
RUTGERS LAW REVIEW

VOLUME 64

Fall 2011

NUMBER 1

ARTICLES

WHAT CONSERVATIVE CONSTITUTIONAL REVOLUTION?

MODERATING FIVE DEGREES OF JUDICIAL CONSERVATISM AFTER SIX YEARS OF THE ROBERTS COURT

*Charles W. "Rocky" Rhodes**

I. THE PLANES OF JUDICIAL CONSERVATISM	4
II. THE JURISPRUDENTIAL APPROACHES OF THE CURRENT	
REPUBLICAN APPOINTEES OF THE ROBERTS COURT	8
A. Justice Scalia	8
B. Justice Kennedy	13
C. Justice Thomas	18
D. Chief Justice Roberts	22
E. Justice Alito	26
F. Summary	29
III. CONSERVATIVE MODERATION ON THE ROBERTS COURT	29
A. Respect for Precedent	30
1. Precedents Expressly Overturned	31
2. "Stealth" Overrulings	36

* Godwin Ronquillo P.C. Research Professor and Professor of Law, South Texas College of Law. An early version of this paper was presented during the 2010 Southeastern Association of Law Schools Annual Meeting in a roundtable discussion on the Roberts Court and the Future of American Constitutional Law, where I benefitted greatly from the discussion and the suggestions of other participants, particularly Bill Marshall, Lino Graglia, Mark Killenbeck, Russ Weaver, Eric Segall, Bill Araiza, Jason Mazzone, and Mike Allen. I am also indebted to Andrew Kumar and Greg Bell for their research assistance; Jonathan Adler, David Day, and Randy Kelso for reviewing earlier written drafts and sharing their invaluable insights; and my lovely wife who, in addition to everything else she does for me, patiently listened to my musings and offered helpful suggestions.

B. Sparing Judicial Review	44
C. Narrow Dispositions	52
D. Incremental Rules and Standards	61
IV. THE FUTURE OF THE ROBERTS COURT?	69

Recent headlines trumpet that the Roberts Court is “The Most Conservative Court in Decades.”¹ Current and former Supreme Court Justices complain that precedents are being “dismantled”² and lament that “[i]t is not often in the law that so few have so quickly changed so much.”³ The President and Democratic Senators decry the Court for allowing “powerful interests” to bankroll American elections,⁴ alleging that “the strike zone for corporations gets better every day.”⁵ Academics join the chorus as well, contending, in the

1. Adam Liptak, *The Roberts Court; The Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at A1; see also Jess Bravin, *Court Conservatives Prevail-- Videogame, Campaign-Finance Rulings Cap Term That Broadened Free Speech*, WALL ST. J., June 28, 2011, at A1 (highlighting how “[t]he Supreme Court ended its annual term with two decisions upholding free-speech protections, capping a year that saw conservatives largely prevail over the [C]ourt’s liberal minority”); Adam Liptak, *The Roberts Court, Tipped by Kennedy*, N.Y. TIMES, July 1, 2009, at A1 (discussing how Chief Justice Roberts has been strategically “laying the groundwork” to move the Court into a conservative direction especially with the Court’s swing vote, Justice Kennedy, shifting to the right more frequently). Although the headline proclaimed the Court the most conservative in decades, other data that was mentioned, but downplayed in the article, supported a contrary portrait of a minimalist Court. See Jonathan H. Adler, *Court Under Roberts Is Most Restrained in Decades*, THE VOLOKH CONSPIRACY (Aug. 1, 2010, 6:01 PM), <http://www.volokh.com/2010/08/01/court-under-roberts-is-most-restrained-in-decades/>.

2. Joan Biskupic, *O'Connor Says Rulings 'Dismantled'; Diversity Crucial to Highest Court*, USA TODAY, Oct. 5, 2009, at 1A (quoting O'Connor, J.).

3. David G. Savage, *High Court Has Entered a New Era; The Chief Justice, with Help from Bush Appointee Alito, Carries Big Rulings to the Right--a Generational Shift*, L.A. TIMES, July 1, 2007, at A1 (quoting Breyer, J.).

4. E.g., President Barack Obama, State of the Union Address, 156 CONG. REC. H418 (Jan. 27, 2010) (“[L]ast week, the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. I don’t think American elections should be bankrolled by America’s most powerful interests, or worse, by foreign entities.”).

5. *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 40 (2010) [hereinafter *Kagan Hearing*] (statement of Sen. Sheldon Whitehouse, Member, S. Comm. on the Judiciary); see also *id.* at 4 (statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary) (arguing that the decision of the five conservative Justices in *Citizens United*, which rejected “100 years of legal developments in order to open the door for massive corporate spending on elections, was such a jolt to the system”); *id.* at 27 (statement of Sen. Charles E. Schumer, Member, S. Comm. on the Judiciary) (fearing that the Court had taken “a step backwards toward *Lochner*, backwards to the era of conservative Supreme Court activism that most egregiously undermined even the most basic regulation of safety

words of Professor Laurence H. Tribe, that the Roberts Court has lost any “legitimate claim” of abiding “to an incremental and minimalist approach to constitutional adjudication, to a modest view of the judicial role vis-à-vis the political branches, or to a genuine concern with adherence to precedent.”⁶

Are such criticisms well founded? Do they indicate a conservative constitutional revolution under the Roberts Court’s “Radicals in Robes”?⁷

I don’t believe so. Part of my evidence is that equally vehement attacks on the Court’s constitutional decisionmaking originate from the right side of the political aisle.⁸ When neither political party is wholly satisfied with the Court’s direction, more than just simple partisan politics must influence its opinions and judgments.

I am not intending to discount the importance of the jurisprudential philosophies of the Justices appointed to the Supreme Court,⁹ as Justice Alito’s selection to replace the retiring Justice O’Connor likely resulted in different outcomes in several constitutional cases over the last six terms.¹⁰ But the overarching effects on constitutional doctrine to date have not been as dramatic

and of welfare”); *id.* at 38 (statement of Sen. Benjamin L. Cardin, Member, S. Comm. on the Judiciary) (arguing that “[t]ime and time again, by the narrowest of margins, this activist Court has sided with big business over Main Street America, wiping away protections set in place by years of legal precedent and Congressional actions”).

6. Laurence H. Tribe, *What Should Congress Do About Citizens United?*, SCOTUSBLOG (Jan. 24, 2010, 10:30 PM), <http://www.scotusblog.com/2010/01/what-should-congress-do-about-citizens-united/>.

