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# Kennedy's Legacy: A Principled Justice


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# Kennedy’s Legacy: A Principled Justice

by MITCHELL N. BERMAN\* & DAVID PETERS†

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## Introduction

Anthony Kennedy was, as far as one can tell, nobody's favorite Justice. Conservatives have reviled him for voting to uphold *Roe*, and for his consistent support of gay rights. Liberals, though thankful for his crucial votes and opinions in these and other areas, will never forgive him for *Bush v. Gore*, *Citizens United*, and the countless other conservative rulings—concerning racial equality, gun rights, national power, and much else—for which he provided the decisive fifth vote. And now, they further disdain him for retiring during a Trump presidency supported by a Republican Senate.

The preceding grounds for complaint are mostly political or ideological in character. 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. Accordingly, one might predict that legal elites who could claim to value law and judging more than outcomes would rate Kennedy more highly than political partisans do. But they generally don't. Scholars and public intellectuals from left and right have long awarded Kennedy disastrously low marks, deriding his reasoning, mocking his writing, and impugning his motives.<sup>1</sup> One observer recently

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1. See, e.g., Ilya Shapiro, *A Faint-Hearted Libertarian at Best: The Sweet Mystery of Justice Anthony Kennedy*, 33 HARV. J.L. & PUB. POL'Y 334, 353 (2009) ("agonized, self-aggrandizing incoherence."); David Pozen et al., *Did Anthony Kennedy Just Destroy His Own Legacy?* POLITICO (June 27, 2018), <https://www.politico.com/magazine/story/2018/06/27/anthony-kennedy-legacy-supreme-court-218900> ("analytically undisciplined"); Andrew Koppelman, *The Supreme Court made the right call on marriage equality—but they did it the wrong way*, SALON (June 29, 2015), [https://www.salon.com/2015/06/29/the\\_supreme\\_court\\_made\\_the\\_right\\_call\\_on\\_marriage\\_equality—but\\_they\\_did\\_it\\_the\\_wrong\\_way/](https://www.salon.com/2015/06/29/the_supreme_court_made_the_right_call_on_marriage_equality—but_they_did_it_the_wrong_way/) ("ponderous self-importance"); Jeffrey Rosen, *Supreme Leader: On the Arrogance of Anthony Kennedy*, NEW REPUBLIC (June 16, 2007) ("self-aggrandizing turncoat"); Rich Lowry, *America's Worst Justice*, NAT'L REV. (July 1, 2008) ("making it up as he goes along"). Of course, the common wisdom is not uniform. Almost every Kennedy opinion that has provoked criticism has won a defender. Additionally, several political scientists have written

spoke for many, though more gently, when describing Kennedy's mind as "a distant and mysterious country, with its own language and folkways beyond the ken of normal Americans."<sup>2</sup>

We think the prevailing narrative is wrong. It is unfair to Justice Kennedy. Much worse, common teaching that Kennedy was an empty robe all but guarantees that students of constitutional law will learn nothing of value from his long judicial tenure. That would be a shame. We think he was on to something important.

"On to" is a key locution here. Kennedy does not have the grasp of a worked out constitutional theory that an academic constitutional theorist might strive for. That's not expected of our Justices. And in as much as Kennedy does "have a theory," we don't find his execution unflawed. Each of us thinks that some of the common complaints have merit. Even putting aside a prose style that does him few favors,<sup>3</sup> we would not paint Kennedy as the second coming of John Marshall or Robert Jackson or (your preferred Justice here). But, for all that, we think that Kennedy's constitutional decision-making reflects a substantial, albeit imperfect, embrace of a view of constitutional law that is coherent, plausible, and worthy of serious attention.

In truth, we (or at least one of us)<sup>4</sup> thinks it more than plausible. The constitutional theory we attribute to Kennedy (or that we offer as a cleaned-up and more theorized refinement) is the account that one of us has recently introduced and defended elsewhere under the label "principled positivism."<sup>5</sup> So this Article has two linked ambitions: to defend Justice Kennedy against what we consider unduly harsh criticism, and to advance the case for a new theory of constitutional law by showing how it makes good sense of a large

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largely sympathetic book-lengths studies of Kennedy's jurisprudence related to liberty. *See generally* ANTHONY D. BARTL, *THE CONSTITUTIONAL PRINCIPLES OF JUSTICE KENNEDY: A JURISPRUDENCE OF LIBERTY AND EQUALITY* (2014); FRANK J. COLUCCI, *JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY* (2009); HELEN J. KNOWLES, *THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY* (2009).

2. Garrett Epps, *What Is on Justice Anthony Kennedy's Mind?*, *THE ATLANTIC* (June 29, 2016), <https://www.theatlantic.com/politics/archive/2016/06/what-is-on-justice-anthony-kennedys-mind/489218/>.

3. *See, e.g.*, Lowry, *supra* note 1 ("vaporous moralizing"); Jeffrey Rosen, *Strong Opinions*, *NEW REPUBLIC* (July 28, 2011), <https://newrepublic.com/article/92773/elena-kagan-writings> ("[Kennedy's] prose alternates between bureaucratic and grandiose, resulting in sentences that manage to be pompous and clueless at the same time."); Ian Millhiser, *Justice Kennedy Deserves this Nasty, Unflinching Sendoff*, *THINK PROGRESS* (June 27, 2018), <https://thinkprogress.org/kennedy-was-a-bad-justice-76e464024d78/> ("[Kennedy's] writing ranged from needlessly flowery to completely incoherent.").

4. This qualifier should be assumed throughout the article whenever views are expressed in the first-person plural. For example, please read "we believe X" to mean that the senior author (Berman) believes X, and the junior author (Peters) either believes X too or is, at worst, agnostic.

5. Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA L. REV. 1325 (2018).

and varied array of constitutional opinions that have defied explanation. We hope to persuade readers that these goals are mutually reinforcing.

The Article proceeds in five parts. Part I introduces the common scholarly wisdom that the body of this Article critically assesses and in large measure rejects. We're all familiar with the gist. Kennedy is said to be a willful and narcissistic judge, little constrained by law—"an unprincipled weathervane," as one critic put it.<sup>6</sup> But that's vague and conclusory. Even if untrue, it would be hard to rebut without taking on every criticism of every opinion, one by one. To make rebuttal at least feasible, this Part distills something like a bill of particulars: a set of more-or-less distinct criticisms of Kennedy's opinions, or flaws they are said to suffer from.

Part II lays out the constitutional theory that we think makes best sense of Kennedy's constitutional jurisprudence, and that we find independently attractive. Principled positivism maintains that the fundamental constitutional matter in our system of constitutional law is not exactly the constitutional text or the distinct ratification events that brought the text into effect. Rather, residing at the ground floor of our constitutional system are a jumble of weighted constitutional "principles" that resist crisp definition but travel under familiar headings such as federalism, separation of powers, stare decisis, limited government, human dignity, textualism, and so forth. These principles are "grounded in" or "constituted by"—that is, they owe their existence to—actual practices of acceptance and endorsement by participants in the constitutional venture, paradigmatically including (but not limited to) decisions and opinions issued by Supreme Court Justices when resolving constitutional cases and controversies. In turn, the principles (and the facts that they make constitutionally relevant) collectively determine or make out the constitutional rights, duties, powers, and permissions about which we disagree and that constitutional adjudication aims to discover. In short: practices ground principles, and principles deliver rules.

Parts III and IV return to Kennedy. Part III makes the *prima facie* case that Kennedy accepts something like principled positivism by demonstrating that he has repeatedly affirmed its core tenets. Part IV then uses the analytical frame that principled positivism supplies to assess a large and representative sample of Kennedy's most relentlessly criticized opinions. We conclude that his decision-making in five domains ranging across the constitutional waterfront—federalism, gay rights, abortion, race, and the law of democracy—are reasonably coherent and defensible given his apparent theoretical commitments. To repeat, we don't deem Kennedy an optimally adept and consistent practitioner of principled positivism. We detect a few

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6. Mark Pulliam, *Is Justice Kennedy Grooming Himself for Posterity?*, NAT'L REV. (June 29, 2016), <https://www.nationalreview.com/bench-memos/anthony-kennedy-supreme-court-legacy-liberal-vote>.

warts, and our study is not 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 Kennedy's constitutional decision-making, and principled positivism itself, in light of judgments reached in Part IV.

This is an article about Justice Kennedy, not Justice Scalia. Still, Scalia, with whom Kennedy shared the high bench for all but two of his thirty-one terms, casts a long shadow. His junior colleague's most relentless critic, Scalia was also the conservative standard against whom Kennedy was most ceaselessly measured and found most emphatically wanting. As far as constitutional theory goes, much does distinguish these Justices despite their shared conservatism. Among other things: where Scalia was an originalist, Kennedy is a living constitutionalist; where Scalia was a monist, Kennedy is a pluralist; and where Scalia was the fierce champion of rules, Kennedy is the determined devotee of principles. In all three respects, Kennedy had the better view. We should regard him more seriously.

## I. The Common Wisdom

### A. From “No Theory” to “Personal Whimsy”

Some critics take Justice Kennedy to task for what they believe he lacks. He is said not to possess a “judicial philosophy,”<sup>7</sup> or “legal philosophy.”<sup>8</sup> He has no “theory of jurisprudence,”<sup>9</sup> “constitutional theory,”<sup>10</sup> or “theory of constitutional interpretation.”<sup>11</sup>

Although we like philosophy and theory as much as the next person, these criticisms must be taken with a large grain of salt. Consider another Justice—say, 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 doubt that Kennedy is most productively criticized for failing to develop “a comprehensive, overarching judicial philosophy.”<sup>12</sup> Prevailing norms and expectations generally allow our Justices to muddle along without

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7. Lowry, *supra* note 1; Epps, *supra* note 2.

8. Robert F. Nagel, *Liberals and Balancing*, 63 U. COLO. L. REV. 319, 323 (1992).

9. Rosen, *supra* note 1.

10. Stephen E. Gottlieb, *Three Justices in Search of a Character: The Moral Agendas of Justices O'Connor, Scalia and Kennedy*, 49 RUTGERS L. REV. 219, 238 (1996).

11. Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1189 (2001).

12. KNOWLES, *supra* note 1, at 3.

conscious grasp of anything properly called a “theory.” What we demand is that they respect a difference (if hard to articulate) between law and politics, or that, in the Federalist’s terms, they (try to) subordinate “will” to “judgment.”<sup>13</sup> And these are the terms in which Kennedy is frequently lambasted. Critics from across the ideological spectrum charge that his reasoning in constitutional cases is driven largely by his own moral values and personal likes and dislikes, his intuitions and hunches, little constrained by anything fairly deemed *legal*.<sup>14</sup> Put otherwise, the more common protest is not about what should but doesn’t guide his decision-making (a theory), but about what does but shouldn’t—“the prevailing political winds,”<sup>15</sup> “specific moral agendas”<sup>16</sup> his desperate need “to court the approval of Washington elites.”<sup>17</sup> Adopting Anthony Bartl’s snappy encapsulation of the charge, we’ll call this the *personal whimsy* thesis.<sup>18</sup>

## B. Four Claimed Flaws

*Personal whimsy* is easy to allege, but hard to rebut without taking on each criticism of each decision, one by one. That would be exhausting, for the critics’ indictment involves scores of opinions decided over three decades. Instead, we present a large and representative sampling of the most widely and loudly 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:

- *Inconsistency*: Kennedy treats premises and arguments inconsistently from case to case.
- *Mysteriousness*: Kennedy invokes premises that have no apparent constitutional or empirical grounding.

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13. THE FEDERALIST NO. 78, at 469 (A. Hamilton) (C. Rossiter ed. 1961).

14. As Garrett Epps and Dahlia Lithwick complained, Kennedy’s judgments in key cases—from abortion to gay rights—seem to have “nothing to do with the Constitution.” Garrett Epps & Dahlia Lithwick, *The Sphinx of Sacramento: Will the real Anthony Kennedy please stand up?* SLATE.COM (Apr. 27, 2007), <http://www.slate.com/news-and-politics/2017/12/roy-moore-spokeswoman-cnn-host-extreme-politics.html>. And now-federal-appellate-court-judge Timothy Tymkovic lamented Kennedy’s “ad hoc, activist jurisprudence without constitutional mooring.” Timothy M. Tymkovic et al., *A Tale of Three Theories: Reason and Prejudice in the Battle over Amendment 2*, 68 U. COLO. L. REV. 287, 333 (1997).

15. Michael S. Paulsen, *The Many Faces of “Judicial Restraint,”* 1993 PUB. INT. L. REV. 3, 17 (1993).

16. Gottlieb, *supra* note 10, at 219.

17. Rosen, *supra* note 1.

18. BARTL, *supra* note 1.

- *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 considerations that his opinions do not capture or reflect.

### 1. *Inconsistency*

Perhaps the single most common complaint about Kennedy opinions is that he changes his mind from one case to another, seemingly unconstrained by his own prior positions. Take *Lawrence v. Texas*,<sup>19</sup> where Kennedy's majority opinion held Texas's anti-sodomy laws unconstitutional, overruling *Bowers v. Hardwick*. In the opening of his fervent dissent, Scalia contrasted the precedential force that Kennedy afforded *Bowers* with the precedential force the *Casey* plurality, joined by Kennedy, had given *Roe*, calling it "manipulative" rather than "consistent."<sup>20</sup> Critics also charged that *Lawrence* adopted an approach to substantive due process "plainly incompatible" with the test Kennedy had endorsed in previous cases.<sup>21</sup> Similar complaints were leveled against Kennedy's opinion in *Gonzales v. Carhart*,<sup>22</sup> which upheld a federal partial-birth abortion ban seven years after the Court struck down a similar state statute. Justice Ginsburg in dissent complained that the decision "refuses to take *Casey* and *Stenberg* seriously."<sup>23</sup> Charles Fried observed tartly that, "Justice Kennedy fails to come to grips with his own jurisprudence."<sup>24</sup>

Complaints of this form resurface time and again: Kennedy "changed his views" on the scope of Congressional power between *Gonzales v. Raich* and *United States v. Lopez*,<sup>25</sup> only to reverse course again in *NFIB*;<sup>26</sup> his

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19. *Lawrence v. Texas*, 539 U.S. 558 (2003).

20. *Lawrence*, 539 U.S. at 586–87 (Scalia, J., dissenting). And in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Scalia took 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." 505 U.S. 833, 997 (1992) (Scalia, J., dissenting).

21. Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1525 (2008).

22. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

23. *Id.* at 170 (Ginsburg, J., dissenting).

24. Charles Fried, *Supreme Confusion*, N.Y. TIMES (Apr. 26, 2007), <http://www.nytimes.com/2007/04/26/opinion/26fried.html?ex=1335240000&en=16b7f794dd80efcf&ei=5090&partner=rssuserland&emc=rss>.

25. Jonathan H. Adler, *Is Morrison Dead? Assessing A Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 768 (2005).

26. See 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



opinion in *Fisher II* is “inconsistent not only with *Fisher I*, but also with his previous opinions regarding race-based decision-making,” including *Grutter v. Bollinger*;<sup>27</sup> his pivotal concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1* “run[s] directly contrary” to his “prior equal protection jurisprudence,”<sup>28</sup> and is “internally contradictory”;<sup>29</sup> his “*Weisman* opinion . . . contradicts his argument in *Allegheny*”;<sup>30</sup> and so forth.

## 2. *Mysteriousness*

The *mysteriousness* objection is a favorite of textualists who wonder where Kennedy gets the fundamental legal premises that do so much work in his opinions. *Obergefell v. Hodges*, which held that states could not exclude same-sex couples from the legal institution of marriage, is a well-known example. Kennedy’s majority opinion emphasized that the choice to marry is a liberty interest “central to individual dignity and autonomy.”<sup>31</sup> 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.”<sup>32</sup>

Justice Scalia pressed a similar objection in *Boumediene v. Bush*, a case challenging the Bush Administration’s detention of suspected terrorists at Guantanamo Bay.<sup>33</sup> 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.”<sup>34</sup> 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

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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*.”)

