if he joined the opinion. Indeed, in City of Sacramento v. Lewis, a case decided one term after Glucksberg, Kennedy authored a separate concurrence where he insisted “it must be added that history and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry.”\textsuperscript{314} Lawrence reflects continuity with this understanding of constitutional liberty.

The constitutionality of state laws denying recognition to same-sex couples lay in the background of Romer, and was only barely offstage in Lawrence.\textsuperscript{315} It took center stage in Obergefell.\textsuperscript{316} We think the issue relatively easy for principled positivism given (highly) plausible assumptions about the rough shape and weight of relevant principles of Liberty and Dignity. First, the ability to enter into the legal institution of marriage with one’s life partner is a matter of tremendous instrumental value: it facilitates the ability of adults to accumulate and control material wealth, of parents to direct the upbringing of their children, and of persons who may become ill or incompetent (all of us) to ensure that a trusted intimate has legal power to make decisions for their welfare. Second, the exclusion of same-sex couples from the important and highly salient legal institution demeans, degrades, and insults gays and lesbians.

\textsuperscript{313} Casey, 505 U.S. at 854 (plurality opinion).
\textsuperscript{315} The Massachusetts Supreme Court decided Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003), the first case to recognize a right to gay marriage, five months after Lawrence.
\textsuperscript{316} 135 S. Ct. 2584 (2015).
This, we think, is essentially how Justice Kennedy saw things in Obergefell. Is his opinion hard to parse? Yes. Is it a model of judicial craftsmanship? Not exactly. But he got the crux of the matter exactly right. First, “marriage is ‘one of the vital personal rights essential to the orderly pursuit of happiness by free men.”’\textsuperscript{317} Second, the exclusion of same-sex couples from the marriage right “is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes” gays and lesbians, and “serves to disrespect and subordinate them.”\textsuperscript{318} In sum, the unconstitutionality of limiting legal recognition of marriage to opposite-sex couples is driven by the “interrelation of the two principles” of liberty and equality.\textsuperscript{319}

The opinion provoked two main objections, both fairly captured by Roberts’s intemperate dissent. First, obscurity. “The central point,” Roberts observed, seems to be that there is a ‘synergy between’ the Equal Protection Clause and the Due Process Clause.” But, he complained, the supposed interaction between the Clauses “is quite frankly, difficult to follow.”\textsuperscript{320} Second, mysteriousness: “There is, after all, no ‘Companionship and Understanding’ or ‘Nobility and Dignity’ Clause in the Constitution.”\textsuperscript{321}

\textsuperscript{317} Id. at 2598 (quoting Loving v. Virginia, 388 U.S. 1, 12 (1967)).
\textsuperscript{318} Id. at 2602, 2604.
\textsuperscript{319} Id. at 2603.
\textsuperscript{320} 135 S.Ct. at 2623 (Roberts, CJ., dissenting).
\textsuperscript{321} Id. at 2616.
By now it should be clear that neither objection is remotely compelling. The first objection requires constitutional analysis to choose among clauses in a fashion that principled positivism rejects. The assumption that rights reside in discrete clauses of the written Constitution and must be satisfied individually or not at all is characteristic of rule-based reasoning, and simply denies what principled positivism affirms—namely, that principles determine rules aggregatively. And Roberts’s mysteriousness objection merely reprises Chemerinsky’s objection to Kennedy’s *Alden* decision, this time from the other side of the aisle. Roberts is wrong for the same reason: principles that do not correspond to, and are not encoded in, portions of the constitutional text are nevertheless the fundamental norms of our constitutional system. Sure, maybe *Obergefell* was wrongly decided. But Roberts’s charge that “[t]he majority’s decision is an act of will, not legal judgment,” is a slander.

[Masterpiece Cakeshop would go here.]

4. Race. We cannot attempt a remotely thorough assessment of Kennedy’s jurisprudence on race in this already overlong Article. There are too many cases on too many different topics. The nutshell summary is that, throughout his long judicial career, Kennedy has been a mostly orthodox and overwhelmingly reliable vote for conservative outcomes, consistently invalidating race-conscious admissions programs and set asides, frustrating efforts to desegregate public schools, and rejecting statutory and constitutional challenges to racially gerrymandered districts. The decisions he joined on these issues attracted criticism from the left, but nothing about Kennedy’s performance on race in his first quarter-century on the Court contributed much fuel to the personal whimsy fire.