7. See, e.g., CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005).

8. See, e.g., *Kagan Hearing*, *supra* note 5, at 4-5, 7, 10, 28-31 (statements of Sen. Jeff Sessions, Sen. Orrin Hatch, and Sen. John Cornyn, Members, S. Comm. on the Judiciary); *The Nomination of Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 5-8, 33-34 (2009) (statements of Sen. Jeff Sessions and Sen. John Cornyn, Members, S. Comm. on the Judiciary); see also generally Michael J. Gerhardt, *The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights*, 10 WM. & MARY BILL RTS. J. 585 (2002) (tracing critiques of the Court from both sides of the political aisle over the last century).

9. See, e.g., HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 3 (5th ed. 2007); MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 203-05 (rev. ed. 2003); Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1203 (1988); Charles W. “Rocky” Rhodes, *Navigating the Path of the Supreme Appointment*, 38 FLA. ST. U. L. REV. 537, 594-95 (2011) (discussing political influences on the appointments process to the Supreme Court).

10. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Hudson v. Michigan*, 547 U.S. 586 (2006).

as conservatives hoped—or liberals feared. The Court—even with a majority of so-called “conservative” jurists—remains an institution comprised of individuals with varying jurisprudential approaches who must concur on a rationale, not just a result, to establish new binding legal doctrine. The common portrayal of the Roberts Court as divided into conservative and liberal camps, with Justice Kennedy the most likely to swing his allegiance,¹¹ fails to appreciate the meaningful distinctions in the jurisprudential views of the “conservative” Justices, which, as I will demonstrate, has dashed any current hope for a conservative constitutional revolution of the type publicly supported by some Republican politicians.

I will begin by examining the potential meanings of “conservatism” when applied to a jurist, identifying five methodological axes or planes along which a judge’s jurisprudence could be described as conservative. I will then apply these axes to the five current Republican appointees to the Roberts Court, providing a sketch as to their own personal interpretive positioning along these planes. I will then detail how their various positions have influenced decisionmaking on the Roberts Court, resulting in a constitutional jurisprudence that (outside some exceptions in the campaign expenditure and criminal procedure contexts) has been respectful of precedent, incremental, and restrained. I will conclude with some thoughts regarding the likely influence of these various strands of conservatism on the Roberts Court in the years to come.

I. THE PLANES OF JUDICIAL CONSERVATISM

The idea of a “conservative judge” has a number of potential meanings. A jurist might be viewed as following a conservative constitutional judicial approach on several different axes, including adopting a historically “frozen” interpretive methodology, employing an analytical process for formulating predictive rules, relying upon an incremental approach to constitutional doctrine, perfecting the Constitution in accordance with a preferred conservative ideological vision, and deferring passively to the other branches of government on constitutional meaning.¹²

11. See, e.g., Robert Barnes, *Justice Kennedy: The Highly Influential Man in the Middle; Court's 5 to 4 Decisions Underscore His Power*, WASH. POST, May 13, 2007, at A1; Adam Liptak, *A Rare Rebuke, In Front of a Nation*, N.Y. TIMES, Jan. 29, 2010, at A12; Tony Mauro, *The Right Stuff*, AM. LAW., Oct. 24, 2008, at S63. Another reason for this portrayal may be that it is easier for the public to understand two “teams” pitted against each other rather than to comprehend the more complex institutional dynamics at play.

12. My focus here is on the types of conservative methodologies portrayed in the judicial role, not a more broad assessment of conservatism in an ideological or political sense. For an insightful analysis of the different categories of conservative thought and the relationship of those categories to the judicial role, see Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1181-1209 (2002).

First, a judicially conservative jurist might view the Constitution strictly in historical terms—as a document containing provisions whose meaning was frozen in time by the originally expected applications or historical practices of the framing generation. Such judges employ constitutional text, structure, and historical materials to ascertain the scope of a constitutional provision as originally understood by the public when it was ratified.¹³ The other recognized modalities of constitutional argument, including pragmatic considerations, policy arguments, and moral or ethical arguments, are largely illegitimate under this view, with the role of precedent a matter of continuing debate.¹⁴ This approach can be viewed as a conservative approach to the judicial process in that the only method for constitutional change is the Article V amendment process—any evolution of constitutional values is thus the province of the democratic polity, not the courts.¹⁵

The second potential axis for judicial conservatism is adherence to formalism, which employs an analytic methodology to formulate, whenever possible, positivist rules from constitutional text, structure, traditions, or precedent to establish predictable, coherent legal outcomes for future controversies.¹⁶ The underlying premise is that “legal rules can be meaningful” and should be consistently “applied to particular facts” in deciding cases,¹⁷ thereby ensuring predictability, uniformity, and transparency while limiting future judicial discretion.¹⁸ Such predictive rules can be viewed as more

13. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 851-52 (1989).

14. See, e.g., Antonin Scalia, *Response*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 129, 140 (Amy Gutmann ed., 1997) (opining that *stare decisis* is a pragmatic exception to, rather than part of, originalism).

15. See, e.g., Scalia, *supra* note 13, at 862. I have resisted referring to this approach in this Part as simply “originalism” because originalism now encompasses several different approaches to the means of constitutional change. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748-49 (1999); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 442-54 (2007). Although those subscribing to a frozen historical understanding are all originalists, all originalists do not believe that the expected applications and historical practices of the framing generation are binding. As discussed in more detail in Part II, though, separating the different approaches is less critical when discussing the methodologies of the current Justices on the Roberts Court as both the two primary originalist jurists, Justices Scalia and Thomas, have defended the concept of a frozen historical constitutional understanding, albeit sometimes from different perspectives.

16. CHARLES D. KELSO & R. RANDALL KELSO, *THE PATH OF CONSTITUTIONAL LAW* § 3.1 (2007).

17. See, e.g., Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 170 (2006) (emphasis omitted) (internal citation omitted); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988).

18. Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57-58 (1992).

judicially conservative than using balancing standards or after-the-fact policy determinations, which are designed to accommodate and incorporate various social and economic factors to obtain the ex post perception of the most just result in a given case.¹⁹

A third plane of judicial conservatism is employing a “minimalist” or incremental approach to the judicial craft, only addressing what is absolutely necessary to resolve the case before the Court. This approach is encapsulated in the view that “if it is not necessary to decide more, it is necessary not to decide more.”²⁰ Minimalism is an essentially pragmatic approach, preferring narrow and shallow rulings, which do not upset the underlying foundations of constitutional doctrine, rather than broad and deep rulings.²¹ The minimalist judge will seek to avoid a constitutional decision if possible, to decide cases in small, incremental steps, and to respect the holdings (although not necessarily the dicta) in prior cases.²² The approach can be described as “conservative” due to its emphasis on a restrained judicial role, even though some liberals also champion it (at least at the present time with the current composition of the Supreme Court).