27. Peter N. Kirsanow, *Race Discrimination Rationalized Again*, 2015 CATO SUP. CT. REV. 59, 65 (2015) (arguing that reading *Fisher v. University of Texas (Fisher II)*, 133 S. Ct. 2411, 2420 (2013) and *Grutter v. Bollinger*, 539 U.S. 306 (2003), “it seems at times as if 2003 Justice Kennedy is dissenting from 2016 Justice Kennedy.”).

28. Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 115 (2007).

29. Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Cmty. Schools v. Seattle School District No. 1*, 88 B.U. L. REV. 937, 987 (2008).

30. Steven G. Gey, *Religions Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 500 (1994).

31. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

32. *Id.* at 2615–16 (Roberts, CJ., dissenting).

33. *Boumediene v. Bush*, 553 U.S. 723 (2007).

34. *Id.* at 755.

the individual separation-of-powers provisions that the Constitution sets forth.”<sup>35</sup> The “general ‘separation-of-powers principles’” that Kennedy invoked, Scalia complained, can only be “dreamed up by the Court.”<sup>36</sup>

Conservatives are not alone in objecting that Kennedy relies upon premises of mysterious provenance. Dean Erwin Chemerinsky castigated Kennedy’s *Alden v. Maine* opinion for “recogniz[ing] a principle nowhere stated in the Constitution.”<sup>37</sup> Jeffery Toobin complained that Kennedy’s decision in *Citizen United* was premised on “bizarre legal theories”<sup>38</sup> that Dworkin found “simplistic” and “preposterous.”<sup>39</sup>

### 3. Implausibility

Every justice advances arguments that critics deem unpersuasive and even, at least occasionally, wholly implausible. Although it’s our impression that Kennedy has attracted more than his fair share of such charges, that’s impossible to establish in short order. Here are a couple of much-discussed examples to convey the flavor.

Start with *Romer v. Evans*,<sup>40</sup> 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 decision-making than others.”<sup>41</sup> But this cannot be true as a general rule.<sup>42</sup> If it were, “it would be violated by every law that imposes a regulation of conduct at other than the most local level.”<sup>43</sup> Just as implausible, in liberal eyes, was Kennedy’s reasoning in *Alden*, which held that Congress, acting pursuant to its Article I powers, could not subject nonconsenting States to private suits for damages in state courts.<sup>44</sup> Justice Souter in dissent charged that the majority’s historical

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35. *Boumediene*, 553 U.S. at 833 (Scalia, J., dissenting) (internal citations omitted).

36. *Id.*

37. Erwin Chemerinsky, *The Hypocrisy of Alden v. Maine: Judicial Review, Sovereign Immunity and the Rehnquist Court*, 33 LOY. L.A. L. REV. 1283, 1285 (2000).

38. Jeffery Toobin, *Bad Judgment*, THE NEW YORKER (Jan. 22, 2010), <https://www.newyorker.com/news/news-desk/bad-judgment>.

39. Ronald Dworkin, *The “Devastating” Decision*, THE N.Y. REV. OF BOOKS (Jan. 28, 2010), <http://www.nybooks.com/articles/2010/02/25/the-devastating-decision/>.

40. *Romer v. Evans*, 517 U.S. 620 (1996).

41. *Id.* at 639 (Scalia, J., dissenting).

42. *Id.* at 639–40.

43. Lino A. Graglia, *Romer v. Evans: The People Foiled Again by the Constitution*, 68 U. COLO. L. REV. 409, 426 (1997).

44. *Alden v. Maine*, 527 U.S. 706, 712 (1999).

analysis was supported by “no evidence” at all.<sup>45</sup> Scholars agreed, deeming Souter’s dissent “clearly correct,”<sup>46</sup> and describing Kennedy’s federalism argument as “nothing short of fanciful.”<sup>47</sup>

Again, examples could be multiplied. Take Kennedy’s claim in *Citizens United* that the appearance of corruption will not erode the citizenry’s faith in democracy. Critics ridiculed this premise as an “absurdity”<sup>48</sup> entirely “removed . . . from political realities.”<sup>49</sup> Dissenting in *Roper v. Simmons*, Scalia protested that Kennedy reached “[an] implausible result” based “on the flimsiest of grounds.”<sup>50</sup> Ginsburg’s *Gonzales* dissent dismissed Kennedy’s assertion that women who have abortions come to regret their choices as “an antiabortion shibboleth” that enjoys “no reliable evidence.”<sup>51</sup> Kennedy’s analysis of the systemic costs of allowing *Bivens* actions in *Ziglar v. Abassi* is “wholly unsubstantiated,” “staggeringly wrongheaded” and, “for lack of a better word, nuts.”<sup>52</sup>

#### 4. *Obscurity.*

A final common objection is that it’s too hard to know just what Kennedy is arguing, or 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.”<sup>53</sup>

Kennedy’s opinions in the gay rights cases are notorious examples. In *Lawrence*, Kennedy did not find, as O’Connor would in her concurrence, that Texas’s anti-sodomy law violated the Equal Protection Clause.<sup>54</sup> But neither did he declare adult sodomy a “fundamental right,” as orthodox

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45. *Alden*, 527 U.S. at 761 (Souter, J., dissenting).

46. John E. Nowak, *Gang of Five & the Second Coming of an Anti-Reconstruction Supreme Court*, 75 NOTRE DAME L. REV. 1091, 1094 (2000).

47. Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1031 (2000).

48. Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243, 246 (2010).

49. Zephyr Teachout, *Facts in Exile: Corruption and Abstraction in Citizens United v. Federal Election Commission*, 42 LOY. U. CHI. L.J. 295, 297 (2011).

50. *Roper v. Simmons*, 543 U.S. 551, 608–09 (2005) (Scalia, J., dissenting).

51. *Gonzales*, 550 U.S. at 183–85 (Ginsburg, J., dissenting).

52. Stephen I. Vladeck, *Implied Constitutional Remedies After Abbasi*, in AM. CONST. SOC’Y, SUP. CT. REV. 179, 194, 195, 200 (2017).

53. George Thomas, *The Curious Case of Justice Anthony Kennedy*, THE AMERICAN INTEREST (Mar. 1, 2010), <https://www.the-american-interest.com/2010/03/01/the-curious-case-of-justice-anthony-kennedy/>.

54. *Lawrence*, 539 U.S. at 579 (O’Connor, J., concurring).

doctrine would require.<sup>55</sup> Nevertheless, Kennedy found “the Due Process Clause” gave the petitioners “full right to engage in their conduct without intervention of the government.”<sup>56</sup> Although some prominent scholars thought Kennedy’s reasoning adequately clear,<sup>57</sup> many more deemed it “remarkably opaque,”<sup>58</sup> “almost incomprehensible,”<sup>59</sup> and “a cruel parody of the modern make-it-up-as-you-go-along judicial decision-making.”<sup>60</sup> And in *Obergefell*, Kennedy’s majority opinion invoked a “synergy between the protections”<sup>61</sup> of the Due Process and Equal Protection Clauses to strike down state prohibitions on gay marriage. Chief Justice Roberts declared the opinion “quite frankly, difficult to follow,”<sup>62</sup> and even fans of the ruling were left perplexed.<sup>63</sup>

The obscurity criticism, however, extends well beyond Kennedy’s gay rights decisions. In the eyes of critics: *Casey* is “unintelligible,”<sup>64</sup> *Parents Involved* is “cryptic,”<sup>65</sup> *LULAC* is “bizarrely unclear,”<sup>66</sup> *Boumediene* is “Kafkaesque.”<sup>67</sup>

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55. See Randy E. Barnett, *Grading Justice Kennedy: A Reply to Professor Carpenter*, 89 MINN. L. REV. 1582, 1583 (2005).

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

57. See, e.g., Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, in CATO SUP. CT. REV.: 2002–2003, at 21 (James L. Swanson ed., 2003); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004).

58. Cass Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 29, n.9 (2003).

59. Calabresi, *supra* note 21, at 1525.

60. Edward Whelan, *The Meta-Nonsense of Lawrence*, YALE L.J. (THE POCKET PART), May 2006, <http://yalelawjournal.org/forum/the-meta-nonsense-of-lawrence>.

61. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015).

62. *Id.* at 2623 (Roberts, CJ., dissenting).

63. 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>.

64. Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 675 (1996).

65. Johnathan Fischbach et al., *Race at the Pivot Point: The Future of Race Based Policies to Remedy De Jure Segregation After Parents Involved in Community Schools*, 43 HARV. C.R.-C.L. L. REV. 491, 492 (2008).

66. Michael S. Kang, *When Courts Won’t Make Law: Partisan Gerrymandering and A Structural Approach to the Law of Democracy*, 68 OHIO ST. L.J. 1097, 1111 (2007) (discussing *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006)).

67. Robert J. Pushaw, Jr., *Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?*, 84 NOTRE DAME L. REV. 1975, 2039 (2009).

In sum, the best objection to Kennedy's constitutional decision-making is less *no theory*, than it is *personal whimsy*. And because *personal whimsy* is not his official judicial philosophy, critics infer it from specific flaws they find in his judicial opinions. Most of those putative flaws fall into four categories. Kennedy is said: to reach inconsistent conclusions, on inconsistent grounds; to rely upon constitutional premises of mysterious provenance, as though conjured from thin air; to assert claims about the world, and draw inferences from evidence, that seem wholly implausible; and to communicate bits of reasoning, and even holdings, in terms that defy understanding. Accordingly, to significantly rebut the charge of *personal whimsy* will require substantial progress in making coherent the inconsistent, lucid the mysterious, plausible the implausible, and comprehensible the obscure.

The point of collecting and classifying common criticisms of Kennedy's handiwork was not to pile on, but to advance our project in two respects. First, by reminding readers of the large number and diversity of opinions that have provoked strident reproach, the exercise makes plain that the straightforward approach of responding to criticisms one by one is not feasible in a single article: too many cases demand attention. Second, by isolating a small number of fairly distinct criticism types, it creates the possibility (one that may or may not be realizable) that we'll be able to leverage in-depth consideration of some decisions (in Part IV) to shed light on others that remain offstage. If the theory that Part II introduces and that Part III attributes to Kennedy has resources sufficient to defeat an objection of type T in case X, then it may also make headway against T-type objections in cases Y and Z. Thus, this typology of criticisms, however rudimentary, will facilitate assessment of charges leveled against Kennedy's performance by enabling us to disambiguate objections that are easily conflated and by helping us to anticipate promising responses to recurring criticism types.

## II. A Theory: Principled Positivism

Part I distinguished two lines of Kennedy criticism, emphasizing *personal whimsy* over *no theory*. But of course these objections are related. Sophisticated commentators have disagreed over whether a judge's embrace of, and adherence to, a bona fide "theory" of constitutional interpretation is necessary to guard against personal whimsy.<sup>68</sup> But nobody should doubt that it's sufficient. And although Kennedy doesn't really *need* any such theory, he might in fact—and to commentators' surprise—actually *have* one (albeit inchoately).

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68. Contrast, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 14 (1997) (judges need a theory) with Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 539 (2012) (no they do not).

Obviously, Kennedy has not spelled out his theoretical commitments with clarity and specificity. If he had, then the complaint that he has no theory would have gained little purchase. Given that he hasn't laid things out very plainly, one might travel either of two paths if trying to establish that, nonetheless, his judicial decision-making is guided and constrained by an intelligible general account of constitutional law or adjudication. One is to simply reengage his opinions more closely, systematically, and sympathetically, aiming to tease out a coherent view. That's hard. Two political scientists who tried concluded that "[t]he more closely one examines Kennedy's Supreme Court jurisprudence, the more confused one becomes."<sup>69</sup> The alternative is to first present an account of constitutional law as an academic would and then try to show that Kennedy's performance fits this theoretical template, that his decision-making makes more sense, and appears in a better light, when viewed as issuing from the proposed theory or something in its vicinity. That's how we'll proceed. The four sections of this Part motivate, present, illustrate, and summarize the theory we call principled positivism.

### A. A Little Context

You say you want a "constitutional theory"? Well, say more. What type of constitutional theory do you want? Think of a theory as an extended proposed answer to a question of a general and abstract nature. 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?" As it happens, theoretically minded constitutional lawyers and scholars have asked (at least) two different sets of questions. As a result, answers they have furnished make out (at least) two different kinds of constitutional theory.

The more familiar set of questions includes the following: How should judges interpret the Constitution? How should (unelected) judges exercise their power of judicial review? How ought courts resolve constitutional disputes? A second cluster of questions includes these: What are the grounds of our constitutional rights and powers? In virtue of what does our constitutional law have the content that it does? What are the truthmakers of true propositions of constitutional law? Call constitutional theories that purport to answer questions of the first type "prescriptive": they aim to prescribe how judges should (or shouldn't) decide constitutional cases. Call theories addressed to the second type of question "constitutive": they purport to explain how our constitutional rights, powers, rules, prohibitions, and the like (collectively, "constitutional norms") are constituted, or metaphysically determined.

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69. Patrick D. Schmidt & David A. Yalof, *The "Swing Voter" Revisited: Justice Anthony Kennedy and the First Amendment Right of Free Speech*, 57 POL. RES. Q. 209, 210 (2004).

Because the first type of question, and corresponding theory, is more familiar than is the second, we should emphasize that the questions that call for constitutive accounts are not academic or abstruse. Lawyers, judges, and scholars routinely disagree about propositions of constitutional law. You may believe, let's imagine, that states are constitutionally free to withhold recognition from plural marriages. We say that they aren't. Or we contend that the President has constitutional power to pardon himself, and you say that he doesn't. Disagreements of this sort are common fare. Plainly, they are not all veiled ways of debating what morality requires or what judges should rule.<sup>70</sup> Rather, their surface grammar suggests that speakers believe that there *is* constitutional law, that propositions about constitutional rights, duties, and powers are capable of being true or false and that at least some of them are true. It suggests that participants to the relevant constitutional debates (and readers of this Article) are, in Connie Rosati's terms, "constitutional realists."<sup>71</sup>

Assuming, that we (or most of us) are constitutional realists, what explains our disagreements about "what the law is"?<sup>72</sup> 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

70. For example, we might all agree about how states should treat plural marriages, "morally speaking," disagreeing only about what is required "constitutionally speaking." Similarly, we could continue to debate the constitutionality of self-pardons even after agreeing or stipulating that any challenges to such a pardon would be nonjusticiable.

71. Connie Rosati, *Constitutional Realism*, in DIMENSIONS OF NORMATIVITY: NEW ESSAYS ON METAETHICS AND JURISPRUDENCE (David Plunkett, Scott Shapiro & Kevin Toh eds., forthcoming 2019). Two cautions and a clarification. First, the "realism" here is that of "moral realism" or "metaethical realism," and nearly the opposite of that in "legal realism." Second, some readers may take "realism" to apply to a domain only if truths within that domain are "mind-independent" or "stance-independent." That is a more demanding conception than Rosati or we intend. Our constitutional realism is "minimally realist" in maintaining only that "there really are ways that things might be [constitutionally] speaking and that our thoughts and sentences do sometimes correctly represent that reality." MARK VAN ROOJEN, *METAETHICS: A CONTEMPORARY INTRODUCTION* 9–14 (2015). Third, realism entails no position regarding how much constitutional law there is, or how many disputed constitutional propositions are true. It is as compatible with Dworkin's right-answer thesis as with the skeptical claim that answers to nearly all constitutional questions that reach appellate courts are underdetermined.

72. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

disagreements, concern what *makes it the case* that our constitutional rights and duties, powers and permissions are what they are. And that, of course, is just what a constitutive theory tries to explain. In so doing, it aims to *vindicate*, not only assume, constitutional realism. Thus anyone who finds herself in a constitutional disagreement should want a good constitutive theory of constitutional law. That's not all she should want, but it's something important, as constitutional theorists increasingly emphasize.<sup>73</sup>

That's our first observation. Here's our second: despite a vast literature on American constitutional theory, the supply of plausible constitutive theories is remarkably short. This is not the place to substantiate that claim in detail.<sup>74</sup> Instead, we offer a picture of the cupboard drawn in a few broad brush strokes.

Turn first to the constitutional theory literature. Current scholarly fashion distinguishes two schools: originalism and non-originalism (or living constitutionalism). The great majority of contributions over the years—those associated with scholars such as James Bradley Thayer,<sup>75</sup> Herbert Wechsler,<sup>76</sup> Alexander Bickel,<sup>77</sup> John Hart Ely,<sup>78</sup> Philip Bobbitt,<sup>79</sup> Cass Sunstein,<sup>80</sup> and David Strauss,<sup>81</sup> among many others—are non-originalist. They are also, almost without fail, prescriptive on their face. H.L.A Hart was struck by this fact 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 . . . how judges reason and should reason, in deciding particular cases.”<sup>82</sup>

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73. See, e.g., William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351 (2015) (noting and advocating a “positive turn” in constitutional theory); Christopher R. Green, *Constitutional Truthmakers*, NOTRE DAME J.L. ETHICS & PUB. POLY. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2901157](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2901157); Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157 (2004), *reprinted and revised as* SCOTT HERSHOVITZ ED., *EXPLORING LAW'S EMPIRE* ch. 10 (2006).

74. For a longer discussion, from which this section is drawn, see Berman, *Our Principled Constitution*, *supra* note 5, Part I.

75. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

76. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16–19 (1959).

77. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 201 (1962).

78. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 87 (1980).

79. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7 (1982); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 22 (1991).

80. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* ix (1999).

81. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 48–49 (2010).

82. H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 969. (1977).



From our perspective, the problem with such theories is that their prescriptivism runs more than skin deep; most have no clear constitutive implications at all. The first widely discussed academic theory of constitutional interpretation—Thayer’s “clear error” theory<sup>83</sup>—clearly illustrates. Thayer argued that courts should not hold an act of Congress unconstitutional unless they are certain of its unconstitutionality beyond a reasonable doubt. This is not an account of the determinants or truthmakers of constitutional law, but rather a standard of review. Or consider Posnerian pragmatism, which urges judges to make sensible and workable law in the “open area” where “orthodox legal materials run out.”<sup>84</sup> Participants to the theoretical disputes disagree about what those materials are, how they combine, and when they run out. A constitutive theory aims to resolve these puzzlements, but is what Posner conspicuously fails to supply.<sup>85</sup> Similar things could be said about all the other theories mentioned in the previous paragraph. Indeed, Bobbitt made his anti-constitutivism unambiguous, insisting that law “is something we do, not something we have as a consequence of something we do.”<sup>86</sup>

Early originalists were also prescriptive, at least nominally. Robert Bork maintained that Wechsler didn’t take his own “neutral principles” seriously enough. It isn’t sufficient that judges be neutral “in the *application* of principles,” Bork argued. “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.”<sup>87</sup> To satisfy this requirement, Bork exhorted, “[t]he judge should stick close to the text and the [constitutional] history, and their fair implications.”<sup>88</sup> This language is unambiguously prescriptive. Other first-generation originalists argued in similar terms.<sup>89</sup> But originalism, unlike most varieties of living constitutionalism, did have constitutive implications that Bork, Scalia, and others would soon make

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83. Thayer, *supra* note 75.

84. RICHARD A. POSNER, HOW JUDGES THINK 15, 324 (2008).

85. See Mitchell N. Berman, *Judge Posner’s Simple Law*, 113 MICH. L. REV. 777, 778 (2015).

86. See BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 79, at 24.

87. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7 (1971).

88. *Id.* at 8.

89. 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).

explicit: the norms that make up our constitutional law are all and only what the constitutional text says or means, and what it says or means is whatever it originally said or meant.<sup>90</sup> Put another way, the constitutional law is fully constituted by the original meaning of the constitutional text.

“The constitutional law is all and only what the constitutional text says” has a superficial plausibility that can help explain its popularity outside the academy. But it confronts many difficulties if offered as a complete constitutive account of American constitutional law, and not just as a slogan. To start, it doesn't jibe well with any widely entertained general theory of law. Ever since Hart demolished John Austin's “command theory of law” over sixty years ago, no legal philosopher 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 provides no support for monist originalism as a *parochial* account of American constitutional law. According to Hart, legal norms in a given jurisdiction are those norms ultimately “validated” by a convergent practice among legal officials, especially judges, that Hart dubs a “rule of recognition.” It is plain that American judges have not converged on accepting the original public meaning of the text as the sole determinant of constitutional norms.<sup>91</sup> Furthermore, and Hart aside, Scalian originalism is inconsistent with many constitutional decisions that strike most legal elites as correct, even on reflection.<sup>92</sup>

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90. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 5 (1990) (contending that a judge “is bound by the only thing that can be called law, the principles of the text, whether Constitution or statute, as generally understood at the enactment.”). See also Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 *YALE L.J.* 541, 551–52 (1994) (“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.”); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 383, 397 & 398 (2012) (arguing 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”) (internal quotation omitted); Randy E. Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411, 417 (2013) (asserting that “the original meaning of the text provides the law that legal decisionmakers are bound by . . .”).

91. 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); Richard H. Fallon, Jr., *Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra* note.

92. Exhibit A is usually *Brown v. Board of Ed.* See JACK BALKIN, *LIVING ORIGINALISM* 105 (2011). 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); Berman, *Our Principled Constitution*, *supra* note 5, at 1345–46.

Perhaps most significantly, it fits poorly with many constitutional sophisticates' considered judgments that judicial decisions or non-judicial historical practices can bear constitutively on the content of our constitutional law. What courts have ruled, and what settled non-judicial practices have been, seem to matter in ways that orthodox constitutive originalism cannot easily accommodate. Thus, originalism's monistic premise—that constitutional law is constituted exclusively by the meanings of the constitutional text—renders it especially doubtful.

That's a picture of what constitutional theorists have produced. Non-originalists, overwhelmingly pluralists, have offered varied accounts of how judges should exercise their powers of judicial review—many of which we find plausible—but no constitutive accounts. A prominent branch of contemporary originalism offers an account that is genuinely constitutive, but that most constitutional theorists—including many self-identifying “originalists”<sup>93</sup>—find entirely implausible. When we shift attention from offerings expressly designed for American constitutional law toward the scholarly field known as general jurisprudence, the picture is not much more promising. The two leading “theories of law” offered and debated within Anglophone general jurisprudence—Hartian positivism and Dworkinian interpretivism—do provide just what an American constitutional theorist might want: pluralism married to constitutivism. But both strike most American constitutional lawyers as doubtful, albeit for almost diametrically opposed reasons.

Start with Hart who, recall, maintains that 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.”<sup>94</sup> Even if vaguely Hartian in outlook, many American constitutional lawyers and scholars find it hard to fully embrace Hart's account because it is thought to entail that there is much less constitutional law than appears correct, even on reflection. Most constitutional lawyers have, at least occasionally, believed two things simultaneously: (1) that thus-

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93. Tellingly, many of the most influential and sophisticated contemporary originalists avoid constitutive claims. See, e.g., Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's Moral Reading of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1292 (1997); Keith E. Whittington *Originalism: A Critical Introduction*, 82 *FORDHAM L. REV.* 375, 388 (2013). See also JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* 2, 116 (2013); William Baude & Steven E. Sachs, *The Law of Interpretation*, 130 *HARV. L. REV.* 1079, 1135, n. 331 (2017). And “new originalists” who may have constitutive ambitions find the sledding getting especially rough when working out the character and contours of the constraints that govern what they call “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).

94. See generally H.L.A. HART, *THE CONCEPT OF LAW*, ch. 6 (1961).

and-such is a constitutional right, power, or duty, and (2) that Justices and other legal officials do not all accept one or another legal premise that serves as essential support for (1). Yet, if Hart's account of law is correct, then belief in (2) should fatally undercut belief in (1). In Dworkin's (surely exaggerated) encapsulation of the worry, on Hart's account, "it would follow that there is actually almost no law in the United States."<sup>95</sup> But few internalize that lesson. Most constitutional lawyers and scholars believe that some legal propositions are true even though the legal premises that make them true are controversial among officials.

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 principles of personal and political morality that best fit and justify the institutional history of the legal regime. Put another way, "propositions 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."<sup>96</sup>

But this account puts pressure on the orthodox understanding among American constitutional lawyers that what our constitutional law is, and what political morality or justice require, are different questions—even if, on some matters, the latter bears contingently on the former. And sure enough, Dworkin would conclude late in life that the theory advanced in *Law's Empire* inevitably leads to a "one-system picture" of the normative landscape in which law is a branch of morality,<sup>97</sup> and our legal obligations and moral obligations cannot conflict. Although that could be, few constitutional lawyers think so. The core 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.

Where does this drive-by review of a vast literature leave us? In our view, it suggests that one might reasonably want at least four things of a constitutional theory—that it: (1) explain how legal rights, duties, powers, immunities, and so on are constituted or determined, and not only how judges

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95. Ronald Dworkin, *Hart's Posthumous Reply*, 130 HARV. L. REV. 2096, 2116 (2017).

96. RONALD DWORIN, *LAW'S EMPIRE* 225 (1986). *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 DWORIN, *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 1351 n.98; see also Jeffrey Goldsworthy, *Dworkin as an Originalist*, 17 CONST. COMMENT. 49 (2000). We're focusing only on Dworkin's general-jurisprudential account.

97. RONALD DWORIN, *JUSTICE FOR HEDGEHOGS* ch. 19 (2011). See also, e.g., 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*, *supra* note 71.

should decide cases; (2) account for the pluralism that appears to characterize our system at a deep level; (3) vindicate the widespread belief that constitutional norms and genuine moral norms sometimes (perhaps often) conflict; and (4) deliver constitutionally correct answers to at least some constitutional questions that are genuinely contested. As we will see, principled positivism satisfies all four desiderata.

## B. The Account Introduced

Principled positivism is not only an account of American constitutional law, it is an account of law as such. Like the accounts offered by Hart and Dworkin (and by Raz and Finnis, among others), principled positivism is a theory about the nature and content of law across jurisdictions.<sup>98</sup> This section presents the account in three short steps and summarizes.

### 1. *Of rules and principles.*

Drawing on Dworkin, let's recognize two types of constitutional norms: "rules" and "principles." Although many commentators agree that the terms mark some distinction of importance, its precise nature or location remains "dogged by confusion and controversy."<sup>99</sup> Indeed, Dworkin himself did not make entirely clear precisely how he distinguished the norm types.<sup>100</sup> 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 key: principles have (finite) weight.

Rules contrast with principles. Lacking "weight," they apply in all-or-nothing fashion, resolving whatever disputes fall within their terms. They are sufficiently determinate to adequately serve the system's core conduct-guidance function.<sup>101</sup>

Consider a representative sampling of constitutional norms: Legally enforced racial segregation in public education is unconstitutional. Congress

98. 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.

99. ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 45 (Julian Rivers trans., Oxford Univ. Press ed. 2002).

100. See, e.g., David Lyons, *Principles, Positivism, and Legal Theory*, 87 *YALE L.J.* 415, 423 (1977).

101. "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."

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 their subject matter, Hohfeldian character, and distance from the constitutional text. But they're all "constitutional rules."<sup>102</sup> 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.*<sup>103</sup>

If there are legal rules and legal principles, what is the relationship between them? The standard view 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 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."<sup>104</sup> His view, as David Lyons put it, is that "principles supplement rules."<sup>105</sup> Jack Balkin, the constitutional theorist who, after Dworkin, has made most of the rule/principle distinction, has a similar view. 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

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102. 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 VA. 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*.

103. With apologies to Greenberg, *supra* note 73.

104. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 29 (1977).

105. See Lyons, *supra* note 100, at 421.

a general principle, we must apply the principle.”<sup>106</sup> Principles, just like rules, are norm-types that “the text enacts.”<sup>107</sup>

Principled positivism paints a different picture. To a first approximation, rules are determined by the principles; the principles determine the rules. That’s a little crude, for principles do not determine the rules all by themselves. More accurately, then: rules are determined by principles and whatever facts the principles make relevant. Suppose a principle provides that historical practices that have proven stable and accepted have legal force (HISTORICAL PRACTICE MATTERS).<sup>108</sup> 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 more fundamental than the rules: the rules are what they are—they have the contents they have—in virtue of legal principles, but not vice versa. Call this a “layered” view of the rule/principle relationship rather than the standard “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 cannot defend a complete answer here. It will 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.

Rules and principles are types of norms; norms are kinds of forces or can be analogized to forces (they press or weigh or favor); and forces can combine. Frequently and most simply, we model the combination of forces as vector addition. Because principles weigh or press “in different directions”—that is, toward different normative upshots—vector addition is a promising model for the determination of rules by principles too. 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.<sup>109</sup> What

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106. BALKIN, *LIVING ORIGINALISM*, *supra* note 92, at 14.

107. *Id.*

108. From here out, we write PRINCIPLES in SMALL CAPS, and underline rules.

109. For possible complications, see Berman, *Our Principled Constitution*, *supra* note 5, at 1367 & n.144.

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 let us introduce an important distinction that our initial discussion of constitutional principles skipped past. Principles come in two types: “derivative” and “fundamental.”

Suppose that what the text says matters. Of course, it does. That (more or less) is a constitutional principle: WHAT THE TEXT SAYS MATTERS. Suppose too that one thing the text says is: “religious freedom matters.” The norm that corresponds to that proposition also is a principle: it has the dimension of weight,<sup>110</sup> 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 absent a compelling justification. So, we have two principles on our plate: RELIGIOUS FREEDOM MATTERS and WHAT THE TEXT SAYS MATTERS. They differ 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, we will have fundamental constitutional principles in mind. 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.<sup>111</sup> Mores, fashion, the use of

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110. Many critics have argued that principles cannot be posited because their weight cannot be posited or promulgated. See, e.g., DWORKIN, *TAKING RIGHTS SERIOUSLY*, at 43–44; Larry Alexander & Ken Kress, *Against Legal Principles*, in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 740 (Andrei Marmor ed., 1995). We think that principles can be promulgated but that promulgation does not fix their weights. A principle's weight ebbs and flows over time with its use and endorsement. See Mitchell N. Berman, *For Legal Principles*, in *MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER* (Heidi Hurd ed., 2018) (forthcoming 2019).

111. Grounding is a non-causal relationship of “metaphysical determination and dependence.” Gideon Rosen, *Metaphysical Dependence: Grounding and Reduction*, in *MODALITY:*



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.”<sup>112</sup> 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 are grounded in social facts. A social norm is produced by the way that certain people “take it up” by 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.<sup>113</sup> This is the standard view of the common law.<sup>114</sup>

(Fundamental) legal principles arise by being “taken up” by the right participants in the system in the right ways.<sup>115</sup> 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. 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.<sup>116</sup>

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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.

112. MATT RIDLEY, *THE EVOLUTION OF EVERYTHING* 4 (2015).

113. See, e.g., GEOFFREY BRENNAN ET AL., *EXPLAINING NORMS* (2013).

114. See, e.g., STRAUSS, *THE LIVING CONSTITUTION*, *supra* note 81, 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.”).

115. See Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMONWEALTH L.J. 155, 166 (2002) (arguing that, for “common lawyers . . . , the law in its fundament 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.”).

116. *Contra* HART, *CONCEPT OF LAW*, *supra* note 94, at 261–62 (arguing that the rule/principle distinction is “incoherent” unless taken to represent differences of degree).

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 their contents “in virtue of”—the interaction of 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.

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 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.”<sup>117</sup> Thus, our constitutional rules change organically because our underlying principles do. They can't help it, and we can't stop it (though we can, collectively, speed change up or slow it down).