That changed just two years ago, in *Fisher II*, when Kennedy wrote for a 4–3 Court (Scalia deceased, Kagan recused) to uphold a program of race-
based admissions preferences at the University of Texas.\textsuperscript{325} When the program had visited the Court three terms earlier, in \textit{Fisher I}, Kennedy had written for seven justices to vacate the lower court’s opinion that had rejected the plaintiff’s constitutional challenge, and to instruct the appellate court to apply more searching review. “The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal,” he emphasized. “On this point, the University receives no deference.”\textsuperscript{326} On remand, the Fifth Circuit again upheld the program, leading Court watchers to anticipate another reversal.\textsuperscript{327} Nevertheless, Kennedy upheld the program, concluding that Texas “articulated precise and concrete goals” supported “by significant evidence, both statistical and anecdotal, in support of the University’s position,” that race conscious considerations were necessary to achieve the educational benefits that flow from diversity.\textsuperscript{328}

Alito in dissent objected spiritedly that the majority opinion was entirely inconsistent with the hornbook understanding of strict scrutiny and with Kennedy’s own previous insistence, in his \textit{Grutter} dissent and \textit{Fisher I} opinion, that the test must be applied rigorously and without deference.\textsuperscript{329} While “the University has still not identified with any degree of specificity the interests that its use of race and ethnicity is supposed to serve,” Alito complained, “the Court inexplicably grants” a “plea for deference that we emphatically rejected in our prior decision.”\textsuperscript{330} Onlookers agreed, proclaiming that \textit{Fisher II} “betrays” Kennedy’s “previous equal protection jurisprudence and the belief that we have a colorblind Constitution,”\textsuperscript{331} and deeming it “a deplorable misfire.”\textsuperscript{332} As Richard Primus wryly observed in

\begin{flushright}
330 \textit{Id.}
332 Ki rsanow, supra note 37 (“[\textit{Fisher II}] was a deplorable misfire inconsistent with [Kennedy’s] opinion in \textit{Fisher I} and with his previous opinions in cases involving race-based decisionmaking”).
\end{flushright}
the *New York Times*: “[T]he most deceptive thing about [*Fisher*] is its first words: ‘Justice Kennedy delivered the opinion of the court.’”

We cannot fully reconcile *Fisher II* with its predecessors. We agree with critics that Kennedy’s opinion defers to the state on narrow tailoring in a way that *Grutter* and *Fisher I* forbid. Instead of trying to erase all traces of inconsistency, we will content ourselves with explaining its source. In our view, two points are essential to understanding Kennedy’s jurisprudence surrounding race. First, like his fellow conservatives, and unlike his liberal colleagues, Kennedy believes that colorblindness is a feature of our constitutional order. Second, and in contrast to the most conservative justices, he believes that colorblindness is a constitutional *principle*, not a constitutional *rule*.

Kennedy’s commitment to COLORBLINDNESS is manifest. As he insisted in his *Croson* concurrence: “The moral imperative of racial neutrality is the driving force of the Equal Protection Clause.”

In *Miller v. Johnson*, a Voting Rights Act case, Kennedy reiterated that “racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.” All the same, Kennedy has made repeatedly clear in cases involving affirmative action or “benign discrimination” that he differs from his more conservative colleagues in refusing to assign COLORBLINDNESS decisive force. In *Grutter*, most notably, he joined Chief Justice Rehnquist and Justices Scalia and Thomas in dissenting from a decision rebuffing a challenge to race-based admissions preferences at the University of Michigan Law School. But he pointedly refused to sign onto Scalia’s dissent that flatly pronounced that “The Constitution proscribes government discrimination on the basis of race.”

Instead, he wrote separately to “reiterate [his] approval of giving appropriate consideration to race in this one context,” even while finding that the program at issue failed searching review.

Just as revealing is Kennedy’s opinion in *Parents Involved*, involving challenges to student assignment plans adopted by public school districts in two states that used student race as a tiebreaker to allocate slots in schools that are racially imbalanced relative to the district as a whole. Kennedy

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336 539 U.S. at 349 (Scalia, J., dissenting).

337 539 U.S. at 395 (Kennedy, J., dissenting).
joined his conservative colleagues to make five votes to invalidate the challenged programs. But he refused to join portions of Chief Justice Roberts’s majority opinion, objecting that they “imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account.” In particular, Roberts’s “plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.” Referring to the first Justice Harlan’s aphorism that “Our Constitution is color-blind”, Kennedy observed that, “as an aspiration, Justice Harlan’s axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.”