A fourth axis of judicial conservatism is adherence to conservative or libertarian ideals in determining legal outcomes. The judge attempts to “perfect” the Constitution’s interpretation in accord with a preferred political or philosophical vision, which may view the Constitution primarily in economic, libertarian, federalist, capitalist, or Christian moralist terms. The jurist’s methodology here is focused on achieving a fit between the Constitution’s provisions and the ideologically preferred substantive results on the merits.

Finally, a judge could be considered conservative by passively deferring to the other branches of government on constitutional meaning, as urged by Professor James Thayer over a century ago.²³ Although often referred to as “judicial restraint,” my preference is “judicial deference” or “judicial passivity” to distinguish its meaning from the restraint aspects inherent in minimalism. The basic concept is that the Court should only intervene with its own constitutional interpretation if the government clearly exceeds permissible

19. *See id.* at 57-59.

20. *PDK Labs., Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and in judgment).

21. Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 *TULSA L. REV.* 825, 825-27 (2008). A narrow ruling governs only the circumstances of the particular case, while a shallow ruling avoids articulating an underlying normative theory of the provision at issue. *See id.*

22. Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 *HARV. L. REV.* 4, 6-7 (1996).

23. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *HARV. L. REV.* 129, 143-44 (1893).

constitutional bounds. As long as the legislature or the executive branch makes a rational choice among the potential interpretations of constitutional text, the result is not to be disturbed or “second-guess[ed]” by the judiciary.²⁴

The frequent description of Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito as “conservative” is predominantly based on the first four axes. Although the Roberts Court as a whole has invalidated substantially fewer laws than the Warren, Burger, or Rehnquist Courts,²⁵ these individual Republican-appointed Justices have not adopted a passive and deferential role that only invalidates clear violations of constitutional commands.²⁶ Instead, their judgments have struck down as unconstitutional legislative and executive branch actions that surely were at least colorable regarding their compliance with constitutional principles.²⁷ This is not to say that the other Justices on the Court fare any better under this benchmark.²⁸ The reality is that none of the current Justices exhibit the trait of judicial deference nearly as much as past champions of restraint such as Justice Felix Frankfurter, nor even as much as William Rehnquist did as an Associate Justice.²⁹ As a result, my primary focus in the next section will be the jurisprudential approaches of the current serving Justices appointed by Republican presidents along the other four axes.

24. See Young, *supra* note 12, at 1144.

25. See *infra* Part III.B.

26. See, e.g., William P. Marshall, *The Empty Promise of Compassionate Conservatism: A Reply to Judge Wilkinson*, 90 VA. L. REV. 355, 362-83 (2004) (detailing several areas in which conservative justices on the Rehnquist Court invalidated legislative enactments); Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43, 45 (2007) (noting Rehnquist Court “conservative justices[,] as well as their more liberal counterparts[,] actively ‘replace’ legislative choices with their own preferred outcomes, and they do so at a roughly equal pace, although . . . in different types of cases”); Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555, 583-84 (2010) (arguing that Chief Justice Roberts and Justices Scalia, Thomas, and Alito do not “typically defer to the government or tend to have a limited view of the role of courts in vindicating individual rights”).

27. See, e.g., *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010); *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

28. See, e.g., *Graham v. Florida*, 130 S. Ct. 2011 (2010); *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

29. E.g., THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* 280-82 (2004).

II. THE JURISPRUDENTIAL APPROACHES OF THE CURRENT REPUBLICAN APPOINTEES OF THE ROBERTS COURT

Approaches to judging are complex and multi-faceted. Just as the term “conservative” masks underlying realities, so too would the mere substitution of other labels, such as “strict originalist,” “formalist,” “minimalist,” or “conservative perfectionist.” No jurist’s opinions perfectly adhere to any particular methodological label. Nonetheless, a meta-view of each Justice’s writings does provide insight on the jurist’s preferences regarding the priority of the various planes of jurisprudential conservatism. I discuss below some of these insights for the current Republican appointees to the Court, in the order of their appointment.

A. Justice Scalia

Justice Scalia’s polestar in interpreting the Constitution is his conception of the rule of law, which entails discerning and applying predictive rules from identifiable texts and traditions.³⁰ He has repeatedly praised the capacity of predictive rules to constrain judicial discretion.³¹ Rules, he believes, require the judiciary to maintain a limited role without expressing “political or policy” preferences best left to the other branches of government.³² Avoiding the appearance of policymaking, he has argued, assists in preserving judicial legitimacy, ensuring that the Court exercises legal judgment, not disguised politics.³³ His opinions demonstrate a preference for formulating and applying predictive rules whenever possible in all aspects of constitutional doctrine.³⁴ He typically (although not

30. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Court in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23-25 (Amy Gutmann ed., 1997).

31. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177-79 (1989).

32. *Id.* at 1179-80.

33. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 987-91, 999-1001 (1992) (Scalia, J., concurring in part and dissenting in part).

34. See, e.g., *Michigan v. Bryant*, 131 S. Ct. 1143, 1168-70 (2011) (Scalia, J., dissenting) (complaining the Court made “itself the obfuscator of last resort” by allowing “judges . . . to reach the ‘fairest’ result under the totality of the circumstances”); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3052 (2010) (Scalia, J., concurring) (“Indeterminacy means opportunity for courts to impose whatever rule they like; it is the problem, not the solution.”); *Kansas v. Marsh*, 548 U.S. 163, 182 (2006) (Scalia, J., concurring) (complaining about “incoherence” of Eighth Amendment death penalty jurisprudence on sentencer’s discretion); *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion) (maintaining judicial actions must be “principled, rational, and based upon reasoned distinctions”); *Tennessee v. Lane*, 541 U.S. 509, 557-58 (2004) (Scalia, J., dissenting) (“The ‘congruence and proportionality’ standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking.”); *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (contending that the majority’s interpretation “ate the rule of law”); *Cnty.*

always) formulates these rules from his understanding of the ordinary social and dictionary meaning of the Constitution's text,³⁵ or if there is no specific or clear text, from longstanding traditions and original practices.³⁶

of *Sacramento v. Lewis*, 523 U.S. 833, 861 (1998) (Scalia, J., concurring) (critiquing the majority opinion for "resuscitat[ing] the *ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of subjectivity, th' ol' 'shocks-the-conscience' test"); *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting) (objecting that the Court's holding subjected "routine practices to endless, uncertain, case-by-case, balance-all-the-factors-and-who-knows-who-will-win litigation"); *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 80 (1993) (Scalia, J., concurring) (complaining that a multiple-factor balancing test "ultimately asks courts to make policy judgments"); *Casey*, 505 U.S. at 987 (Scalia, J., concurring in part and dissenting in part) (describing the "standardless nature of the 'undue burden' inquiry" as reflective of its lack of any "principled or coherent legal basis"); *Lee v. Weisman*, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting) (objecting to Court's invention of "a boundless, and boundlessly manipulable, test of psychological coercion"); *Morrison v. Olson*, 487 U.S. 654, 733 (1988) (Scalia, J., dissenting) ("A government of laws means a government of rules. Today's decision on the basic issue of fragmentation of executive power is ungoverned by rule, and hence ungoverned by law."); *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (complaining balancing of competing interests is "like judging whether a particular line is longer than a particular rock is heavy"); *cf. KELSO & KELSO*, *supra* note 16, at § 3.1 (discussing Justice Scalia's approach to interpreting constitutional text in a formalistic manner).