Recall our imagined constitutional disagreements. Suppose you are right about plural marriage: states are constitutionally permitted not to recognize plural marriages. If this is a rule, it exists in virtue of the balance of all implicated constitutional principles. Maybe, for example, 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 we are right that presidential self-pardons are constitutional, that might be thanks to principles concerning separation of powers or intentions or understandings of framers and ratifiers.

### C. An Illustration

What we've said so far is abstract. An example will make it more concrete, and an illustration may make it clearer.<sup>118</sup>

The model that follows, and will reappear in Part IV, aims to depict the determination of rules (represented by circles) by principles (represented by arrows). It does not depict the grounding of principles in practices.<sup>119</sup> The

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117. 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.

118. This example is taken from Berman, *Our Principled Constitution*, *supra* note 5, at 1396.

119. Think of the principles as having emerged over time from a huge number of speech acts by countless persons acting in a large variety of constitutional capacities, from Supreme Court Justices issuing opinions, to elected officials making speeches, to citizens writing op-eds.

width (height) of the arrow depicts its relative weightiness or importance within our system of constitutional law. Relative weights are invariant across contexts. Length depicts the extent to which the principle is activated given the relevant facts. 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 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. The total force any given principle exerts in favor of a rule is some function of its power and the extent of its activation, roughly as the gravitational force that a celestial body exerts on an object is a function of its mass (invariant) and the intervening distance (variant). (The principles are shaded to loosely reflect the total force that the principle is exerting; shading does not add new information but 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 reflect the relative net impact of the principles. The model assumes that a rule obtains when the degree of support it receives from all implicated principles exceeds, by some unspecified threshold, the support enjoyed by any impossible alternative.

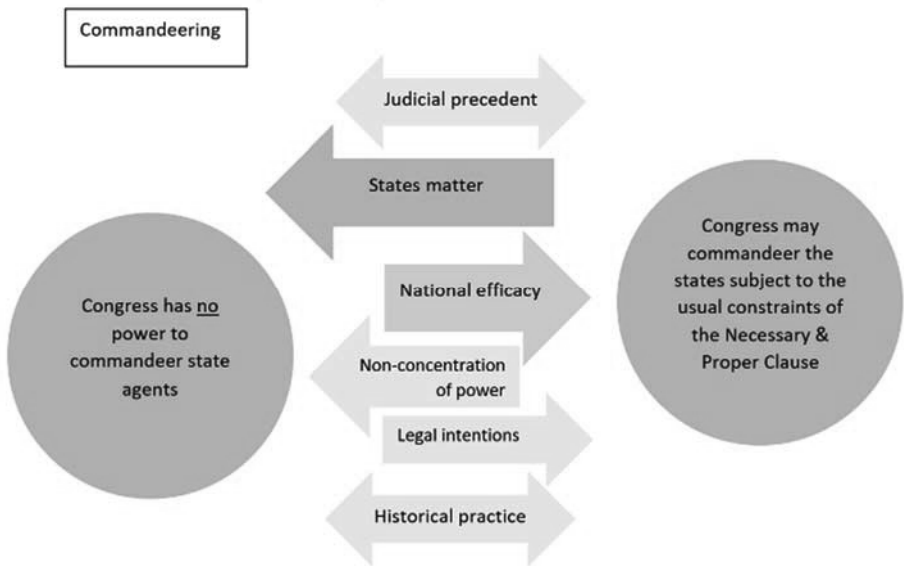
That's the model. Here's the question: Does Congress have constitutional power to require state executive or administrative agents to enforce or help to administer a federal regulatory scheme? The Court narrowly divided on this question two decades ago, in *Printz v. United States*.<sup>120</sup> We think the issue is close.

It's close because many constitutional principles are implicated, but the bearing of each is uncertain. Judicial precedents cut in different directions.<sup>121</sup> Some framers intended that the federal government would possess some commandeering power, but others intended otherwise or had no views on the topic. An untrammelled power to commandeer would threaten state independence, but its total absence might impede Congress's ability to accomplish important national ends. Commandeering could augment presidential power at congressional expense, thereby implicating NON-CONCENTRATION OF POWER, but probably not by much. There are historical precedents for federal commandeering of state agents, but not a lengthy and settled practice. All told, the relevant principles and their activation can be approximated by the following snapshot:

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120. 521 U.S. 898 (1997).

121. Compare *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress may not require state legislative action), with *Testa v. Katt*, 330 U.S. 386 (1947) (holding that Congress may require state courts to entertain federal causes of action).



Not everybody finds the question so close. But disagreements are readily explained by different views about the weights of implicated principles and the extent of their activation. One who sides with the *Printz* majority likely believes, say, that commandeering threatens the independence and autonomy of the states more than this figure represents (i.e., the STATES MATTER arrow drives even further to the left). One who sides with the dissent may believe that the framers harbored the legal intention that Congress should have this power, and also believe that this principle is weightier than shown above (i.e., the rightward-pointing AUTHORS' LEGAL INTENTIONS arrow should be depicted as wider). These are the types of disagreement that principled positivism, and these illustrations, can make more salient.

#### D. Summary: Four Core Elements

Principled positivism is characterized by four features: it is *realist*, *pluralist*, *aggregative*, and *organic*.

##### 1. Realism.

Principled positivism assumes what we have called “constitutional realism.” 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 deny the

(minimal) reality of constitutional norms. Recall Bobbitt's insistence that law "is something we do, not something we have as a consequence of something we do."<sup>122</sup> Principled positivism rejects that claim; it maintains that law is something we both do and have. Second, realism 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."<sup>123</sup> More particularly, the determinants are instances of a norm type that is distinguished by its "weight," and conventionally termed a "principle."

## 3. *Aggregationism.*

The derivative determinate norms that adjudication seeks to discover, announce, and apply—"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.<sup>124</sup> 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 (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

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122. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 79, at 24.

123. Mark Greenberg, *The Moral Impact Theory, the Dependence View, and Natural Law* (forthcoming). See also Solum, *supra* note 93, at 481 (presenting and critiquing the "multiple modalities model").

124. The parenthetical signals that we do not exclude the possibility that principles can interact in a fashion that is more complicated than simple aggregation, and that some constitutional principles might not apply because they are disabled or not enabled.

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.<sup>125</sup>

### III. Kennedy is a Principled Positivist

Together, this Part and the next advance a hedged and provisional defense of Kennedy's constitutional adjudication against the charge of *personal whimsy*. This Part presents evidence, drawn from a wide range of opinions, that Kennedy espouses realism, pluralism, aggregationism, and organicism—and thus that he's a principled positivist. Part IV 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 principled positivism.

#### A. Kennedy is a Constitutional Realist

Of course he is. Almost everyone is. And no federal judge will confess otherwise. Throughout his judicial career, Kennedy has opined that there are correct and incorrect answers to constitutional questions, including many that divide appellate courts. In *Texas v. Johnson*, for example, Kennedy joined the majority to strike a Texas law that criminalized burning of the American flag.<sup>126</sup> He also concurred separately to explain that “sometimes we must make decisions we do not like,”<sup>127</sup> but that “[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.”<sup>128</sup>

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 held the Line Item Veto Act violated the Presentment Clause.<sup>129</sup> Kennedy acknowledged that the statute's objective—“to restrain excessive spending”—was “of first importance.”<sup>130</sup> But, the statute “must be found invalid” because “[t]he Constitution's structure requires a stability which

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125. Accord Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 11 (2003) (“Constitutional law emerges from an ongoing dialectic between constitutional culture and the institutional practices of constitutional adjudication.”); H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS* (2002).

126. *Texas v. Johnson*, 491 U.S. 397 (1988).

127. *Id.* at 420 (Kennedy, J., concurring).

128. *Johnson*, 491 U.S. at 420–21.

129. *Clinton v. City of New York*, 524 U.S. 417 (1997).

130. *Id.* at 499.

transcends the convenience of the moment.”<sup>131</sup> Rejecting the pragmatic approach proffered by Justice Breyer in dissent, Kennedy concluded that, even if the “controls over improvident spending. . . . prove insufficient,” that “cannot validate an otherwise unconstitutional device.”<sup>132</sup>

## B. Kennedy is a (Principled) Pluralist

Kennedy’s enthusiasm for principles is well-known. To be sure, every justice invokes principles. But (to paraphrase the naturalist JBS Haldane) Kennedy’s fondness for them appears inordinate.<sup>133</sup> In case after case, constitutional domain after constitutional domain, Kennedy’s opinions are densely populated by a diverse menagerie of constitutional principles. They range from the broad and familiar principles of “federalism,” “separation of powers,” “personal freedom,” and “human dignity,”<sup>134</sup> to the narrow or even oddball: “the principle . . . that navigable waters uniquely implicate sovereign interests”;<sup>135</sup> “the fundamental principle . . . that different branches of government ‘converse with each other on matters of vital common interest’”;<sup>136</sup> “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”;<sup>137</sup> 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”;<sup>138</sup> and others.

Even more significantly, Kennedy treats (many) constitutional principles as 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 “*de jure* sovereignty is the touchstone of habeas corpus jurisdiction,” because “that position would be . . . contrary to fundamental separation-of-powers

131. *Clinton*, 524 U.S. at 499.

132. *Id.* at 452–53.

133. 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, *Homage to Santa Rosalia or Why Are There So Many Kinds of Animals?*, 93 THE AMERICAN NATURALIST 145, 146, n.1 (1959).

134. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

135. *Idaho v. Coeur d’Alene Tribe of Idaho, et al.*, 521 U.S. 261, 284 (1997).

136. *Blakely v. Washington*, 542 U.S. 296, 326 (2003) (Kennedy, J., dissenting) (quoting *Mistretta v. United States*, 488 U.S. 361, 408 (1989)).

137. *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014).

138. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017).

principles.”<sup>139</sup> 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.”<sup>140</sup> 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.”<sup>141</sup> “It is nonsensical to interpret those provisions themselves in light of some general ‘separation-of-powers principles’ dreamed up by the Court.”<sup>142</sup> Kennedy denies that a principle, if not set forth in the constitutional text, can only be “dreamed up” by the Court that enforces it. Non-textual principles are often immanent in, and birthed by, the practices of the constitutional community.

### C. Kennedy is an Aggregationist

We have just said that Kennedy treats constitutional principles as fundamental in character. They are explanatorily prior to (they “determine,” “constitute,” or “ground”) the relatively determinate rules that, as a constitutional realist, Kennedy sees Supreme Court Justices as trying to discover. But how do principles determine rules? For Kennedy, as for other 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. When cases are hard, that’s often because various principles are pressing, with greater or lesser force, in opposite 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 still controversial) opinions exemplify. In *Harmelin v. Michigan*, Kennedy’s concurring opinion derived “[t]he Eighth Amendment does not require strict proportionality between crime and sentence” from DEMOCRACY, FEDERALISM, and SEPARATION OF POWERS.<sup>143</sup> In *Powers v. Ohio*, prosecutors may not use race-based peremptory challenges regardless of defendant’s race is a function of PERSONAL DIGNITY and JUDICIAL INTEGRITY.<sup>144</sup> And in *Zivotofsky v. Kerry*, the President has preclusive power over recognition reflects the net effect of a diverse lot of principles:

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139. *Boumediene v. Bush*, 553 U.S. 723, 755 (2007).

140. *Id.* at 833 (Scalia, J., dissenting).

141. *Id.*

142. *Id.*

143. *Harmelin v. Michigan*, 501 U.S. 957, 998, 1001 (1990) (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added).

144. *Powers v. Ohio*, 499 U.S. 400, 402 (1999).



WHAT THE TEXT SAYS, JUDICIAL PRECEDENT, HISTORICAL PRACTICE, and PRAGMATISM, among others.<sup>145</sup>

#### D. 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,<sup>146</sup> and as punishment for any sexual assault not resulting in death.<sup>147</sup> Both opinions relied heavily on “evolving standards of decency,” generating a small flurry of commentary extolling (or deriding) Kennedy as a “living constitutionalist.”<sup>148</sup> 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.<sup>149</sup> 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; 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 traditions from

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145. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084, 2086, 2090, 2093 (2015).

146. *Roper v. Simmons*, 543 U.S. 551, 561 (2005).

147. *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008).

148. See e.g., Lisa K. Parshall, *Embracing the Living Constitution: Justice Anthony M. Kennedy’s Move away from a Conservative Methodology of Constitutional Interpretation*, 30 N.C. CENT. L. REV. 25, 74 (2007) (extolling); Adam Lamparello & Charles E. MacLean, *Originalism and the Criminal Law: Vindicating Justice Scalia’s Jurisprudence-and the Constitution*, 50 AKRON L. REV. 227, 263 (2016) (deriding).

149. See e.g., Lee J. Strang, *Originalism and the “Challenge of Change”: Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 955 (2009).

which it developed as well as the traditions from which it broke. That tradition is a living thing.<sup>150</sup>

*Poe* concerned due process. But the thought is general. “One need not be a rigid partisan of Blackstone,” Harlan would later emphasize, “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.”<sup>151</sup>

Justice Kennedy, along with Justices O’Connor and Souter, endorsed Harlan’s *Poe* dissent explicitly and enthusiastically in their *Casey* joint opinion.<sup>152</sup> 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.<sup>153</sup> As “new insights and societal understandings” emerge, the constitutional community gains “a better informed understanding” of principles that “once passed unnoticed and unchallenged.”<sup>154</sup> As “judicial exposition . . . in common-law fashion, clarif[ies] the contours” of our constitutional principles,<sup>155</sup> they “acquire[] over time a power and an independent significance” that “become part of our constitutional tradition.”<sup>156</sup> Contrast this picture of the organic development of our principles with Justice Breyer’s claim that judicial review “requires applying constant constitutional principles to changing circumstances.”<sup>157</sup> Kennedy (like Harlan) attributes to our constitutional principles an evolutionary character that Breyer’s more static picture denies.

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150. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

151. *Desist v. U.S.*, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting).

152. *See Planned Parenthood of Se. Penn. 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).

153. *Blakely v. Washington*, 542 U.S. 296, 326–27 (2004) (Kennedy, J., dissenting).

154. *Obergefell v. Hodges*, 135 S. Ct. 2071, at 2602–03 (2015).

155. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 885 (2011).

156. *Minnesota v. Carter*, 525 U.S. 83, 100 (1998) (Kennedy, J., concurring). *See also* Louis D. Bilionis, *Grand Centrism and the Centrist Judicial Personam*, 83 N.C. L. REV. 1353, 1354 (2005) (attributing to Kennedy 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”).

157. STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 73 (2010).

#### IV. Personal Whimsy through a Principled Positivist Lens

This Part examines the extent to which the conceptual frame and apparatus that principled positivism supplies, the tenets of which Kennedy appears to endorse, can make intelligible and defensible his performance in those opinions that have attracted the fiercest criticism.

Which are those? There's the rub. A determined advocate of *personal whimsy* could plausibly introduce a few dozen Kennedy opinions into evidence. And we have discovered no consensus "bottom ten." So we'll have to be selective. This Part surveys 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 contextualizing the supposedly worst decisions. And, we've selected these fields because, collectively, they cover both structure and rights, include a disproportionate number of opinions that have attracted the broadest or most vociferous criticism, and were targeted by critics from the left and from the right in nearly equal measure.

This approach necessarily omits entire doctrinal areas worthy of study, including expressive and religious liberties, and criminal justice. Resources are limited, and we have given reasons for focusing our attention as we have. Still, we acknowledge this study's limitations. A more comprehensive survey could leave Kennedy looking less good than we perceive him to be. Or better. Either way, the incompleteness 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 Kennedy's apparent embrace of the four planks of principled positivism, you 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 label "mysteriousness" object that it's unclear where an invoked principle "comes from." But this is just what organicism ensures: like other evolutionary phenomena, our fundamental principles cannot be traced to distinct sources. They're more like soccer (of diverse and indistinct origins) 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 easier to comprehend. And it might even

induce some of his critics to chalk up any remaining obscurity to *bad writer* or *clunky thinker*, criticisms far less damning than *personal whimsy*.