It’s not transparent what “universal constitutional principle” means, exactly. To inquire into whether a particular constitutional principle is “universal” suggests interest in whether it holds true in, say, Bangladesh as it does in the United States. We doubt that was Kennedy’s concern, and therefore that “universal” is the adjective he most wanted. Consider “absolute” as a friendly substitute. Thus, according to Kennedy, COLORBLINDNESS is not an “absolute constitutional principle”—i.e., a rule—because other principles of our order—e.g., ANTI-CASTE, EQUAL OPPORTUNITY—combine with the actual facts of “the real world” to sometimes require or allow government attention to race.

Where does this leave us on Fisher II? Not, unfortunately, with the conclusion that if you cock your head and squint, you can see that the Texas program satisfied hornbook strict scrutiny. Rather, we surmise, the continued use of, and support for, race-conscious admissions by university administrators and elected state office holders, not all of whom were ideologically disposed in favor of race-based preferences, helped persuade

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340 Id.
341 Similarly, in Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN), Kennedy joined a 6-2 majority to uphold a state constitutional amendment that prohibited race-based affirmative action in public university admissions. 134 S. Ct. 1623, 1628 (2014) (plurality opinion) But whereas Scalia and Thomas would have upheld the amendment on the ground that the Equal Protection Clause cannot “forbid what its text plainly requires,” Schuette, 134 S. Ct. at 1639 (Scalia, J., concurring in the judgment), Kennedy’s three-Justice plurality opinion reached the same result only after entertaining other somewhat countervailing constitutional principles—“that consideration of race in admissions is permissible, provided that certain conditions are met,” and “that when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts”—and finding them not activated on the facts. Schuette, 134 S. Ct at 1630, 1637 (plurality opinion).
Kennedy that, contrary to his previous hopes and beliefs, rigorously non-deferential scrutiny would prove fatal to programs that really are reasonably necessary to the promotion of racial justice. We speculate, in short, that Kennedy realized that political and university leaders acting in good faith may be unable to establish, under non-deferential review, that any given race-conscious admissions program does satisfy narrow tailoring. And if nothing that “works” satisfies an honest application of strict scrutiny, then its continued and rigorous application will produce states of affairs that COLORBLINDNESS could not compel without overriding other genuine principles of our constitutional regime. Continued application of strict scrutiny would be, in the end, to allow COLORBLINDNESS to predominate unduly over constitutional principles—e.g., ANTI-CASTE, DIVERSITY, EQUAL OPPORTUNITY—that, in practice, require special solicitude for the interests and welfare of African-Americans and other racial minorities. Kennedy was unwilling to sacrifice these other constitutional principles on the altar of COLORBLINDNESS.

5. Law of democracy. We have emphasized that, lacking a canonical list of Kennedy’s most notorious opinions, this project will inescapably slight decisions worth discussing. But if our investigation ended here, we think that one opinion more than any other would be conspicuous by its absence: Kennedy’s opinion for a five-justice majority in *Citizens United*.

*Citizens United* is a nonprofit corporation, funded mostly by donations from individuals, founded to promote conservative causes and political candidates. In 2008, it produced and distributed a 90-minute documentary highly critical of Hillary Clinton, then battling Barack Obama for the Democratic presidential nomination. The federal Bipartisan Campaign Reform Act of 2002 (BCRA), however, prohibited corporations and unions from expending general treasury funds on “electioneering communications” that clearly reference a candidate for federal office, and that are made 30 days before a primary election, or 60 days before a general election. Wanting to distribute its documentary by video-on-demand within the 30-day pre-primary window, *Citizens United* sought a ruling that, as applied to it, the BCRA’s restrictions would violate the First Amendment.

Although the Court had previously allowed restrictions on corporate political speech in *Austin v. Michigan Chamber of Commerce* and, relying on *Austin*, had upheld the BCRA in *McConnell v FEC*, *Citizens United* could have prevailed on many grounds. First, of course, it could have won

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343 *Id.* at 319.
the as-applied constitutional challenge that it had raised. Second, the Court could have ruled, on statutory grounds, that a feature-length film distributed through video-on-demand does not qualify as an “electioneering communication.” Finally, the Court had previously interpreted the BCRA to exempt nonprofits that do not receive any funds from for-profit corporations or unions, and it could have followed several lower courts that had expanded that exemption to cover nonprofits that, like Citizens United, accept only a de minimis amount of money from those sources. But, worried that any narrow ruling in Citizen United’s favor would unduly chill protected expression, Kennedy’s majority opinion eschewed them all in favor of a broad rule that required the overruling of Austin and portions of McConnell: “Government may not suppress political speech on the basis of the speaker’s corporate identity.”