35. *See, e.g., Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346-347 (1999) (Scalia, J., concurring) ("Dictionaries roughly contemporaneous with the ratification of the Constitution demonstrate that an 'enumeration' requires an actual counting, and not just an estimation of number."); *Casey*, 505 U.S. at 980 n.1 (Scalia, J., concurring in part and dissenting in part) (explaining that the judiciary was not bound by any tradition against interracial marriage because it "was contradicted by a text—an Equal Protection Clause that explicitly establishes racial equality as a constitutional value"); *Maryland v. Craig*, 497 U.S. 836, 864-65 (1990) (Scalia, J., dissenting) (consulting dictionaries from eighteenth and nineteenth centuries to establish the meaning of the word "witness" in the Sixth Amendment); *Walton v. Arizona*, 497 U.S. 639, 670-71 (1990) (Scalia, J., concurring) (suggesting that the Eighth Amendment's textual employment of the conjunctive "and" requires punishments to be both cruel and unusual), *overruled by Ring v. Arizona*, 536 U.S. 584 (2002); Scalia, *supra* note 30, at 99 ("Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible.").

36. *See, e.g., Stern v. Marshall*, 131 S. Ct. 2594, 2620-21 (2011) (Scalia, J., concurring) (arguing that Article III judges were required in all federal adjudications outside certain agency determinations "unless there is a firmly established historical practice to the contrary"); *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2347-50 (2011) (holding that the longstanding history of legislative recusal rules since the founding established their constitutionality under the First Amendment); *Doe v. Reed*, 130 S. Ct. 2811, 2832-37 (2010) (Scalia, J., concurring) (arguing that the long history of the practice permitted public disclosure of signed referendum petitions when the meaning of the constitutional text was unclear); *Printz v. United States*, 521 U.S. 898, 905 (1997) (reasoning that "[b]ecause there is no constitutional text speaking to this precise question, the answer . . . must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 371-78 (1995) (Scalia, J., dissenting)

Justice Scalia's attraction to originalism is, in many respects, an outgrowth of his core belief in a logical, rule-based, and textually analytic judicial craft.³⁷ He justifies the search for original meaning in pragmatic terms as a necessary adjunct of the appropriate judicial function: "[T]he Constitution, though it has an effect superior to other laws, is in its nature the sort of 'law' that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law."³⁸ He views his brand of originalism as preferable to nonoriginalism primarily because it serves the values of "consistency and predictability" in obtaining judicial outcomes with minimal intrusion on the democratic process, not necessarily because it reaches "better" outcomes.³⁹

While Justice Scalia often interprets constitutional provisions in accordance with the original understanding of the public as evidenced by contemporaneous practices,⁴⁰ his overarching purpose is to return the rule of law to well-established tenets after the perceived excesses of recent Courts in using "open-ended interpretation to implement the Justices' own values."⁴¹ He employs longstanding

(urging that longstanding historical practices authorized a statute banning anonymous campaign literature when the meaning of the constitutional text was uncertain because "[w]here the meaning of a constitutional text (such as 'the freedom of speech') is unclear, the widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs it was intended to enshrine").

37. See George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1321-38 (1990); Eric J. Segall, *Justice Scalia, Critical Legal Studies, and the Rule of Law*, 62 GEO. WASH. L. REV. 991, 1002-04 (1994).

38. Scalia, *supra* note 13, at 854; cf. *Roper v. Simmons*, 543 U.S. 551, 629 (2005) (Scalia, J., dissenting) ("[T]he concept of 'law' ordinarily signifies that particular words have a fixed meaning. Such law does not change, and this Court's pronouncement of it therefore remains authoritative until (confessing our prior error) we overrule.").

39. Scalia, *supra* note 13, at 855.

40. See, e.g., *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2502-07 (2011) (Scalia, J., concurring in part and dissenting in part) (urging that historical practices must be examined to determine the scope of pre-existing individual rights codified in the Constitution); *Boumediene v. Bush*, 553 U.S. 723, 843 (2008) (Scalia, J., dissenting) ("The proper course of constitutional interpretation is to give the text the meaning it was understood to have at the time of its adoption by the people."); *McIntyre*, 514 U.S. at 372 (Scalia, J., dissenting) (arguing the "traditional view" is "that the Constitution bears its original meaning and is unchanging"); *Minnesota v. Dickerson*, 508 U.S. 366, 379 (1993) (Scalia, J., concurring) (urging that "the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification"); *Lee v. Weisman*, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting) ("[O]ur interpretation of the Establishment Clause should 'comport with what history reveals was the contemporaneous understanding of its guarantees.'") (quoting *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)); *Harmelin v. Michigan*, 501 U.S. 957, 975 (1991) (equating the meaning of the "Cruel and Unusual Punishments Clause" with its meaning "to the Americans who adopted the Eighth Amendment").

41. David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1385 (1999).

historical practices to help define the constitutional text and thereby avoid the subjectivity he believes inherent in certain of the broad, majestic phrases of the Constitution.⁴² Originalism is thus a means to an end to Justice Scalia, not necessarily the end itself. As Justice Scalia insightfully characterized himself, he is a “faint-hearted originalist,” who is willing to dispense with originalism when it leads to unpalatable results or contravenes well-established precedent.⁴³

He accordingly sometimes jettisons any pretense of examining the text or historical understanding of the Constitution while still maintaining his preference for predictive rules of law. For instance, in *Lucas v. South Carolina Coastal Council*, he adopted a bright-line rule that governmental regulations barring all economically viable use of property are takings, even though the Constitution’s text and original meaning suggest that the Takings Clause only applies when the government actually obtains title to the property through eminent domain or similar procedures.⁴⁴ Similarly, he has repeatedly asserted that affirmative action programs, even those adopted by the federal government, are per se invalid, despite the fact that there is no textual support in the Constitution for applying the Equal Protection Clause to the federal government and the original understanding of that provision authorized extensive race-based governmental assistance.⁴⁵ And he has refused to find any protection for unenumerated rights that cannot be detailed with rule-based precision, despite the textual and historical foundation for such rights in the Ninth Amendment.⁴⁶

42. See, e.g., *McCreary Cnty. v. ACLU*, 545 U.S. 844, 886-94 (2005) (Scalia, J., dissenting) (relying on religious traditions to articulate proposed rule on scope of Establishment Clause); *City of Chicago v. Morales*, 527 U.S. 41, 84-86 (1999) (Scalia, J., dissenting) (criticizing the plurality’s opinion for viewing “the historical practices of our people [as] nothing more than a speed bump on the road to the ‘right’ result”); *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (Scalia, J., joined by Rehnquist, C.J.) (contending that “a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all”).