The goal of this section is to investigate the extent to which such potential defenses can be made out. We'll submit that Kennedy's performance in many of his most notorious opinions, read and reconstructed sympathetically (but not sycophantically), reflect a reasonably consistent and broadly defensible approach to constitutional decision-making.

## A. Federalism

As a staunch supporter of "states' rights" throughout his career on the Court,<sup>158</sup> Kennedy 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*,<sup>159</sup> 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."<sup>160</sup>

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

Suppose, as the previous Part 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

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158. Justice Kennedy has voted with the conservative majority to limit federal power in every major federalism case: on Congress's commerce and spending powers (*see, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1994); *United States v. Morrison*, 529 U.S. 598 (2000); *Nat'l Fed'n of Indep. Business v. Sebelius*, 567 U.S. 519 (2012)), commandeering of state authorities (*see, e.g.*, *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997)), state sovereign immunity (*see, e.g.*, *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Alden v. Me*, 527 U.S. 706 (1999)). These are the headlines, not a comprehensive list.

159. 527 U.S. 706, 712 (1999).

160. Chemerinsky, *supra* note 37, at 1286; *see also* Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 953 (2000) ("The Court's Eleventh Amendment and sovereign immunity case law deserves the condemnation and resistance of scholars.").

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. Fourth, insofar as he's an organicist, Kennedy might recognize that the shape and force of the relevant federalist principles have shifted over time. All four predictions are borne out.

Kennedy's concurrence in *Lopez* exemplifies. There, the Court held, 5-4, that the federal Gun-Free School Zone Act (GFSZA), which criminalized possession of firearms near schools, exceeded Congress's commerce power.<sup>161</sup> Kennedy joined Chief Justice Rehnquist's majority opinion. He also concurred (joined by 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 thrust 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 varied demands 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."<sup>162</sup> 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."<sup>163</sup> 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."<sup>164</sup> Development of these principles has not followed "a coherent or consistent course."<sup>165</sup> But there are "essential principles now in place respecting the congressional power to regulate transactions of a commercial nature."<sup>166</sup> They include a judicial commitment "to sustaining federal legislation on broad principles of economic practicality."<sup>167</sup>

If our plural and partially conflicting constitutional principles determine our constitutional powers and rights, the statute's constitutionality turns upon the relative force or impact of the complementary principles STATES

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161. *Lopez*, 514 U.S. at 549.

162. *Id.* at 568 (Kennedy, J., concurring).

163. *Id.* at 568.

164. *Id.* at 574, 577-78.

165. *Id.* at 568.

166. *Lopez*, 514 U.S. at 574.

167. *Id.* at 571.

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."<sup>168</sup> 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."<sup>169</sup> 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.<sup>170</sup> 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."<sup>171</sup>

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.<sup>172</sup> Justice Thomas authored the dissent on behalf of the conservatives. "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."<sup>173</sup> "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."<sup>174</sup> As he had in *Lopez*, Kennedy penned a separate concurrence, this time to object that the dissent's "course of argumentation runs counter to fundamental principles of federalism."<sup>175</sup> 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."<sup>176</sup>

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168. *Lopez*, 514 U.S. at 583.

169. *Id.* at 564.

170. *Id.* at 583 (Kennedy, J., concurring).

171. *Id.* at 580.

172. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

173. *Id.* at 845 (Thomas, J., dissenting).

174. *Id.* at 847–48.

175. *Thornton*, 514 U.S. at 838 (Kennedy, J., concurring).

176. *Id.* at 841.

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's a simplification because STATES MATTER and EFFECTIVE NATIONAL SUPREMACY weren't the only principles that *Alden* implicated. One obvious additional principle is WHAT THE TEXT SAYS MATTERS. Kennedy acknowledged that it weighed against immunity, but abjured reliance "on the words of the Amendment alone."<sup>177</sup> What the framers intended to codify (even if the language chosen did not effectively communicate that intention) also matters.<sup>178</sup> So too does historical practice. No single principle is determinative nor do all principles point in the same direction. But STATES MATTER and EFFECTIVE NATIONAL POWER are the main drivers. The former, Kennedy reasons, is activated substantially:

[A]n 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.<sup>179</sup>

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.<sup>180</sup> 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, as the following picture conveys:

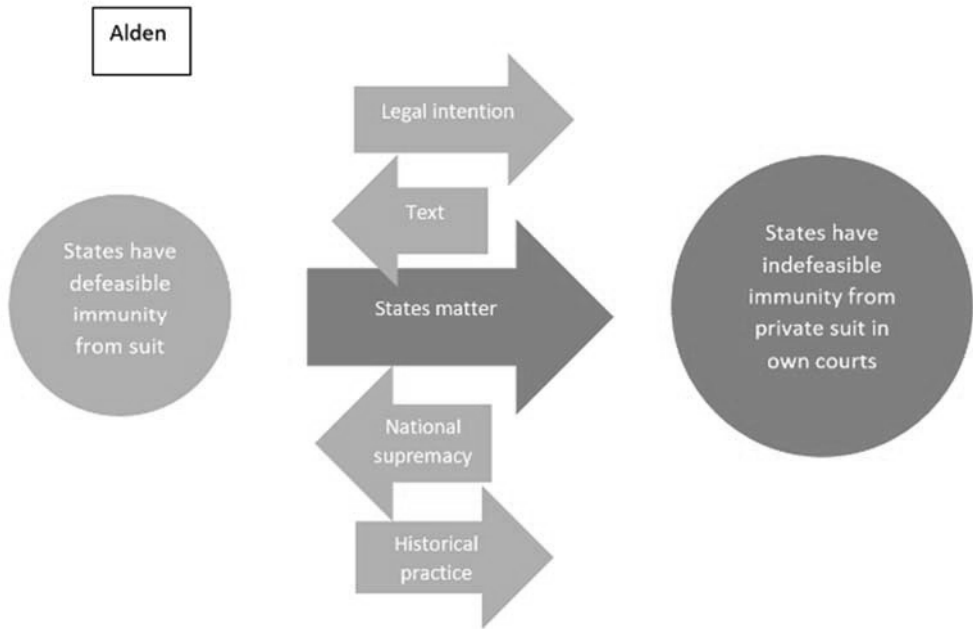
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177. *Thornton*, 514 U.S. at 730.

178. 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 1386–87 & 1387 n.200. The principles may be aligned, but, as Kennedy recognizes in *Alden*, needn't be.

179. *Alden v. Maine*, 527 U.S. 706, 750 (1999).

180. *Id.* at 755–57, 759 (discussing alternate means of enforcement).



Given Kennedy's priors, that strikes us as a reasonable analysis. 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 is fallacious, this objection goes, because it relies upon implausible historical premises.<sup>181</sup>

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

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181. *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.").



objection goes, the majority's rule is entirely unsupported. This criticism has merit, but less, we think, than first meets the eye, for LEGAL INTENTION is a less dominant note in Kennedy's opinion than Souter appreciates.<sup>182</sup>

Kennedy's chief 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 to serve as bulwarks against excessive concentration of power, and to satisfy needs of their citizens that can be met more effectively by subnational governments. This principle of independent state authority has retained 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."<sup>183</sup> 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.<sup>184</sup>

The suggestion that the state immunity rule 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 found in the Constitution."<sup>185</sup> 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 that Kennedy relies upon principles "nowhere found 'in the Constitution,'" that's an ineliminable aspect of 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 gets you.

182. Cf. *Alden*, 527 U.S. at 763, 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.").

183. *Id.* at 748.

184. 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.

185. Chemerinsky, *supra* note 37, at 1294.

Put differently, Souter maintains that Kennedy's opinion "turns on history."<sup>186</sup> 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."<sup>187</sup> "But it is the principle itself," and not any precise piece of historical evidence, "that does most of the work in deciding the case."<sup>188</sup> Thus, the evolving "history of legal and political theory . . . illuminate[s] the meaning of the constitutional plan"<sup>189</sup> and delivers the "principle of sovereign immunity *as reflected in our jurisprudence*."<sup>190</sup> Kennedy's decision in *Alden*, then, reflects his more general embrace of the "organic development of social institutions."<sup>191</sup>

So we are little moved by common complaints that *Alden* is *implausible* or *mysterious*. What criticism is left? One possibility 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 or threatened.

We think that both these things are true—in *Alden* and more generally. First, we think that the rule *Alden* discerns and announces impedes national supremacy more than Kennedy believes.<sup>192</sup> 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*;<sup>193</sup> his *Boerne* opinion displays insufficient appreciation for Congress's special role in

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186. *Alden*, 527 U.S. at 763 (Souter, J., dissenting).

187. Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1630 (2000).

188. *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. See *infra* Part V.

189. *Id.*

190. *Alden*, 527 U.S. at 757 (emphasis added).

191. Young, *supra* note 187, at 1604.

192. See, e.g., Meltzer, *supra* note 47, at 1012 (pointing out that the "Court fails to acknowledge" how the rule in *Alden* "harm[s] legitimate national objectives.>").

193. See Berman, *Our Principled Constitution*, *supra* note 5, at 1402 n.247. 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).

enforcing the Reconstruction Amendments;<sup>194</sup> 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.<sup>195</sup> In short, we think that our principles of national power are broader and weightier than Kennedy does. But this is the stuff of ordinary constitutional disagreement, not grounds to prosecute for *personal whimsy*.

## B. Abortion

One year after arriving on the Court, Kennedy joined Chief Justice Rehnquist's plurality opinion in *Webster v. Reproductive Health Services* that announced four Justices' intention to reconsider *Roe*.<sup>196</sup> Two years later, when Justice Thurgood Marshall retired and was replaced by Justice Clarence Thomas, most Court-watchers agreed 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 term, in *Casey*, a case challenging provisions of the Pennsylvania Abortion Control Act.<sup>197</sup>

In the event, conservative hopes were dashed. In a shocking joint opinion,<sup>198</sup> 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.<sup>199</sup> All the same, they replaced *Roe*'s rigid trimester framework with a less onerous "undue burden" test.<sup>200</sup>

The *Casey* dissenters reacted with fury. Scalia 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."<sup>201</sup> 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.

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194. See Michael H. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 174 (1997) ("[T]he *Boerne* majority viewed congressional action as an irrelevance, if not an impertinence.").

195. See Vladeck, *supra* note 52.

196. 492 U.S. 490 (1989) (plurality opinion).

197. Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 841 (1992).

198. 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).

199. *Casey*, 505 U.S. at 853 (plurality opinion).

200. *Id.* at 874.

201. *Id.* at 983 (Scalia, J., dissenting).

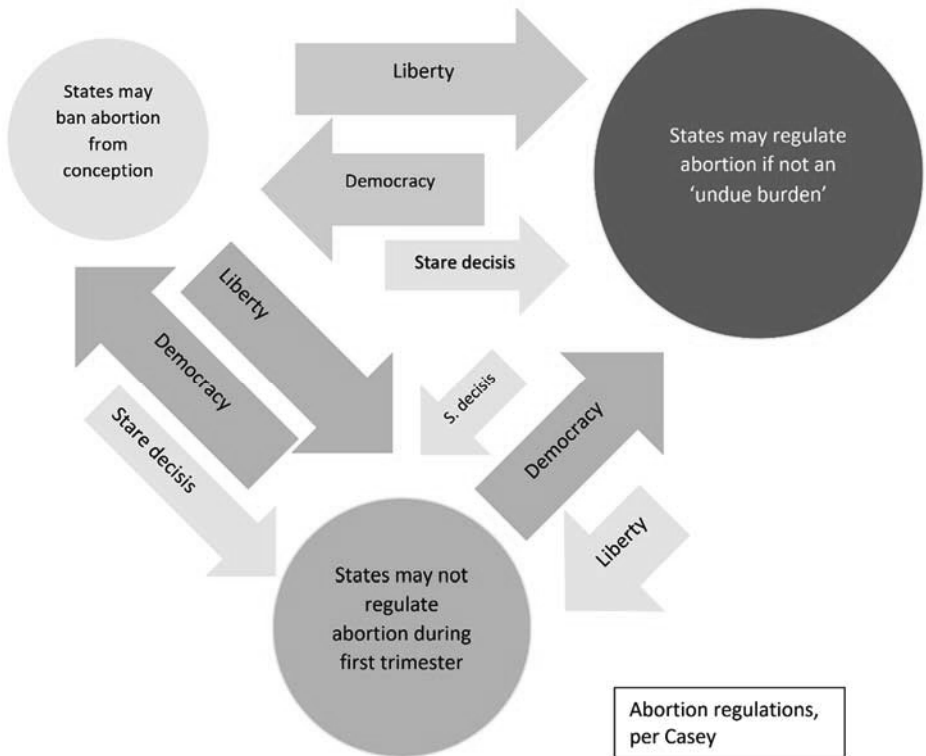
O'Connor, Kennedy, and Souter agreed that abortion regulations implicate two principal principles: a principle that the state must respect the liberty and autonomy interests of the pregnant woman, and of women who may become pregnant,<sup>202</sup> and a principle that the state may act to promote, and express respect for, the life of the unborn.<sup>203</sup> 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 puts matters grossly, but nuance isn't needed at this point.)

The joint opinion suggests that its authors may have differing (or unsettled) views about which principle would outweigh the other in a case of first judicial impression. But *Roe* had already held that bans on abortion from conception are unconstitutional. So a third principle was implicated: STARE DECISIS. And the authors of the joint opinion all agreed that the aggregate weight of these three principles dictated that banning abortion is unconstitutional, whatever 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.

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202. *Casey*, 505 U.S. at 869 (plurality opinion). (“[A] woman’s liberty to determine whether to carry her pregnancy to full term”).

203. *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)).



But that wasn't the end of the story. The possible constitutional rules here are not limited to two: 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.<sup>204</sup> The *Casey* joint opinion concluded that the aggregate weight of the principles favored O'Connor's undue burden rule over *Roe*'s trimester rule because the former gains more in the coin of DEMOCRACY than it loses in the coins of LIBERTY and 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 undue burden rule over *Roe*'s trimester rule, so too does it favor undue burden over a pro-life rule that conservative critics of *Roe* favor.) Put differently, the

204. *Akron v. Akron Ctr. For Reprod. Health*, 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting).

“undue burden” standard optimizes the applicable constitutional principles better than either the “compelling interest” test that *Roe* endorsed or the complete elimination of the abortion right.

That’s how we understand the joint opinion. In support of his *personal whimsy* charge, Scalia threw the kitchen sink of objections—*inconsistency* (Kennedy and O’Connor “abandon[ed] previously stated positions”),<sup>205</sup> *mysteriousness* (their “new mode of constitutional adjudication” is “nothing more than philosophical predilection”),<sup>206</sup> *implausibility* (the joint opinion’s analysis of *stare decisis* is “contrived”),<sup>207</sup> and *obscurity* (there is no way to know what is or is not an “undue burden,” because the standard is a “verbal shell game”).<sup>208</sup> Many commentators agreed.<sup>209</sup>

Tackling all these objections would consume too much space.<sup>210</sup> We’ll concentrate on the nub: that if justices abandon text and longstanding (fairly specific) traditions as the sole determinants of our constitutional law, then they can be guided only by their own personal value judgments. That’s a reasonable worry, but this version of the objection recognizes too few alternatives. Organicists maintain that fundamental constitutional principles change over time as commitments of participants in constitutional practice do. By their nature, evolving commitments and practices are contestable. But that does not entail that informed observers cannot get them right, or that claims about the contents and weights of evolving constitutional principles must be projections of personal preferences. (An observer of fashion, etiquette, or grammar can correctly discern what the norms of those domains have become, even while decrying them.) And though Americans plainly disagree over the bottom-line moral permissibility of abortion, and about the moral status of the fetus at various stages of gestation, the joint opinion’s judgment 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 hardly wacky. We think it’s correct.