The rule’s unnecessary breadth, the overruling of Supreme Court precedents that it necessitated, the judicial machinations that produced it, the analytical weaknesses in the majority opinion that defended it, and the partisan interests that it advanced, all combined to elicit outrage from the left. In an indignant dissent running over eighty pages, the characteristically mild-mannered John Paul Stevens, joined by Ginsburg, Breyer, and Sotomayor, complained that “The Court's ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution.” Critics were less restrained. Lawrence Lessig was “dumbfounded by [Kennedy’s] tone-deaf” opinion; and Rick Hasen concluded that elements of Kennedy’s opinion

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346 See Citizens United, 558 U.S. at 405-08 (Stevens, J., dissenting) (identifying these possibilities); Citizens United, 558 U.S. at 322-36 (assessing and rejecting any “narrower grounds” for decision).

347 Citizens United, 558 U.S. at 365; id. at 340 (contending that “restrictions distinguishing among different speakers” are constitutionally prohibited, and that “political speech must prevail against laws that would suppress it”).

348 See Citizens United, 558 U.S. at 396 (Stevens, J., dissenting) (“[T]he majority decides this case on a basis relinquished below, not included in the questions presented to us by the litigants, and argued here only in response to the Court's invitation.”) The backstory is recounted in Jeffrey Toobin, Money Unlimited, THE NEW YORKER (May, 21 2012), https://www.newyorker.com/magazine/2012/05/21/money-unlimited. Stevens put it tersely but not unfairly: “Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.” Citizens United, 558 U.S. at 398 (Stevens, J., dissenting).

349 Id. at 396.

“sound more like the rantings of a right-wing talk show host than the rational view of a justice with a sense of political realism.”  

The five opinions in the case consumed 175 pages in the United States Reports, and provoked unusually voluminous commentary. We will cut to what we consider the pith. One needn’t be a card-carrying principled positivist to conceptualize the constitutionality of corporate campaign finance restrictions as implicating (at least) two constitutional principles pushing in opposed directions. The first principle (or cluster of principles) travels under varied verbal formulae: self-governance, republicanism, and “democratic integrity,” among others. We’ll call it POPULAR SOVEREIGNTY, and gloss it as providing (to a first pass) that “the People” should not face unnecessary obstacles to the intelligent and effective exercise of their sovereign power. Because corporations can amass vast financial resources that they use to curry favor with office holders and to swamp divergent voices of individual flesh-and-blood members of the polity, POPULAR SOVEREIGNTY favors some limits on corporate campaign expenditures are permissible. On the other hand, of course, lies the principle cluster FREE SPEECH, which, so long as money counts as speech, opposes any such restrictions. Furthermore, recall that this wasn’t a case of first judicial impression. The Court had already upheld tailored restrictions on corporate campaign expenditures in Austin and McConnell. So JUDICIAL PRECEDENTS were a third principle. Other principles may be implicated too (e.g., FRAMERS’ INTENT, WHAT THE TEXT SAYS, HISTORICAL PRACTICE), but plainly no fewer than three principles bore on the issue, with two favoring the constitutional permissibility of restrictions, and one opposing. This, more or less, is how the dissent saw things.

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352 See Richard H. Pildes, Is the Supreme Court a “Majoritarian” Institution?, 2010 SUP. CT. REV. 103, 111 (2010) (“Citizens United spawned an immediate torrent of academic and more popular reactions and commentary, surely as much as any Supreme Court decision since Bush v Gore.”).
The majority viewed matters very differently. To Justice Kennedy, this is, from start to finish, a case about **FREE SPEECH**. More than that, it’s a case in which the power or exertion of that principle is overwhelming: “If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.”

What about the fact that the speakers whose free speech rights are infringed are artificial persons, themselves creations of law? Irrelevant. Not only does “First Amendment protection exten[d] to corporations,”

Does it matter that the expenditure restrictions at issue are limited in scope, somewhat analogous to “time, place, and manner” restrictions?  

Nope. The BCRA “is an outright ban,” a “classic example[e] of censorship.” In short, on Kennedy’s view, we have a constitutional principle of great weight or importance activated very fully toward **no corporate campaign expenditure restrictions**.