43. Scalia, *supra* note 13, at 864.

44. 505 U.S. 1003, 1019-29 (1992).

45. Compare, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (arguing “government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction”), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 528 (1989) (Scalia, J., concurring) (opining that no government program “that operates on the basis of race” is “in accord with the letter” of the Constitution), with Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 427 (1997) (highlighting that the same Congress enacting the Fourteenth Amendment also passed laws providing special benefits on the basis of race to poor African American families), and Stephen A. Siegel, *The Federal Government’s Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 590 (1998) (demonstrating that, under an originalist perspective, the federal government may enact affirmative action legislation).

46. See *Troxel v. Granville*, 530 U.S. 57, 91-93 (Scalia, J., dissenting) (“[T]he Constitution’s refusal to ‘deny or disparage’ other rights is far removed from affirming

In these (and other similar) instances, he refuses to adopt the legal outcome that should be required under a textual and historical approach, instead formulating a predictive rule that accords with his own values, reasoning, and doctrinal understanding.⁴⁷ To be fair, though, he has also followed his formalistic approach to results that depart sharply from traditional conservative political ideological views. For example, he has shown no inclination to disturb any award of punitive damages against corporate defendants.⁴⁸ He has also been a champion of formalism and original meaning in criminal law, becoming the “unlikely friend” of criminal defendants in Sixth Amendment cases.⁴⁹ His jurisprudence is thus almost always faithful to his view that predictive rules are the backbone of the law, even if he is a “faint-hearted” originalist and sometimes ignores the constitutional text.

Because he prefers the positivist virtues of formalism over narrow precedential distinctions, Justice Scalia predominantly rejects minimalism. He has chastised some of the other current Republican-appointed Justices for their restraint in hollowing—but not overruling—prior precedents:⁵⁰

Minimalism is an admirable judicial trait, but not when it comes at the cost of meaningless and disingenuous distinctions that hold the sure promise of engendering further meaningless and disingenuous distinctions in the future. The rule of law is ill served by forcing lawyers and judges to make arguments that deaden the soul of the

any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges’ list against laws duly enacted by the people.”)

47. *Cf.* Segall, *supra* note 37, at 1009-14 (detailing additional examples in First Amendment, dormant Commerce Clause, and separation of powers cases).

48. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (Scalia, J., dissenting) (adhering to his objection to due process review of punitive damages as being “insusceptible of principled application”); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting) (contending constitutional review of punitive damages violated textualist, originalist, and formalist principles).

49. *See, e.g.*, *United States v. Resendiz-Ponce*, 549 U.S. 102, 111-17 (2007) (Scalia, J., dissenting) (urging on formalistic grounds that an indictment was defective and not harmless error); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150-52 (2006) (holding trial court’s erroneous deprivation of criminal defendant’s choice of counsel entitled him to a new trial); Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 *GEO. L.J.* 183 (2005); Kannar, *supra* note 37, at 1321-38 (discussing cases where Justice Scalia’s approach to constitutional issues of criminal procedure has favored defendants).

50. *See, e.g.*, *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 618-37 (2007) (Scalia, J., concurring); *see also* *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 498 n.7 (2007) (Scalia, J., concurring) (contending failure to overrule *McConnell* was “faux judicial restraint” and “judicial obfuscation”); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 537 (1989) (Scalia, J., concurring) (urging erroneously decided precedent should be overruled rather than dismantled “doorjamb by doorjamb”).

law, which is logic and reason.⁵¹

Justice Scalia apparently would prefer to largely dispense with the humility and restraint of minimalists,⁵² and instead he would “reorder constitutional law around clear interpretative and operative rules.”⁵³

B. Justice Kennedy

Justice Kennedy is the most difficult of the Supreme Court Justices to categorize. As even his sympathetic chroniclers have noted, he lacks “a comprehensive, overarching judicial philosophy.”⁵⁴ Nevertheless, it is possible to sketch a few principles that guide his constitutional jurisprudence.

He is not committed to viewing the Constitution in purely textual or historical terms, as he frequently employs the other constitutional modalities in his opinions.⁵⁵ He often appeals to the ethos of the American people, and he views American legal history and traditions as an ongoing and evolving process, not frozen in the past.⁵⁶ As he remarked in his confirmation testimony, studying the “intentions and the purposes and the statements and the ideas of the Framers” is useful, but it does not compel a particular conclusion in a given case.⁵⁷ Instead, he views the judicial craft as employing “history, the case law, and our understanding of the American constitutional tradition in order to determine the intention of the document broadly expressed.”⁵⁸ Thus, while he often incorporates

51. *Hein*, 551 U.S. at 633.

52. *Cf.* *NASA v. Nelson*, 131 S. Ct. 746, 767 (2011) (Scalia, J., concurring) (contending “[w]hatever . . . virtues” supported judicial minimalism did not “justify judicial incoherence” in assuming without deciding the existence of a federal constitutional right to informational privacy).

53. Sullivan, *supra* note 18, at 114-15.

54. HELEN J. KNOWLES, *THE TIE GOES TO FREEDOM* 3 (2009).

55. *See, e.g.*, *Minnesota v. Carter*, 525 U.S. 83, 100 (1998) (Kennedy, J., concurring) (emphasizing constitutional traditions over time rather than original meaning); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 276 (1990) (Kennedy, J., concurring) (declining to resolve case on textualist grounds); *cf.* 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, 38-61 (2007).

56. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 571-74 (2003) (emphasizing “laws and traditions in the past half century” rather than “history of Western civilization”); *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) (contending “history and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry”).

57. *Nomination of Anthony M. Kennedy to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 138-41 (1987) (statement of Anthony Kennedy, J.).

58. *Id.* at 85. *Cf.* *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005) (iterating that “expansive language in the Constitution[] must be interpreted according to its text, by

historical and textual arguments, these arguments are the beginning, not typically the end, of his search for constitutional meaning.

His adherence to the precepts of formalism and minimalism is uneven. He illustrates some traits of formalism but only in a limited sense. While hardly uniform in his approach, he frequently favors bright-line rules when interpreting certain clauses of the Constitution. For example, Justice Kennedy often employs categorical rules rather than balancing standards in deciding cases under the Free Speech and Establishment Clauses.⁵⁹ State sovereignty, federalism, and separation of powers are other doctrinal areas in which Justice Kennedy frequently prefers a predictive rule.⁶⁰

considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design”).