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205. *Casey*, 505 U.S. at 997 (Scalia, J., dissenting).

206. *Id.* at 1000.

207. *Id.* at 993.

208. *Id.* at 987.

209. See, e.g., Robert F. Nagel, *Nationhood and Judicial Supremacy*, in CHRISTOPHER WOLFE ED., *THAT EMINENT TRIBUNAL: JUDICIAL SUPREMACY AND THE CONSTITUTION* 22 (2004); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1040 (2003).

210. For some responses, see Laurence H. Tribe, *The “Fundamental Right” That Dare Not Speak Its Name*, 177 HARV. L. REV. 1893, 1927, 1928 (2004); Ronald Dworkin, *The Center Holds!*, N.Y. REV. OF BOOKS, (Aug. 13, 1992), <http://www.nybooks.com/articles/1992/08/13/the-center-holds/#fnr-8>.

Eight years after *Casey*, the Court first encountered 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 *Stenberg v. Carhart*,<sup>211</sup> the Court by a 5-4 margin invalidated a Nebraska statute that criminalized performance of a “partial birth abortion,”<sup>212</sup> 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 *method* of performing abortion.”<sup>213</sup> Kennedy dissented and took issue with the majority’s characterization of the state’s interest, arguing that “Nebraska was entitled to find the existence of a consequential moral difference” between abortion procedures.<sup>214</sup> 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.”<sup>215</sup>

Congress responded to *Stenberg* by passing the Partial-Birth Abortion Act, which proscribed “partial-birth abortion” nationwide. When a challenge to the Act reached the Supreme Court in the form of *Gonzales v. Carhart*,<sup>216</sup> 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.<sup>217</sup> Furthermore, the ban does not have the purpose of placing a substantial obstacle in the path of women choosing an abortion because 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*.<sup>218</sup>

211. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

212. *Id.* at 922. Because the statutory definition of “partial birth abortion” did not reference specific procedures, O’Connor’s concurrence explained that “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. *Id.* at 949 (O’Connor, J., concurring); *id.* at 960 (Kennedy, J., dissenting) (“Nebraska seeks only to ban D&X.”).

213. *Id.* at 930.

214. *Id.* at 962 (Kennedy, J., dissenting).

215. *Id.* at 964.

216. *Gonzales v. Carhart*, 550 U.S. 124, 150 (2003).

217. The federal statute, like Nebraska’s, applied to “partial-birth abortion,” rather than to specific medical procedures. 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 150–51. Ginsburg’s dissent questioned this interpretation. *Id.* at 181 (Ginsburg, J., dissenting).

218. *Gonzales*, 550 U.S. at 190–91 (Ginsburg, J., dissenting). A second objection attached to Kennedy’s ruminations that “some women come to regret their choice to abort the infant life they

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 promoting fetal life.”<sup>219</sup> That interest, he says, requires upholding the Act. 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.”<sup>220</sup> 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.”<sup>221</sup> 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.”<sup>222</sup>

We agree with Ginsburg that a ban on intact D&E that allows standard D&E does little to protect fetal life. We also agree 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,<sup>223</sup> 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.”<sup>224</sup>

Kennedy is consistent when asserting in *Gonzales* that *Casey* “confirms the State’s interest in promoting respect for human life.”<sup>225</sup> Indeed, because

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once created and sustained,” and that “[s]evere depression and loss of esteem can follow.” *Id.* at 159–60. Many readers found that speculation baseless and offensive. 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 don’t think it does much work in Kennedy’s analysis. It was a gratuitous unforced error.

219. *Gonzales*, 550 U.S. at 145.

220. *Id.* at 181 (Ginsburg, J., dissenting).

221. *Id.* at 182.

222. *Id.* (citing *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 850 (1992) and *Lawrence v. Texas*, 539 U.S. 558, 571 (2003)).

223. See, e.g., *id.* at 145 (quoting *Casey*, 505 U.S. at 846) (“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.”).

224. *Casey*, 505 U.S. at 869. See also *id.* at 877 (“[T]he State may . . . express profound respect for the life of the unborn.”); *Gonzales*, 550 U.S. at 146 (“[T]he State may . . . express profound respect for the life of the unborn.”) (quoting *Casey*, 505 U.S. at 877)).

225. *Gonzales*, 550 U.S. at 163.



the post-*Roe* decisions “had ‘undervalue[d] the State’s interest in potential life,’”<sup>226</sup> a “central premise” of *Casey* was that “[t]he government may use its voice and regulatory authority to show respect for the life within the woman.” And, according to Kennedy, that is what banning a procedure that Congress found “disturbing” achieved: “The Act expresses respect for the dignity of human life.”<sup>227</sup>

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 constitutes 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),<sup>228</sup> whereas the cost to democracy of striking it down is measured, in part, by the ban’s expressive significance to its proponents (large).<sup>229</sup> The balance of principles looks something like this:

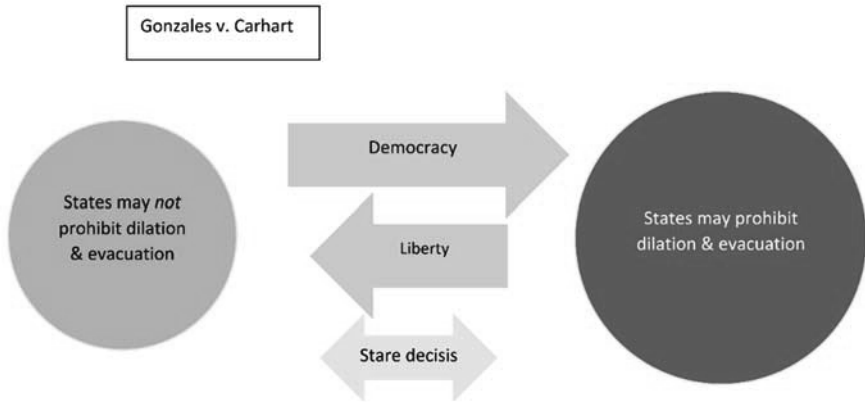
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226. *Gonzales*, 550 U.S. at 157 (plurality opinion) (quoting *Casey*, 505 U.S. at 873)).

227. *Id.* at 157–58.

228. *Id.* 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 192–193 (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”).

229. 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 v. Carhart*, 530 U.S. 914, 956–57 (2000) (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.<sup>230</sup> 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,<sup>231</sup> Kennedy's position is not obviously any more subjective or whimsical than those of any other Justice.

### C. Gay and Lesbian Rights

Whereas Kennedy has been a secondary voice (though 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

230. *Casey*, 505 U.S. at 846.

231. In *Casey*, the conservatives in dissent refused to countenance a woman's protected liberty interest. *Compare id.* 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."), *with id.* 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 "scarcely 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.").

all.<sup>232</sup> Each has attracted withering criticism: *Romer* “defies logic”;<sup>233</sup> *Lawrence* is “a tissue of sophistries embroidered with a bit of sophomoric philosophizing”;<sup>234</sup> and *Obergefell* “has no more basis in the Constitution than did the naked policy preferences adopted in *Lochner*.”<sup>235</sup> We assess here whether that criticism is warranted.

*Romer* arose as a challenge to a Colorado state constitutional amendment that provided that discrimination on the basis of sexual orientation was permissible and could be made impermissible only by subsequent amendment.<sup>236</sup> 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.” 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.<sup>237</sup>

This is the key: the amendment offends against a principle of NON-SUBORDINATION or ANTI-CASTE. That is not the only principle of relevance; HISTORICAL PRACTICE MATTERS is also lurking about, for instance. But ANTI-CASTE (or something similar) does most of the work. *Romer* is a difficult case and not a clearly reasoned opinion.<sup>238</sup> So we are 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

232. There are other opinions, most notably *United States v. Windsor*, where Kennedy authored the majority opinion striking down the federal Defense of Marriage Act. 133 S. Ct. 2675 (2013). Though not discussed here, the opinion further exemplifies Kennedy’s pluralist, aggregationsist approach. See, e.g., Ernest Young & Erin C. Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, 2013 CATO SUP. CT. REV. 117 (2013) (arguing that Kennedy’s majority opinion combines federalism and equal protection principles).

233. Graglia, *supra* note 43, at 426. See also Tymkovic, *supra* note 14.

234. Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1557 (2004). See also Whelan, *supra* note 60 (calling *Lawrence* “unfettered moral philosophizing” and “meta-nonsense”).

235. *Obergefell*, 135 S.Ct. at 2621 (Roberts, CJ., dissenting).

236. *Romer v. Evans*, 517 U.S. 620 (1996).

237. *Id.* at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559, (1896) (dissenting opinion))

238. Cf. Lynn A. Baker, *The Missing Pages of the Majority Opinion in Romer v. Evans*, 68 U. COLO. L. REV. 387, 389 (1997) (“[T]he majority reached the right result, but for reasons that it articulated only partially or not at all.”).

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*. First, the reasoning is so shoddy as to undermine the candor of its author.<sup>239</sup> Second, the result is incompatible with *Bowers*.<sup>240</sup>

The main target of the implausibility charge 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 decision-making than others."<sup>241</sup> This is a sharp-edged thesis—in our terminology, a "rule." And thus construed, Scalia objects, it is untenable in "any multilevel democracy." "For *whenever* a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decision-making. . . the affected group has (under this theory) been denied equal protection."<sup>242</sup> Yet in many cases the conclusion that the discrimination offends the Constitution seems utterly implausible. "To take the simplest of examples," Scalia proposes,

[C]onsider 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.<sup>243</sup>

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 decision-making. But it is not obvious that Kennedy's "central thesis" is best read as Scalia

239. *Romer*, 517 U.S. at 653 (Scalia, J., dissenting) ("Today's opinion has no foundation in American constitutional law, and barely pretends to.").

240. *Id.* at 636 (Scalia, J., dissenting),

241. *Id.* at 639.

242. *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 is 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 could not be disproven by Scalia's counter-examples.

243. *Id.*

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 others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”<sup>244</sup> 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.

If the shape of a constitutional rule is determined by the aggregate bearing of multiple principles, Scalia’s example bolsters Kennedy’s case rather than undermining it. Those on the short end of Scalia’s imagined stick—the relatives of municipal officeholders—strikingly do not 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.<sup>245</sup>

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.”<sup>246</sup> 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 others

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244. *Romer*, 517 U.S. at 633.

245. Our take resonates with Akhil Amar’s defense of Kennedy’s *Romer* opinion. See Akhil Reed Amar, *Attainder and Amendment 2: Romer’s Rightness*, 95 MICH. L. REV. 203 (1996). 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.* at 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).

246. *Romer*, 517 U.S. at 640–41 (Scalia, J., dissenting).

that the failure of Kennedy's opinion even to mention *Bowers* warrants criticism.<sup>247</sup>

In any event, a more appropriate occasion to reconsider *Bowers* arose several years later, in *Lawrence*.<sup>248</sup> And Kennedy took it, writing for five justices to overrule the earlier decision.<sup>249</sup> We reckon that *Lawrence* is easy for almost any principled positivist who, like Kennedy, believes that our constitutional regime includes robust principles that broadly concern liberty and that evolve organically.<sup>250</sup> 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).<sup>251</sup> 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.<sup>252</sup> Furthermore, the effect and social meaning of a ban on gay and lesbian sex are extraordinarily demeaning and denigrating.<sup>253</sup> Pointing the other way is STARE DECISIS. But that is "not an inexorable command"<sup>254</sup>—i.e., it's a *principle*—and it would be bizarre if those who believe that LIBERTY,

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247. Eric J. Segall, *Reconceptualizing Judicial Activism as Judicial Responsibility: A Tale of Two Justice Kennedys*, 41 ARIZ. ST. L.J. 709, 744 (2009); Thomas C. Grey, *Bowers v. Hardwick Diminished*, 68 U. COLO. L. REV. 373, 373-74 (1997). *But see* Amar, *supra* note 245, at 227–28 (arguing that, thanks to the status/conduct distinction, *Bowers* was far removed).

248. *Lawrence v. Texas*, 539 U.S. 558 (2003).

249. 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).

250. *Lawrence's* pronouncements on liberty are sweeping. *See e.g.*, *Lawrence*, 539 U.S. at 562 ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.").

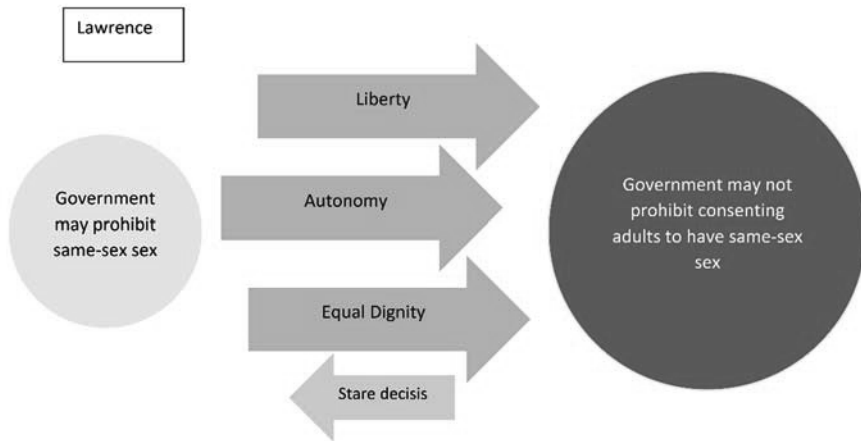
251. In discussing Kennedy's abortion decisions, we lumped the cluster of similar but distinct principles under a single heading entitled LIBERTY. *See supra* Part IV.B. Here, we engage in a modest degree of splitting. The reason for this is that the existence of similar, mutually reinforcing, but non-identical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

252. *Lawrence*, 539 U.S. at 572 (noting the "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.").

253. *Id.* 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 State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

254. *Id.* at 577.

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 want 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."<sup>255</sup> Scholars leveled the same criticism. Sunstein called the majority opinion "remarkably opaque."<sup>256</sup> Nelson Lund and John McGinnis complained that it "simply abandons legal analysis. Freed from the chains even of rational argument, the *Lawrence* Court issued an ukase wrapped up in oracular riddles."<sup>257</sup> Although the opinion is unlikely to win its author any writing awards, we think its gist clear enough: Prohibiting gay and lesbian adults from engaging in

255. *Lawrence*, 539 U.S. at 586, 605 (Scalia, J., dissenting).

256. Sunstein, *supra* note 58 (asking rhetorically, "What Did Lawrence Hold?").

257. Lund & McGinnis, *supra* note 234, at 1574. See also *id.* at 1614 ("[F]ew decisions in its entire history are so poorly reasoned.").

consensual sex acts is a grievous insult to principles of liberty, autonomy, and dignity. What's so hard to figure out?<sup>258</sup>

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 if rationally related to any legitimate state interest. Because Kennedy did not say that anybody had a fundamental right to engage in any of the criminalized sex acts, 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,”<sup>259</sup> observers inferred that the Court held that the law was subject to, and failed, the rational basis test. But that amounted to the conclusion—wholly implausible in the eyes of many—that promoting majoritarian moral norms is not even a legitimate interest. Scalia deemed “the contention that there is no rational basis for the law here under attack” “the ground on which the Court squarely rests its holding,” and dismissed it as “out of accord . . . with the jurisprudence of *any* society we know.”<sup>260</sup>

Even if the proposition is absurd, we think it less clear than Scalia does that it grounded 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 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. Because the majority did not maintain that the liberty interests at stake qualify for “intermediate” or “strict” scrutiny, then the

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258. 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: (1) that Kennedy appropriately appeals to these principles *qua* constitutional principles, not *qua* moral principles; (2) that it is not clear that a great many Americans *do* disagree with the relevant principles; and (3) 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).

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

260. *Id.* at 599.