To be sure, given *Austin* and *McConnell*, **JUDICIAL PRECEDENT** does press the other way, toward the constitutional permissibility of expenditure

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353 558 U.S. at 349.
354 *Id.* at 342.
355 *Id.* at 343 (“The Court has rejected the argument that political speech should be treated differently under the First Amendment simply because such associations are not ‘natural persons’”). See also *Citizens United*, 558 U.S. at 393 (Scalia, J., concurring) (“We should celebrate rather than condemn the addition of [corporate] speech to the public debate.”).

356 *Citizens United*, 558 U.S. at 419 (Stevens, J., dissenting) (“In many ways, . . . § 203 functions as a source restriction or a time, place, and manner restriction. . . . [T]he majority's incessant talk of a ‘ban’ aims at a straw man.”)

357 *Citizens United*, 558 U.S. at 337.
restrictions such as embodied in the BCRA. But that principle weighed weakly here because, in Kennedy’s estimation, *Austin* was itself “a significant departure” from previous cases.\(^{358}\) And *POPULAR SOVEREIGNTY*? Not implicated. Kennedy did grant that the principle would support restrictions on corporate campaign *contributions* given the risk that funds donated directly to candidates could provoke *quid pro quo* corruption or its appearance. But, he concluded, *POPULAR SOVEREIGNTY* weighs *not at all* in favor of restrictions on independent *expenditures*: “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”\(^{359}\)

Three differences between the majority and dissent’s analyses leap out. Relative to the dissent, Kennedy: (1) believes that *FREE SPEECH* activates much more forcefully against restrictions on corporate campaign expenditures; (2) adjudges that judicial precedents press less forcefully in favor of the constitutional permissibility of such restrictions, and (3) sidelines entirely *POPULAR SOVEREIGNTY*. On each of these points, we find Stevens’s dissent substantially more persuasive. In our view, Kennedy’s opinion inflates the force of *FREE SPEECH* on this issue by overstating the censorial character of the legislative restrictions, and by grossly understating (to nothing) the constitutional significance of the difference between actual human beings and corporations. At the same time, it minimizes the force of

\(^{358}\) *Id.* at 319 (quoting Federal Election Comm’n v. Wisconsin Right to Life, Inc., 551 U. S. 449, 490 (2007) (Scalia, J., concurring in part and concurring in judgment)).

\(^{359}\) *Id.* at 357.
JUDICIAL PRECEDENT by relying on dissents to exaggerate Austin’s departure from past practice.

Even more striking and disconcerting, though, is the majority’s neutering of POPULAR SOVEREIGNTY. Criticizing “the majority's myopic focus on quid pro quo scenarios and the free-floating ‘First Amendment principles’ on which it rests so much weight,” Stevens maintained that a “broader understanding of corruption has deep roots in the Nation's history.” And observing that “[t]he Framers were obsessed with corruption, which they understood to encompass the dependency of public officeholders on private interests,” he concluded, dolefully, that “the Framers had their minds trained on a threat to republican self-government that this Court has lost sight of.”

We fear this is true. Worse, once the majority “effectively discounts” the bearing of POPULAR SOVEREIGNTY in this case “to zero,” then, putting judicial precedents aside—as it promptly does—we are left with a single constitutional principle doing all the work. This is no longer pluralism.

In short, if any of Kennedy’s most notorious opinions lends support to personal whimsy, Citizens United (in our opinion) is it. This is not to say that any non-whimsical analysis faithful to our constitutional principles must necessarily side with the dissent, but that the combination of steps that the majority opinion takes to reach its constitutional bottom line reasonably raises eyebrows. The least cynical explanation, we think, draws on two suggestions about Kennedy’s constitutional vision: that he is preoccupied nearly to the point of distraction with FREE SPEECH, and that he is curiously insensitive to POPULAR SOVEREIGNTY. If true, then Citizens United, though