59. *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding speech made pursuant to a government employee’s official job duties did not receive First Amendment protection from retaliatory discharge); *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (urging categorical invalidation of content-based speech restrictions outside traditional exceptions); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465-66 (2001) (Thomas, J., dissenting) (contending, in a dissenting opinion joined by Justice Kennedy, that all political spending and contribution limits in the course of elections should be subject to typically fatal strict scrutiny); *Hill v. Colorado*, 530 U.S. 703, 786 (2000) (Kennedy, J., dissenting) (urging that the government is prohibited from “foreclos[ing] a traditional medium of expression”); *Denver Area Educ. Telecomm. Consortium v. Fed. Comm’n Comm’n*, 518 U.S. 727, 784 (1996) (Kennedy, J., concurring and dissenting) (objecting to plurality’s “evasion of any clear legal standard” in defining First Amendment rights in context of cable television); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-92 (1992) (holding, in an opinion joined by Justice Kennedy, that government may not selectively target disfavored messages under any circumstances); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring) (urging absolute rule that all content-based restrictions not categorically excluded from First Amendment protection violate the Constitution); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 659-63, 668-74 (1989) (Kennedy, J., concurring and dissenting) (urging adoption of more formalistic coercion test for Establishment Clause jurisprudence). *But see* *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 693-94 (1992) (Kennedy, J., concurring) (objecting to “jurisprudence of categories” in majority’s public forum analysis).

60. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 636-37 (2006) (Kennedy, J., concurring) (concluding military commission exceeded statutory congressional bounds on presidential authority); *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379-87 (2006) (Thomas, J., dissenting) (contending, in a dissenting opinion joined by Justice Kennedy, that state sovereign immunity cannot be abrogated under Congress’ Article I powers); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding, in an opinion authored by Justice Kennedy, that Congress had no Article I power to subject nonconsenting states to suits in state court); *Clinton v. City of New York*, 524 U.S. 417, 449-53 (1998) (Kennedy, J., concurring) (explaining his agreement with majority’s formalist holding that the Federal Line Item Veto Act violated bicameralism and presentment requirements of Article I); *Missouri v. Jenkins*, 495 U.S. 33, 65 (1990) (Kennedy, J., concurring) (urging remedial judicial taxing order was legislative function outside judicial power); *Pub. Citizen v. Dep’t of Justice*, 491 U.S. 440, 485-87 (1989) (Kennedy,

He is similarly enamored of rules when interpreting the Cruel and Unusual Punishment Clause, where he has often adopted a categorical approach to ban the imposition of certain punishments.⁶¹

Yet in other areas of constitutional doctrine, Justice Kennedy prefers balancing standards.⁶² Justice Kennedy's due process decisions, for example, are typically the antithesis of rule-based adjudication.⁶³ He has demonstrated similar nuances in equal protection decisions, including affirmative action cases and some other individual rights cases.⁶⁴

There are two potential explanations for this Janus-like dichotomy. One is that Justice Kennedy's preference for formalism depends on his agreement with the underlying claim. This proposition finds support in his failure to maintain consistency within doctrinal areas in which he typically favors one approach over another. For instance, despite his usual preference for balancing in due process cases, he has defended a rather formalistic approach to due process constraints on a state court's adjudicatory jurisdiction.⁶⁵

J., concurring) (urging categorical approach preventing any intrusion by the legislative branch on powers the Constitution, by explicit text, commits to the exclusive control of the President).

61. *See, e.g.*, *Graham v. Florida*, 130 S. Ct. 2011, 2030-32, 2034 (2010) (adopting categorical approach barring juveniles from being sentenced to life in prison without the possibility of parole for a nonhomicide crime); *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008) (barring capital punishment for nonhomicide crimes); *Roper v. Simmons*, 543 U.S. 551, 574-75 (2005) (barring capital punishment for defendants committing crimes before the age of eighteen); *cf. Atkins v. Virginia*, 536 U.S. 304, 318-321 (2002) (joining Justice Stevens' majority opinion barring capital punishment for mentally disabled). Justice Kennedy has also joined several decisions adopting predictive rules providing greater leeway for constitutionally valid jury instructions in capital cases. *See, e.g.*, *Kansas v. Marsh*, 548 U.S. 163, 179-81 (2006); *Brown v. Sanders*, 546 U.S. 212, 223-25 (2006).

62. *See, e.g.*, *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 124-25 (2005) (Ginsburg, J., dissenting) (joining Justice Ginsburg's dissenting opinion objecting to majority's categorical bright-line rule prevailing over interest balancing test).

63. *See, e.g.*, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263-66 (2009); *Lawrence v. Texas*, 539 U.S. 558, 564-78 (2003); *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 856-58 (1998) (Kennedy, J., concurring); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871-79 (1992) (joint plurality opinion of O'Connor, Kennedy, and Souter, JJ.).

64. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 766-71 (2008) (employing functional rather than formalistic approach to ascertain scope of habeas corpus rights); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787-88 (2007) (Kennedy, J., concurring) (disagreeing with plurality's "all-too-unyielding insistence that race cannot be a factor" in school assignments); *Romer v. Evans*, 517 U.S. 620, 635-36 (1996) (invalidating state constitutional amendment repealing all laws providing protected-class status to gays, lesbians, and bisexuals).

65. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786-90 (2011) (plurality opinion). Perhaps this was because his approach to personal jurisdiction in this case emphasized sovereign power more than individual liberty. *See id.*

On the other hand, although he almost always favors predictive rules in free speech cases, he has nonetheless asserted that the free speech “public forum doctrine ought not to be a jurisprudence of categories rather than ideas.”⁶⁶ Even when abiding by his formalism preference in a particular doctrinal area, his “rules” are sometimes narrower than the predictive rules favored by Justices Scalia and Thomas.⁶⁷ Perhaps he is guided by his conception of individual liberty, as he tends to favor balancing or a narrow rule whenever he believes that a more predictive rule would risk infringing on personal liberty rights.⁶⁸

Another possibility is that Justice Kennedy is a “doctrinal formalist,” who tends to view “certain clauses of the Constitution [as] countenanc[ing] a formalistic perspective, whereas others do not.”⁶⁹ It might be argued that such tendencies are defensible because, as a textual matter, the phraseology and structure of certain constitutional provisions indicate that a rule is contemplated, while other provisions indicate to the contrary. Or, such an approach might be defended as a prudential recognition of the need for certain rights, such as speech and religion, to be subject to predictive rules in order to provide advance notice to actors regarding precise constitutional boundaries. His opinions incorporate both of these defenses. Sometimes he has highlighted the difficulty of adopting a formalistic perspective in interpreting certain constitutional provisions. The best example is the joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which detailed that the boundaries of substantive due process “are not susceptible of expression as a simple rule[.]” leading the plurality to employ the undue burden standard

66. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 693-94 (1992) (Kennedy, J., concurring). *But see* *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677-80 (1998) (employing both categorical and expansive approaches to forum analysis).