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.<sup>261</sup> They are not accurate renditions of what our constitutional principles serve up. And however binding those tests are on lower courts, many Justices believe they do not fully bind the Supreme Court. Kennedy had been willing, in *Lopez*, 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*,<sup>262</sup> 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.<sup>263</sup>

There is some merit to these objections. But not enough, we think, to significantly undermine or question Kennedy’s integrity or competence. 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 sufficient conditions—that is, a rule.<sup>264</sup> 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 though he joined the opinion. Indeed, in *City of Sacramento v. Lewis*, a case decided one term after *Glucksberg*, Kennedy concurred to insist “that history and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry.”<sup>265</sup> *Lawrence* is continuous with this understanding of constitutional liberty.

The constitutionality of state laws denying recognition to same-sex couples lay in the background of *Romer*, and barely offstage in *Lawrence*.<sup>266</sup>

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261. See *supra* note 102 and accompanying text.

262. *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.”).

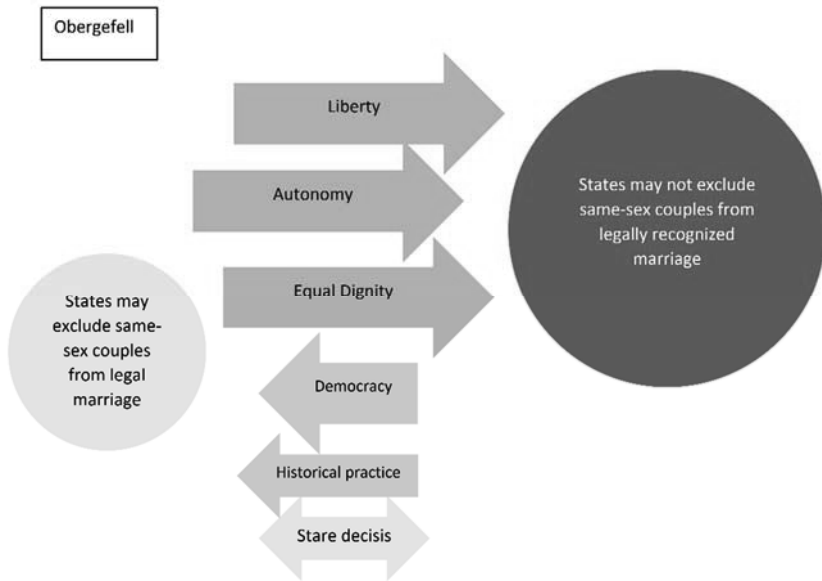
263. See Calabresi, *supra* note 21.

264. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 854 (1992) (plurality opinion).

265. *City of Sacramento v. Lewis*, 523 U.S. 833, 857 (1988) (Kennedy, J., concurring).

266. 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*.

It assumed center stage in *Obergefell*.<sup>267</sup> We think the issue easy for principled positivism given highly plausible assumptions about the rough shape and weight of relevant principles of LIBERTY and DIGNITY. First, the legal institution of marriage is of massive instrumental value: it facilitates adults' ability to accumulate and control material wealth, direct their children's upbringing, and ensure that a trusted intimate has legal power to make decisions for their welfare in cases of illness or incompetence. Second, excluding same-sex couples from an institution of this importance and social significance demeans, degrades, and insults gays, lesbians, and bisexuals.



This is essentially how Justice Kennedy saw things in *Obergefell*. The opinion is hard to parse. We do not think it a model of judicial craftsmanship. 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.’”<sup>268</sup> 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.”<sup>269</sup> In sum, withholding legal recognition of same-sex unions is

267. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

268. *Id.* at 2598 (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

269. *Obergefell*, 135 S. Ct. at 2602, 2604.

unconstitutional because of the “interrelation of the two principles” of liberty and equality.<sup>270</sup>

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.”<sup>271</sup> Second, *mysteriousness*: “There is, after all, no ‘Companionship and Understanding’ or ‘Nobility and Dignity’ Clause in the Constitution.”<sup>272</sup>

By now we hope it clear why neither objection is compelling. The first assumes a clause-boundedness that principled positivism rejects. The assumption that rights can reside only in discrete clauses of the constitutional text 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 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,”<sup>273</sup> is a slander.

Kennedy’s last opinion concerning gay rights, his majority opinion in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,<sup>274</sup> supplies a fitting coda. That case raised the question whether a state could compel a Christian baker to supply a cake for a same-sex wedding against his religious and expressive scruples. As one of a spate of similar controversies pitting antidiscrimination norms against claims sounding in rights of conscience, compelled speech, and religious exercise, it had been anticipated as one of the major cases of the 2017 Term. In the event, Kennedy wrote for six Justices to hold for the baker. But the grounds were so narrow—that anti-religious animus fatally infected deliberations by a state civil rights commission when ruling on his request for an exemption—that some observers questioned who actually won the case,<sup>275</sup> and others disparaged the

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270. *Obergefell*, 135 S. Ct. at 2603.

271. *Id.* at 2623 (Roberts, CJ., dissenting).

272. *Id.* at 2616.

273. *Id.* at 2612.

274. *Masterpiece Cakeshop v. Colo. Civ. Rights Comm’n*, 138 S. Ct. 1719 (2018).

275. See, e.g., Andrew Koppelman, *The Press Is Wrong on Masterpiece Cakeshop*. *The Baker Lost*, THE AMERICAN PROSPECT (June 5, 2018), <http://prospect.org/article/press-wrong-on-masterpiece-cakeshop-baker-lost> (“The Court’s opinion provides no tangible help for the baker or other religious objectors to antidiscrimination laws.”). The ACLU, who represented the couple refused service, claimed the decision as a “win.” James Esseks, *In Masterpiece, the Bakery Wins*

opinion as “the worst form of judicial minimalism,” lacking “both intellectual clarity and moral courage.”<sup>276</sup>

This criticism is too harsh. With many critics, we believe that Kennedy exaggerates the degree of anti-religious hostility that the baker, Jack Phillips, encountered at the commission level, and are unpersuaded that whatever hostility he did confront indelibly tainted all subsequent state proceedings.<sup>277</sup> But these cases are hard. They're hard for just the reason that Kennedy, flying his principled-positivist flag, would emphasize: they “present[] difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State . . . to protect the rights and dignity of gay persons . . . . The second is the right of all persons to exercise fundamental freedoms under the First Amendment . . . .”<sup>278</sup>

In our judgment, some liberals oversimplify these cases by indulging analogies to racial discrimination too uncritically.<sup>279</sup> Certainly, a wedding vendor who harbored genuine religious objections to “race-mixing” would lack a constitutional right not to serve interracial couples.<sup>280</sup> But that needn't be because RESPECT RELIGIOUS BELIEF & PRACTICE doesn't count among our constitutional principles. It could be because our constitutional commitment to RACIAL EQUALITY is great enough to overwhelm whatever principles might militate for an exemption. Certainly, principles concerning

*the Battle but Loses the War*, ACLU.ORG (June 4, 2018), <https://www.aclu.org/blog/lgbt-rights/lgbt-nondiscrimination-protections/masterpiece-bakery-wins-battle-loses-war>.

276. Richard Epstein, *The worst form of judicial minimalism—Masterpiece Cakeshop deserved a full vindication for its claims of religious liberty and free speech*, SCOTUSBLOG (June 4, 2018), <http://www.scotusblog.com/2018/06/symposium-the-worst-form-of-judicial-minimalism-masterpiece-cakeshop-deserved-a-full-vindication-for-its-claims-of-religious-liberty-and-free-speech/>. See also Mark Joseph Stern, *Gay Americans Have Little to Fear From the Supreme Court's Compromise in Masterpiece Cakeshop*, SLATE (June 4, 2018), <https://slate.com/news-and-politics/2018/06/the-supreme-courts-decision-in-masterpiece-cakeshop-is-a-kennedy-compromise.html> (deriding the decision as “a Kennedy special” that is “largely filler”).

277. Cf. *Masterpiece Cakeshop*, 138 S. Ct. at 1749 (Ginsburg, J., dissenting) (“The different outcomes the Court features do not evidence hostility to religion of the kind we have previously held to signal a free-exercise violation, nor do the comments by one or two members of one of the four decision making entities considering this case justify reversing the judgment below.”).

278. *Id.* at 1723.

279. In an *amicus* brief, the NAACP made this argument explicitly: “The logic of *Piggie Park* and other precedents overwhelmingly rejecting religious justifications for racial discrimination apply squarely to the context of LGBTQ discrimination.” Brief for NAACP Legal Defense & Education Fund as Amici Curiae Supporting Respondents, *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 2290 (2017) (No. 16-1111) (citing *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1962) (*per curiam*)). See also Vanita Gupta, *Discrimination Is Not a Fundamental American Value*, SCOTUSBLOG (Sept. 12, 2017), <http://www.scotusblog.com/2017/09/symposium-discrimination-not-fundamental-american-value/>.

280. Indeed, that is the upshot of *Piggie Park*. 390 U.S. at 402, n.5 (rejecting as “patently frivolous” the contention that public accommodation requirement of the Civil Rights Act of 1964 was unconstitutional because it interfered with the defendant's free exercise of religion).

dignity and equality could weigh with comparable force when LGBTQ rights and interests are at stake. But that can't be assumed. Our principles need not conform to demands of logical or moral consistency. They are the product of historical contingency and social forces. *Masterpiece Cakeshop* is Kennedy's reminder that many constitutional principles populate our constitutional firmament, that their contours and contents are not always clear, that it can be difficult to determine how they net out over a range of diverse fact patterns, and, therefore, that proceeding slowly and narrowly is often wise, not cowardly.

## D. Race

We cannot attempt a remotely thorough assessment of Kennedy's jurisprudence on race in this already long Article. There are too many cases on too many different topics. Throughout his long judicial career, Kennedy has been a mostly orthodox and reliable vote for conservative outcomes, consistently invalidating race-conscious admissions programs and set asides,<sup>281</sup> frustrating efforts to desegregate public schools,<sup>282</sup> and rejecting statutory and constitutional challenges to racially gerrymandered districts.<sup>283</sup> The decisions he joined attracted criticism from the left, but nothing about Kennedy's performance on race contributed much fuel to the *personal whimsy* fire.

That changed 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.<sup>284</sup> When the program had visited the Court three terms earlier, in *Fisher I*, Kennedy had written for seven justices to vacate a lower court ruling for the university, 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

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281. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (concurring in part and concurring in the judgment); *Adarand Constructions, Inc. v. Peña*, 515 U.S. 200 (1995); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Kennedy, J., dissenting); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (Kennedy, J., dissenting) (benign race-conscious federal policies). See also *Ricci v. DeStefano*, 557 U.S. 557 (2009) (labor law).

282. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Kennedy, J., concurring in part and concurring in the judgment); *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Bd. of Ed. of Oklahoma City v. Dowell*, 498 U.S. 237 (1991) (school desegregation).

283. See *Georgia v. Ashcroft*, 539 U.S. 461 (2003) (Kennedy, J., concurring); *Miller v. Johnson*, 515 U.S. 900 (1995); *Johnson v. De Grandy*, 512 U.S. 997 (1994) (Kennedy, J., concurring in part and concurring in the judgment); *Shaw v. Reno*, 509 U.S. 630 (1993) (racial gerrymandering). See also *Rice v. Cayetano*, 528 U.S. 495, (2000) (race-conscious, local voting limitations)

284. *Fisher v. University of Texas (Fisher II)*, 136 S. Ct. 2198 (2016).

no deference.”<sup>285</sup> On remand, the Fifth Circuit again upheld the program, leading Court watchers to anticipate another reversal.<sup>286</sup> Yet 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 needed to achieve the educational benefits that flow from diversity.<sup>287</sup>

Alito in dissent objected spiritedly that the majority opinion was inconsistent with the hornbook understanding of strict scrutiny and with Kennedy’s own previous insistence, in *Grutter* and *Fisher I*, that the test must be applied rigorously and nondeferentially.<sup>288</sup> 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.”<sup>289</sup> Onlookers agreed, proclaiming that *Fisher II* “betrays” Kennedy’s “previous equal protection jurisprudence and the belief that we have a colorblind Constitution,”<sup>290</sup> and deeming it “a deplorable misfire.”<sup>291</sup> As Richard Primus wryly observed in the *New York Times*: “[T]he most deceptive thing about [*Fisher*] is its first words: ‘Justice Kennedy delivered the opinion of the court.’”<sup>292</sup>

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

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285. *Fisher v. University of Texas (Fisher I)*, 133 S. Ct. 2411, 2420 (2013).

286. See, e.g., Mario L. Barnes et al., *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action after Fisher v. University of Texas*, 62 UCLA L. REV. 271 (2015).

287. *Fisher II*, 136 S. Ct. at 2210–11.

288. *Id.* at 2215 (Alito, J., dissenting).

289. *Id.*

290. Elizabeth Slattery, *A Disappointing Decision, But More Lawsuits Are On The Way*, SCOTUSBLOG (June 23, 2016), <http://www.scotusblog.com/2016/06/symposium-a-disappointing-decision-but-more-lawsuits-are-on-the-way/>.

291. Kirsanow, *supra* note 27.

292. Richard Primus, *Affirmative Action in College Admissions, Here to Stay*, N.Y. TIMES (June 23, 2016), <http://nyti.ms/28PLjIN>.

neutrality is the driving force of the Equal Protection Clause.”<sup>293</sup> In 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.”<sup>294</sup> All the same, Kennedy has made clear in cases involving affirmative action that he differs from his more conservative colleagues in refusing to assign COLORBLINDNESS decisive force. In *Grutter*, most notably, he joined Rehnquist, Scalia and Thomas in dissenting from a decision that upheld 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 “[t]he Constitution proscribes government discrimination on the basis of race.”<sup>295</sup> 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.<sup>296</sup>

Just as revealing is Kennedy’s opinion in *Parents Involved*, involving challenges to student assignment plans adopted by two public school districts that used student race as a tiebreaker when allocating slots in schools that are racially imbalanced relative to the district as a whole. Kennedy joined his conservative colleagues to make five votes to invalidate the challenged programs. But he refused to join portions of 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.”<sup>297</sup> 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.”<sup>298</sup> 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.”<sup>299</sup>

It’s not clear what “*universal* constitutional principle” means, exactly. The adjective “universal” suggests that a principle would qualify only if 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 modifier he

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293. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (concurring in part and concurring in the judgment).

294. *Miller v. Johnson*, 515 U.S. 900, 904 (1995) (internal quotation omitted).

295. *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Scalia, J., dissenting).

296. *Id.* at 395 (Kennedy, J., dissenting).

297. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in judgment).

298. *Parents Involved in Cmty. Sch.*, 551 U.S. at 788.

299. *Id.*

sought. We propose “absolute” as a friendly substitute. That would yield: 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.<sup>300</sup>

Where does this leave us on *Fisher II*? Not with the conclusion that if you cock your head and squint, you’ll 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 to favor race-based preferences, helped persuade Kennedy that, contrary to his previous hopes and beliefs, rigorously non-deferential scrutiny would prove fatal to programs that really are reasonably necessary for the promotion of racial justice. In short, we speculate 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 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 (rightly) unwilling to sacrifice these other constitutional principles on the altar of COLORBLINDNESS.

## E. Law of Democracy

We have emphasized that, lacking a canonical list of Kennedy’s most notorious opinions, this Article inescapably slights decisions worth discussing. But if our investigation ended here, one opinion above all would

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300. 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. 572 U.S. 291, 298 (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,” *Id.* at 316 (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. *Id.* at 313 (plurality opinion).



be conspicuous by its absence: Kennedy's opinion for a five-justice majority in *Citizens United*.<sup>301</sup>

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 are made 30 days before a primary election, or 60 days before a general election.<sup>302</sup> 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.