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360 Citizens United, 558 U.S. at 451 (Stevens, J., dissenting).
361 Id. at 452 (internal quotations and citations omitted).
362 Id. at 463.
363 See id. at 394 (“The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its 'identity' as a corporation.”).
364 Among other defects, Kennedy’s effort to distinguish his one-term-old majority opinion in Caperton rings especially false. See 558 U.S. at 458-60 (Stevens, J., dissenting). In Caperton, the Court had held that a party’s very substantial indirect expenditures to support a state judge’s election can produce an appearance of bias or corruption sufficient to require the judge’s recusal. Caperton v. A. T. Massey Coal Co., 556 U.S. 868 (2009). In Citizens United, Kennedy distinguished Caperton on the ground that that case involved a due process challenge and that its “holding was limited to the rule that the judge must be recused, not that the litigant’s political speech could be banned.” Citizens United, 558 U.S. at 360. To be sure, the legal issues in the two cases are different and the result in the first does not dictate a particular result in the second. But Kennedy’s reasoning in Caperton is devastating to his factual assertion—intuitively implausible on its own—that “independent expenditures, including those made by corporations, do not give rise to . . . the appearance of corruption.” 558 U.S. at 357.
(in our view) profoundly misguided, may be viewed, not as the product of personal whimsy, but as an unfortunate illustration of what happens when an obsession meets a blindspot. Now, the first of these observations—concerning Kennedy’s enthusiasm for free speech—is common wisdom. The second is not. We close this section by demonstrating that popular sovereignty is conspicuous by its absence from another of Kennedy’s criticized opinions—his concurrence in the 2004 partisan gerrymandering case, Vieth v. Jubelirer—and we explain why it matters.

Vieth involved a constitutional challenge to an extreme partisan gerrymander by the Republican-controlled Pennsylvania legislature. For the first time, all nine justices agreed that “excessive partisanship in redistricting is unconstitutional.” But they couldn’t agree on a judicially manageable standard to police it. Concluding that none could be crafted, the four most conservative justices would have held all such claims nonjusticiable. The four liberal justices believed, in contrast, that a standard could be devised, and collectively proposed three. Kennedy found none of the proposed standards acceptable, but thought it premature to foreclose the possibility of crafting one, as his more conservative colleagues would.

Despite criticisms, we believe that Kennedy’s concurrence makes great sense, up until the last step. As we parse the opinion, Kennedy starts by asking, sensibly enough, what’s the rule? No partisanship in redistricting? Can’t be. Whatever principles might support it, historical practice weighs decisively against. No excessive partisanship in redistricting? Possible. But even if so, it’s not a constitutional rule that courts can administer; it’s not a “judicially manageable standard.” Happily, the Supreme Court has constitutional authority to craft doctrinal “tests” to implement the balance of principles in a more manageable fashion. To craft a test in this context, however, we need to know what is meant by “excessive.” Excessive by reference to what standard? Until we know that, we cannot determine whether any proposed test not only is administrable but also adequately fits the constitutional wrong. And to give content to the amorphous notion of “excessive partisanship,” we must identify the constitutional principles that drive no excessive partisanship in redistricting in the first place.

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367 Id. at 304 (chiding Kennedy for proposing a disposition that “is not legally available”).
368 See supra note Error! Bookmark not defined.
To this point, we are singing in unison. So, which constitutional principles do regulate partisan gerrymandering? POPULAR SOVEREIGNTY must be an obvious possibility. Indeed, Breyer made it the centerpiece of his dissent.\textsuperscript{369} And Kennedy? After observing that we lack standards of districting fairness drawn from the Equal Protection Clause, Kennedy suggested (no surprise) that “[t]he First Amendment may be the more relevant constitutional provision.”\textsuperscript{370} Maybe. But if not that, what else? Although he flirted with POPULAR SOVEREIGNTY in his concluding paragraph,\textsuperscript{371} Kennedy never took seriously that principles of self-governance can do the sort of work that, elsewhere, he (rightly) accords other structural principles central to founding thought such as FEDERALISM and SEPARATION OF POWERS. This is a substantive, not a nominal, point. Once POPULAR SOVEREIGNTY is on the table, we can conceptualize the harms that extreme partisan gerrymandering inflicts in terms of injury to the body politic, or to the institution of republican self-governance itself.\textsuperscript{372} By ignoring the relevance of this principle, Kennedy can conceive of the injury only in terms of unequal “burdens” that gerrymanders can impose on individuals’ “representational rights.”\textsuperscript{373} This is a very partial—and, we think, distorting—lens on the nature of the problem.\textsuperscript{374}

Under whatever designation, it is a principle of our constitutional order that the People must be enabled to effectuate its political will unhindered by unnecessary obstacles. There are reasons to believe that, in an age of oligarchy, unrestricted corporate influence in political campaigns offends that principle. There are reasons to believe that, in an age of big data and supercomputing, unrestricted political gerrymandering offends it too. To

\textsuperscript{369} Vieth, 541 U.S. at 356 (Breyer, J., dissenting) (“I start with a fundamental principle. ‘We the People,’ who ‘ordained and established’ the American Constitution, sought to create and to protect a workable form of government that is in its principles, structure, and whole mass, basically democratic. In a modern Nation of close to 300 million people, the workable democracy that the Constitution foresees must mean more than a guaranteed opportunity to elect legislators representing equally populous districts. There must also be a method for transforming the will of the majority into effective government.”) (internal citations omitted).

\textsuperscript{370} Vieth 541 U.S. at 314 (Kennedy, J., concurring).

\textsuperscript{371} Id. at 316 (“The ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government, and in the citizenry itself.”).

\textsuperscript{372} Cf. Vieth, 541 U.S. at 367 (Breyer, J., dissenting) (emphasizing the “risk of harm to basic democratic principles”).

\textsuperscript{373} See Vieth, 541 U.S. at 308, 309, 312, 313, 315, 317 (Kennedy, J., concurring).

\textsuperscript{374} As Rick Pildes explained: “The instinct to turn to the First Amendment reflects a recurring search for grounding in familiar and conventional models of individual rights. But those models will provide no solace in addressing structural problems concerning the proper allocation of political representation.” Richard H. Pildes, The Constitutionalization of Democratic Politics, 118 HARV. L. REV. 28, 58–59 (2004).
the extent that these practices do threaten or injure republican self-governance, then POPULAR SOVEREIGNTY militates toward constitutional rules such as it is constitutionally permissible for Congress to restrict corporate campaign expenditures and it is constitutionally prohibited for state legislatures to design districts to excessively insulate a favored party from declining popularity in the electorate at large. To be sure, that this principle might militate for these rules over their negations does not by itself establish what, all things considered, our constitutional rules are; that’s a lesson of pluralism. But one thing is certain: we cannot reach warranted judgments about the constitutional status of these challenged practices so long as we ignore POPULAR SOVEREIGNTY entirely, or minimize its activation to nothing by assuming an unrealistic picture of our political reality. We hope that, by gaining a more sympathetic understanding of Kennedy’s constitutional jurisprudence, scholars can help him see how he can do better, by his own lights. If we had his ear, Citizens United and Vieth together suggest one piece of advice we’d offer: take POPULAR SOVEREIGNTY more seriously.

V. APPRAISAL AND LESSONS

Part IV has painted a rather pretty picture of Kennedy’s constitutional jurisprudence. Some readers will find it too pretty by half. Against our tentative and tempered defense of Kennedy as a reputable principled positivist, committed proponents of personal whimsy are likely to argue: first, that Kennedy simply makes up the contents or weights of the principles that he invokes; or second, that, even to the extent that he identifies genuine constitutional principles, he deploys them opportunistically, invoking or omitting them, understating or exaggerating the degree of their activation, to accord with his fancies. Either way, the critics could be right. Kennedy does not emerge unblemished even on our mostly sympathetic reconstruction, and reasonable readers might think us too charitable. Still, without repeating the lengthy analyses from Part IV, two final observations in Kennedy’s defense are warranted.

375 That was George Thomas’s complaint. After agreeing that “[i]ndividual autonomy . . . is more rooted in the American constitutional tradition . . . than many of Kennedy’s critics admit,” and that, “despite Kennedy’s often inchoate rhetoric, his vision of individual autonomy is more restrained and responsible than it may seem at first glance,” Thomas concluded that “Kennedy has not been very good at connecting his understanding of liberty to constitutional roots” and that he inexplicably ignores some “liberties associated with individual autonomy—such as the right to choose a calling, to labor and to contract—that are as deeply rooted in American constitutionalism as any others.” Thomas, supra note 64.
First, it is hard to take strenuous exception to any of the principles that do most work in the Kennedy opinions that we have examined. On this point, the test is not whether Kennedy’s reliance on principles can be mocked by those who (claim to) believe that all genuine constitutional powers, rights, and duties are fixed and located only “in the text,” but whether Kennedy’s principles resonate with those who accept the basic tenets of principled positivism. Kennedy passes that test. His favored principles—LIBERTY, AUTONOMY, DEMOCRACY, ANTI-CASTE, STATES MATTER, EFFECTIVE NATIONAL POWER, and the like—are familiar and widely (though unevenly) endorsed. Kennedy is not a peddler of principles that should strike constitutional lawyers as highly eccentric—EQUAL INCOME, AGRARIANISM, ANIMALS MATTER, or whatnot.