The Court had previously allowed restrictions on corporate political speech in *Austin v. Michigan Chamber of Commerce*<sup>303</sup> and, relying on *Austin*, had upheld the BCRA in *McConnell v. FEC*.<sup>304</sup> That's why Citizens United pressed an as-applied challenge. It could have prevailed on that basis, or on several others. 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." Or the Court could have followed several lower courts that had exempted nonprofits that, like Citizens United, accept only a de minimis amount of money from for-profit corporations or unions from the BCRA's reach.<sup>305</sup> But, worried that any narrow ruling in Citizen United's favor would unduly chill protected expression, Kennedy's majority opinion for the five conservatives opted for 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."<sup>306</sup>

The rule's unnecessary breadth, the overruling of Supreme Court precedents that it necessitated, the judicial machinations that produced it,<sup>307</sup>

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301. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

302. *Id.* at 321.

303. 494 U.S. 652 (1990).

304. 540 U.S. 93 (2003).

305. *See Citizens United*, 558 U.S. at 405–08 (Stevens, J., dissenting) (identifying these possibilities); *id.* at 322–36 (majority opinion) (assessing and rejecting any "narrower grounds" for decision).

306. *Id.* at 365.

307. 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 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 Justice 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.” Moreover, he feared, “the path it has taken to reach its outcome will . . . do damage to this institution.”<sup>308</sup> Critics were less restrained. Larry Lessig was “dumbfounded by [Kennedy’s] tone-deaf” opinion;<sup>309</sup> Rick Hasen concluded that elements of Kennedy’s opinion “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.”<sup>310</sup>

The five opinions in the case consumed 175 pages in the United States Reports, and provoked voluminous commentary.<sup>311</sup> We will cut to the pith. One needn’t be a card-carrying principled positivist to believe that the constitutionality of corporate campaign finance restrictions implicates (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 STARE DECISIS was a third principle. Other principles might

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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).

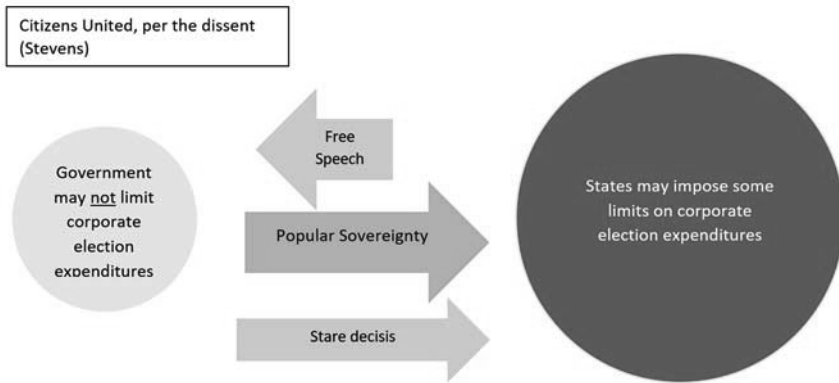
308. *Citizens United*, 558 U.S. at 396 (Stevens, J., dissenting).

309. Lawrence Lessig, *Institutional Integrity: Citizens United and the Path to a Better Democracy*, HUFFPOST (Mar. 24, 2010), [https://www.huffingtonpost.com/lawrence-lessig/institutional-integrity-c\\_b\\_433394.html](https://www.huffingtonpost.com/lawrence-lessig/institutional-integrity-c_b_433394.html).

310. Richard L. Hasen, *Money Grubbers*, SLATE (Jan. 21, 2010), <https://slate.com/news-and-politics/2010/01/the-supreme-court-kills-campaign-finance-reform-in-citizens-united.html>.

311. 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*.”).

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.



The majority viewed matters very differently. To Justice Kennedy, this was, from start to finish, a case about FREE SPEECH. And it's not only a FREE SPEECH case: it's one in which that single principle exerts overwhelming force: "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."<sup>312</sup> 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,"<sup>313</sup> but the extent of that protection is the same.<sup>314</sup> Does it matter that the expenditure restrictions at issue are limited in scope, somewhat analogous to "time, place, and manner" restrictions?<sup>315</sup> Nope. The BCRA "is an outright ban," a "classic exampl[e] of censorship."<sup>316</sup> In short, on Kennedy's view, we have a constitutional principle of great weight

312. *Citizens United*, 558 U.S. at 349.

313. *Id.* at 342.

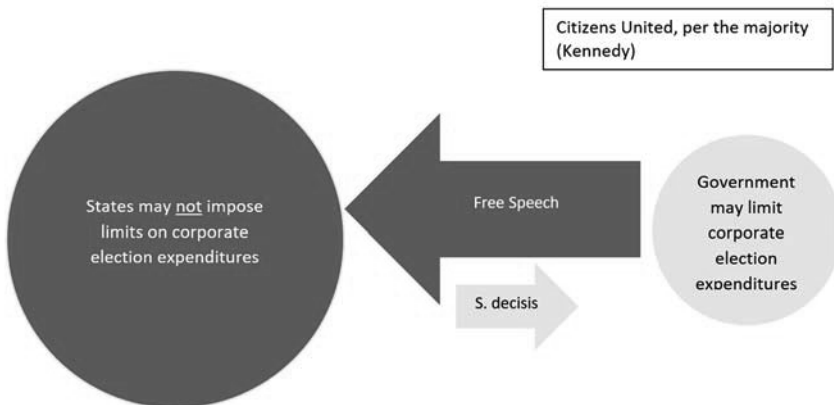
314. *Id.* at 343 ("The Court has rejected the argument that political speech should be treated differently under the First Amendment simply because such associations are not 'natural persons'").

315. *Id.* 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.").

316. *Id.* at 337.

or importance activated very fully toward no corporate campaign expenditure restrictions.

To be sure, given *Austin* and *McConnell*, STARE DECISIS presses the other way, toward the constitutionality of expenditure restrictions such as those embodied in the BCRA. But that principle weighed weakly here because, in Kennedy's estimation, *Austin* was itself "a significant departure" from previous cases.<sup>317</sup> And POPULAR SOVEREIGNTY? Not implicated. Kennedy granted that the principle would support restrictions on corporate campaign *contributions* given that funds donated directly to candidates could risk *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."<sup>318</sup>



Three differences between the majority's and dissent's analyses leap out. 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) entirely sidelines POPULAR SOVEREIGNTY. On all three 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 human beings and corporations. At

317. *Citizens United*, 558 U.S. at 319 (Scalia, J., concurring in part and concurring in judgment) (quoting *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 490 (2007).

318. *Id.* at 357.

the same time, it minimizes the force of STARE DECISIS by relying on dissents to exaggerate *Austin*'s departure from past practice.

Even more striking and disconcerting is the majority's neutering of POPULAR SOVEREIGNTY. Criticizing "the majority's myopic focus on quid pro quo scenarios," Stevens maintained that a "broader understanding of corruption has deep roots in the Nation's history."<sup>319</sup> 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."<sup>320</sup> We fear this is true. Worse, once the majority "effectively discounts" the bearing of POPULAR SOVEREIGNTY in this case "to zero,"<sup>321</sup> then, putting judicial precedents aside—as the majority 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 judgment) is it.<sup>322</sup> This is not to contend that any non-whimsical analysis faithful to our constitutional principles must side with the dissent. It's to acknowledge that the combination of steps that the majority opinion takes to reach its constitutional bottom line raises eyebrows sharply. Our least cynical explanation draws on two suggestions about Kennedy's constitutional vision: that he is preoccupied with FREE SPEECH, and that he is curiously insensitive to POPULAR SOVEREIGNTY. If true, then *Citizens United*, though (in our view) profoundly misguided, may be seen, not as the product of *personal whimsy*, but as illustrating what happens when an obsession meets a blindspot.

That Kennedy was something of a FREE SPEECH fetishist is well known.<sup>323</sup> That he was nearly blind to POPULAR SOVEREIGNTY is not. We close this section by demonstrating that POPULAR SOVEREIGNTY is oddly AWOL from another of Kennedy's criticized opinions—his concurrence in the 2004 partisan gerrymandering case, *Vieth v. Jubelirer*<sup>324</sup>—and we explain why it matters.

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319. *Citizens United*, 558 U.S. at 451 (Stevens, J., dissenting).

320. *Id.* at 452 (internal quotations and citations omitted).

321. *Id.* at 463.

322. Among other defects, Kennedy's effort to distinguish his one-term-old majority opinion in *Caperton v. A. T. Massey Coal Co.* rings especially false. See *id.* at 458–60 (Stevens, J., dissenting).

323. See e.g., Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994-2000*, 48 UCLA L. REV. 1191 (2001) (finding, among the nine members of the Court, Kennedy most consistently took a maximalist free speech position).

324. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

*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 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,<sup>325</sup> we believe that Kennedy's concurrence makes great sense, until the last step. As we parse the opinion, Kennedy starts by asking, sensibly, what's the rule? No partisanship in redistricting? Can't be. Whatever principles might support it, HISTORICAL PRACTICE weighs heavily against. No excessive partisanship in redistricting? Possible. But 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.<sup>326</sup> To craft a test here, 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, no matter how administrable, 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.

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.<sup>327</sup> 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."<sup>328</sup> Maybe. But if not that, what else?

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325. *Vieth*, 541 U.S. at 304 (plurality opinion) (chiding Kennedy for proposing a disposition that "is not legally available").

326. *See supra* note 102.

327. *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).

328. *Id.* at 314 (Kennedy, J., concurring).

Despite flirting with POPULAR SOVEREIGNTY in his concluding paragraph,<sup>329</sup> 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 our constitutional tradition since the founding, 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.<sup>330</sup> 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.”<sup>331</sup> This is a very partial and distorting lens on the nature of the problem.<sup>332</sup>

Under whatever designation, it is a principle of our constitutional order that the People must be able to effectuate its sovereign will unhindered by unnecessary obstacles. In an age of oligarchy, unrestricted corporate influence in political campaigns offends that principle. In an age of big data and supercomputing, unrestricted political gerrymandering offends it too. To 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. Kennedy could have done better.<sup>333</sup>

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329. *Vieth*, 541 U.S. 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.”).

330. *Cf. Id.* at 367 (Breyer, J., dissenting) (emphasizing the “risk of harm to basic democratic principles”).

331. *Vieth*, 541 U.S. *passim* (Kennedy, J., concurring).

332. See Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 58–59 (2004) (“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.”).

333. Kennedy appeared poised to craft doctrine to enforce the constitutional rule against excessively partisan gerrymandering when, in 2017, the Court granted cert in a handful of cases challenging state gerrymanders. See *Gil v. Whitford*, 138 S. Ct. 1916 (2018) (challenging

## V. Appraisal and Lessons

Part IV has painted a rather pretty picture of Kennedy's constitutional jurisprudence. Some readers will find it too pretty. 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, to the extent 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.<sup>334</sup> Either way, they conclude, Kennedy may be a "Justice of principles," but not a "principled Justice." Sorry, Tony.

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, two final observations in Kennedy's defense are warranted.

First, it's hard to take strenuous exception to any of the principles that do most work in the Kennedy opinions 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." It's whether Kennedy's principles resonate with those who accept principled positivism or something like it. 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 does not peddle principles that should strike constitutional lawyers as highly eccentric—EQUAL INCOME, AGRARIANISM, ANIMALS MATTER, or whatnot.

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Wisconsin's state legislative redistricting plan); *Benisek v. Lamone*, 138 S.Ct. 543 (2017) (challenging Maryland's congressional redistricting plan). See also Richard L. Hasen, *Justice Kennedy's Beauty Pageant*, THE ATLANTIC (June 19, 2017), <https://www.theatlantic.com/politics/archive/2017/06/justice-kennedys-beauty-pageant/530790/> ("The partisan gerrymandering beauty pageant is returning to the Supreme Court next fall for a limited engagement for an audience of one: Justice Anthony Kennedy."). That proved not so, as Kennedy tamely joined opinions that skirted the merits and, instead, remanded the cases on procedural grounds. See *Gil*, 138 S. Ct. 1916, 1923 (2018) (concluding plaintiffs failed to adequately establish standing); *Benisek v. Lamone*, 138 S.Ct. 1942 (2018) (per curiam) (finding the preliminary injunction improperly granted).

334. 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 53.



Second, while critics understandably highlight apparent inconsistencies, *consistencies* across Kennedy's opinions often go underappreciated. Many scholars have noted the continued reappearance, in Kennedy's jurisprudence, of DIGNITY and LIBERTY.<sup>335</sup> But that only scratches the surface. Kennedy thoughtfully invokes many of the same principles across doctrinal categories—JUDICIAL INTEGRITY,<sup>336</sup> HISTORICAL PRACTICES MATTER,<sup>337</sup> HORIZONTAL SEPARATION OF POWERS,<sup>338</sup> and others.

All that said, recall this Article's twin ambitions: to rehabilitate Kennedy, and to promote principled positivism. Frankly, 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. We would be worried 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 skeptic of principled positivism could, by endorsing our second premise, hope to drive a very different conclusion: (1) Kennedy's constitutional jurisprudence is "a tissue of sophistries",<sup>339</sup> (2) Kennedy's constitutional jurisprudence is principled positivism; therefore (3) principled positivism is "a tissue of sophistries."

That disheartening conclusion might be credible if we claimed Kennedy as a virtuoso of principled positivism—our Hercules, as it were. But we have emphasized that Kennedy exhibits only an imperfect grasp and execution of principled positivism. Accordingly, unhappiness with Kennedy's constitutional decision-making could cause serious difficulty for principled positivism only if 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

335. See generally Laurence H. Tribe, *Equal Dignity: Speaking Its Name* 129 HARV. L. REV. F. 16 (2015); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions under Casey/Carhart*, 117 YALE L.J. 1694 (2008).

336. See, e.g., *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (use of race-based preemptory challenges); *Crawford-El v. Britton*, 523 U.S. 574, 601 (1998) (Kennedy, J., concurring) (qualified immunity); *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) (judicial recusal).

337. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (gay marriage); *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1824 (2014) (public prayer); *Loving v. United States*, 517 U.S. 748, 766 (court martial)

338. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 53-36 (1997) (Congress's remedial power); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (line-item veto); *Mistretta v. United States*, 488 U.S. 361, 408 (1989) (sentencing guidelines).

339. Lund & McGinnis, *supra* note 234.

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.<sup>340</sup> 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 the things we call “constitutional principles” could not exist, 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 decision-making lend support to these conclusions or others in the same ballpark. Even if Kennedy is a less able or faithful principled positivist than we have concluded, the better response to his failings and foibles is to try to see what he’s up to, understand how he goes wrong, and help his successors do better.

### Conclusion

No, we are not “all originalists now”<sup>341</sup>—at least not if the moniker retains any discriminating power. *Pace* Justice Kagan, we’re not “all textualists”<sup>342</sup> either. 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 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 absent an authoritative judicial ruling on point.

Constitutional realism is wholly compatible with the belief that many hard constitutional questions lack determinate answers. Furthermore, even to the extent that constitutional law is determinate on a given point, judicial review involves much more (and in some cases 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, 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 extant constitutive constitutional

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340. See Scalia, *supra* note 89, at 864 (“Originalism is, it seems to me, the librarian who talks too softly.”).

341. ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE I (2011).

342. Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes at 8:28 (Nov. 17, 2015), <https://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/>

theories is slimmer than slim—a couple of branches of contemporary originalism, a few Hartians and Dworkinians, and that’s about it.

We have argued that Kennedy’s constitutional jurisprudence displays a genuine constitutive alternative to originalism—in broad strokes, the account that one of us has dubbed “principled positivism” and explicated in other work. Concededly, Kennedy does not represent an ideal type. Now that his thirty-year tenure on the Court has ended, and constitutional lawyers need no longer tailor their arguments to win his often-decisive vote, the inclination to dismiss him as a hack will only grow. It should be resisted. No member of the Court is a paragon of theoretical consistency. 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 (imperfect) way is Kennedy a “principled positivist.” We can deepen our grasp of the constitutional law that he helped to shape, and enrich our appreciation for the range of constitutional approaches reasonably available, by taking more seriously the possibility that, just perhaps, Kennedy had been on to something all along.