Second, while critics understandably highlight apparent inconsistencies, consistencies across Kennedy’s opinions often go underappreciated. To be sure, many commentators have discussed the continued reappearance, in Kennedy’s jurisprudence, of DIGNITY and LIBERTY. But that only scratches the surface. Kennedy thoughtfully invokes many of the same principles across doctrinal categories—JUDICIAL INTEGRITY, HISTORICAL PRACTICES MATTER, HORIZONTAL SEPARATION OF POWERS, and others.

All that said, recall that this Article has twin ambitions: to rehabilitate Kennedy, and to promote principled positivism. Of the two, we are more committed to the second. So we are not deeply troubled if some readers friendly to principled positivism resist our judgment that Kennedy is a responsible practitioner of it. It is more worrisome if reasonable doubts about the integrity of Kennedy’s constitutional performance could impugn principled positivism itself. The pro-Kennedy argument we have put forth runs something like this: (1) Principled positivism is a plausible and attractive constitutional theory; (2) Kennedy practices principled positivism; therefore (3) Kennedy practices a plausible and attractive constitutional theory. A

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376 See supra notes 174-175.
skeptic of principled positivism could, by endorsing our second premise, hope to drive a very different conclusion: (1) Kennedy’s constitutional jurisprudence is principled positivism; (2) Kennedy’s constitutional jurisprudence is “a tissue of sophistries,” therefore (3) principled positivism is “a tissue of sophistries.”

That disheartening conclusion would be more credible if we claimed Kennedy as a virtuoso of principled positivism—our Hercules, as it were. But we have emphasized that Kennedy exhibits, at best, only an imperfect grasp and execution of principled positivism. Accordingly, unhappiness with Kennedy’s constitutional decisionmaking could cause serious difficulty for principled positivism, only if we suppose that the whimsical Kennedy of conventional wisdom is what principled positivism is bound to deliver. Some critics may advance precisely that worry. By encouraging justices to constitutionalize the moral principles of their liking under the guise of discovering and applying “our constitutional principles,” principled positivism, on this objection, is the librarian who speaks through a bullhorn. We do not think that Kennedy’s performance licenses that strong anxiety.

More fundamentally, this is the wrong type of objection to a constitutive theory. Principled positivism would be unsound if, inter alia, there are no such things as constitutional principles, or if principles could not interact to generate more determinate norms (rules), or if we could not gain epistemic access to our principles or to their interaction. But no defects in Kennedy’s constitutional decisionmaking lend support to these criticisms or others in the same ballpark. Even if Kennedy is a less able or faithful principled positivist than we have argued, the better response to his failings and foibles is to try to see what he’s up to, understand how he goes wrong, and strive to do better.

CONCLUSION

No, we are not “all originalists now”—at least not if the moniker retains any discriminating power. But we are almost all (minimal) constitutional realists. We believe that constitutional propositions of the form “Congress has constitutional power to X,” or “People have a constitutional

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380 Lund & McGinnis, supra note 281.
381 See Scalia, Originalism: The Lesser Evil, supra note Error! Bookmark not defined., at 864 (“Originalism is, it seems to me, the librarian who talks too softly.”).
right to Y,” or “Zing is constitutionally prohibited,” are capable of being true, and that some of them are true—including some that are reasonably contested, and even in the absence of an authoritative judicial ruling on point.

Constitutional realism is wholly compatible with the (non-Dworkinian) belief that answers to many hard constitutional questions are indeterminate. Furthermore, even to the extent that constitutional law is determinate on a given point, the power of judicial review involves much more (and also less) than declaring “what the law is.” For both these reasons, realists can welcome, and contribute to, prescriptive theories that advise judges how best to perform their jobs. For a constitutional realist, however, all such prescriptive theories supplement, but cannot supplant, constitutive accounts of how our constitutional norms gain their contents, or of what makes true constitutional propositions true.

Remarkably, though, the catalogue of constitutive constitutional theories is slimmer than slim. Some strands of contemporary originalism are constitutive, but not much else. We have argued that Kennedy’s constitutional jurisprudence displays a genuine constitutive alternative to originalism—the account that one of us has dubbed “principled positivism,” and defends in other work. To be sure, Kennedy does not represent an ideal type. But nor do his colleagues. As Scalia and Thomas are “originalists,” as Breyer is a “pragmatist,” as Brennan was a “moral reader,” and as O’Connor was a “minimalist,” in much the same way is Kennedy a “principled positivist.” We have merely lacked the label.