67. *See, e.g., McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 885 (2005) (Scalia, J., dissenting) (indicating Kennedy did not join parts of Scalia's dissenting opinion which would have allowed governmental recognition of monotheistic religious traditions); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000) (invalidating prayer over loud speaker at high school football game); *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring) (indicating some discomfort with majority opinion and writing separately to delineate its limits); *Lee v. Weisman*, 505 U.S. 577, 587-99 (1992) (invalidating prayer at school graduation ceremony, but limiting holding to secondary schools).

68. *Cf.* Charles D. Kelso & R. Randall Kelso, *The Constitutional Jurisprudence of Justice Kennedy on Liberty* (Aug. 1, 2010), available at http://works.bepress.com/randall_kelso/6/ (describing “how the concept of constitutionally protected liberty has been developed and applied in Justice Kennedy's opinions, and how he has sought to cushion the impact on liberty of Court decisions that have sustained the exercise of governmental power in ways that limit liberty”).

69. Charles W. “Rocky” Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1203-04 (2007).

rather than the previous trimester framework for abortion regulations.⁷⁰ In other instances, however, he has defended the pragmatic necessity of adopting a clear rule to minimize judicial intrusions and provide predictability.⁷¹

His adherence to minimalism appears to be the converse of his formalism preferences. In those areas in which he believes the Constitution requires a formalistic approach, he does not proceed incrementally, but instead prefers the application of the correct rule, despite any impact on prior precedent. Empirical studies not surprisingly reveal that his commitment to precedent lags behind many of the other Justices.⁷² But in those areas outside his formalism preferences, his opinions and judgments frequently respect precedent, trying to accommodate even opinions he disagreed with earlier. In *Gonzales v. Carhart*, for example, he attempted to demonstrate that the federal law prohibiting partial birth abortions was distinguishable from the state law invalidated by the Court over his dissent in an earlier case.⁷³

Nonetheless, even in those cases in which he proceeds incrementally, he tends to write broadly, while deciding narrowly.⁷⁴ His opinions sometimes appear to reach out and discuss everything

70. 505 U.S. 833, 849 (1992). In a later part of the opinion, the plurality noted the difficulty of drawing “a specific rule from what in the Constitution is but a general standard.” *Id.* at 869. The substitution in *Casey* of the undue burden standard for the trimester system was quite correctly viewed by the dissent as the substitution of a subjective standard for what had been a clear rule. *Id.* at 964-65 (Rehnquist, C.J., dissenting).

71. *E.g.*, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2790 (2011) (plurality opinion); *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006).

72. *See, e.g.*, Jason J. Czarnecki, William K. Ford & Lori A. Ringhand, *An Empirical Analysis of the Confirmation Hearings of the Justices of the Rehnquist Natural Court*, 24 CONST. COMMENT. 127, 139-40 (2007) (placing Justice Kennedy as the third most likely Justice to overrule or modify precedent on the Rehnquist Court, behind Justices Thomas and Scalia, but ahead of both Chief Justice Rehnquist and Justice O'Connor); Ringhand, *supra* note 26, at 65 (establishing that Justice Kennedy voted more than any other Justice but Justice Thomas during the natural Rehnquist Court to invalidate a statute and was the third most likely member of the Court to vote to overrule precedent); *cf.* Jonathan H. Adler, *Getting the Roberts Court Right: A Response to Chemerinsky*, 54 WAYNE L. REV. 983, 1010 (2008) (opining “Justice Kennedy has a ‘maximalist’ streak, making him the Justice least likely to defer to the political branches and among the most likely to reconsider past precedents”).

73. 550 U.S. 124, 162-67 (2007) (distinguishing *Stenberg v. Carhart*, 530 U.S. 914 (2000)). The success of his attempt is subject to some debate, however. *See id.* at 189-91 (Ginsburg, J., dissenting); Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1538 (2008).

74. *See, e.g.*, *Nev. Comm’n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2352-54 (2011) (Kennedy, J., concurring); *Boumediene v. Bush*, 553 U.S. 723, 739-89 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 636-55 (2006) (Kennedy, J., concurring); *Hudson v. Michigan*, 547 U.S. 586, 602-04 (2006) (Kennedy, J., concurring); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (joint plurality opinion).

under the “spatial” heavens.⁷⁵ Perhaps that is because he views the Supreme Court’s role, in part, as the facilitator of the public dialogue on constitutional meaning.⁷⁶ As he stated in an interview, “Society has to recognize that it has to confront hard decisions in neutral, rational, dispassionate debate. . . . [a]nd not just leave it to [the] courts.”⁷⁷ By touching on—without resolving—numerous issues in his expansive, sometimes philosophical musings, he may believe he is fostering public debate without undue judicial intrusion.

C. Justice Thomas

Justice Thomas’ jurisprudence is the most innovative—and least judicious—of any member of the Roberts Court. He is the Court’s firmest believer in interpreting the Constitution in accord with its text and original meaning, although he is not troubled by integrating his own vision of “the higher law political philosophy of the Founding Fathers” into the original public understanding.⁷⁸ While he has less respect for precedent than any other Justice,⁷⁹ his jurisprudence is predominantly rule-based, which he maintains reduces judicial discretion and encourages impartiality.⁸⁰

Justice Thomas strongly criticizes the concept of an evolving Constitution and instead asserts that the proper approach is

75. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (concluding case involved “liberty of the person both in its spatial and in its more transcendent dimensions”); *Casey*, 505 U.S. at 851 (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”).

76. See *Blakely v. Washington*, 542 U.S. 296, 326-27 (2004) (Kennedy, J., dissenting) (urging that judicial decisions “often yield intelligible patterns that can be refined by legislatures and codified into statutes or rules as general standards. As these legislative enactments are followed by incremental judicial interpretation, the legislatures may respond again, and the cycle repeats. This recurring dialogue, an essential source for the elaboration and evolution of the law, is basic constitutional theory in action”).

77. Jeffrey Rosen, *The Agonizer*, NEW YORKER, Nov. 11, 1996, at 90. His opinions have also reiterated the role of the law as a teacher. See, e.g., *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring) (opining “the law can be a teacher”).

78. Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POLY 63, 63-64 (1989); see also Clarence Thomas, *Personal Responsibility*, 12 REGENT U. L. REV. 317, 318-19 (2000) (arguing “classical conception” of purpose of legal and political system differs from the modern post-New Deal conception that has infected constitutional analysis). Professor Scott Gerber has demonstrated that Justice Thomas, at least in cases involving race, relies on original natural rights principles from human nature as articulated in the Declaration of Independence rather than merely the original practices of the Founders. See SCOTT D. GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* 101-04 (1999).

79. See Czarnezki et al., *supra* note 72, at 139-40 (concluding Justice Thomas was the “least committed to precedent” on the Rehnquist Court).

80. Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6 (1996).

“tethering [constitutional] analysis to the understanding of those who drafted and ratified the text” to keep the meaning—in the absence of an amendment—“fixed.”⁸¹ But his approach to the original understanding is not so constant. Sometimes he views original meaning through a natural law prism, which appears reflective of his own beliefs.⁸² The best example is that, instead of abiding by the Fourteenth Amendment’s text and the surrounding historical practices that unquestionably viewed at least federal affirmative action programs as constitutional, he considers such programs per se invalid under the Declaration of Independence’s “principle of inherent equality that underlies and infuses our Constitution.”⁸³ He has similarly argued in other racial cases for applying underlying philosophical principles he believes are evident in the Nation’s history and traditions rather than the actual historical practices of the framing generation.⁸⁴ On the other hand, outside the racial sphere, he usually (although not always) equates the original meaning with the historical practices of the framers without attempting to recover natural or philosophical principles.⁸⁵ And then finally, he occasionally drops any pretense of employing originalism and simply ignores the framing philosophy, text, and historical understanding. An example is his support for the right of anonymity in electioneering and direct democracy initiatives under the First Amendment,⁸⁶ a position irreconcilable with the original

81. *Id.* at 2, 7 (arguing that the idea that Justices assist in the evolution of the Constitution “is a dangerous idea that is at war with the very concept of impartial judging and the rule of law”). His testimony during his confirmation hearing, however, had a different view of the evolution of the Constitution. *The Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 274 (1993) (discussing need for constitutional provisions to evolve and move “with our history and our tradition”).

82. See GERBER, *supra* note 78, at 41-42.

83. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment).

84. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 772-80 (2007) (Thomas, J., concurring); *Grutter v. Bollinger*, 539 U.S. 306, 371-78 (2003) (Thomas, J., dissenting); *Gratz v. Bollinger*, 539 U.S. 244, 281 (2003) (Thomas, J., concurring); *Missouri v. Jenkins*, 515 U.S. 70, 115-23 (1995) (Thomas, J., concurring).

85. See, e.g., *Turner v. Rogers*, 131 S. Ct. 2507, 2521 (2011) (Thomas, J., dissenting); *Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Thomas, J., concurring); *Morse v. Frederick*, 551 U.S. 393, 410-16 (2007) (Thomas, J., concurring); *Lawrence v. Texas*, 539 U.S. 558, 605-06 (2003) (Thomas, J., dissenting). *But see* *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2751-58 (2011) (Thomas, J., dissenting) (relying on philosophical beliefs of the founding generation that parents had absolute authority over their children as excluding any free speech rights of minors without approval of their parents).

86. See, e.g., *Doe v. Reed*, 130 S. Ct. 2811, 2839-47 (2010) (Thomas, J., dissenting); *Citizens United v. FEC*, 130 S. Ct. 876, 980-82 (2010) (Thomas, J., concurring in part

constitutional understanding.⁸⁷ These inconsistencies in Justice Thomas' approach have led some commentators to complain that his historical analysis is merely a vehicle to obtain his desired result,⁸⁸ although, in all fairness, his opinions do not always comport with politically conservative beliefs.⁸⁹

Justice Thomas is committed to formalism's conception of the rule of law.⁹⁰ He frequently extols the virtues of principled rules and their capacity to reduce judicial discretion in both his own writings and the opinions he has joined.⁹¹ He believes that "clear, bright-line rules" assist judges in maintaining impartiality and restraint.⁹² It seems, though, that Justice Thomas' formalism is an adjunct to his primary allegiance to the original understanding, in contrast to Justice Scalia whose preferences appear to be the converse.

Justice Thomas' originalist, rule-based jurisprudence is inconsistent with the precepts of minimalism. He is more inclined than any other Justice to urge for the disavowal of prior precedent,⁹³ especially precedent he believes deviates from the original understanding.⁹⁴ He has expressed a willingness to reconsider settled

and dissenting in part).

87. See, e.g., *Reed*, 130 S. Ct. at 2833-36 (Scalia, J., concurring); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 371-75 (1995) (Scalia, J., dissenting).

88. Mark A. Graber, *Clarence Thomas and the Perils of Amateur History*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 70-71, 77 (Earl M. Maltz, ed., 2003).

89. See, e.g., *Philip Morris USA v. Williams*, 549 U.S. 346, 361-62 (2007) (Thomas, J., dissenting) (disapproving of the majority's holding that awarding punitive damages for the purpose of punishing a defendant for conduct harmful to nonparties is unconstitutional).

90. Thomas, *supra* note 80, at 6 ("The law is a distinct, independent discipline, with certain principles and modes of analysis that yield what we can discern to be correct and incorrect answers to certain problems.").

91. See, e.g., *id.* at 6-7; cf. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 91-95 (2008) (Thomas, J., dissenting) (complaining that the majority's "claim-by-claim approach" for preemption was "unworkable" and "atextual"); *Randall v. Sorrell*, 548 U.S. 230, 267 (2006) (Thomas, J., concurring) ("The plurality opinion, far from making the case for *Buckley* as a rule of law, itself demonstrates that *Buckley's* limited scrutiny of contribution limits is 'insusceptible of principled application' . . ."); *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (contending, with Justice Thomas, that the majority's interpretation "ate the rule of law"); *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting) (complaining, in an opinion joined by Justice Thomas, that the Court's holding "subjected those routine practices to endless, uncertain, case-by-case, balance-all-the-factors-and-who-knows-who-will-win litigation").

92. Thomas, *supra* note 80, at 7.

93. See *Czarnecki et al.*, *supra* note 72, at 139-40 (determining Justice Thomas voted to overrule precedent more frequently than any other Justice on the Rehnquist Court).

94. See, e.g., *United States v. Lopez*, 514 U.S. 549, 584-85 (1995) (Thomas, J., concurring) (urging "faithful[ness] to the original understanding" in constitutional interpretation required reconsideration of Commerce Clause jurisprudence).

doctrines on the Commerce Clause, the dormant or negative Commerce Clause, the Necessary and Proper Clause, the Establishment Clause, Free Speech Clause protections for commercial, campaign, student, and underage speech, the Cruel and Unusual Punishments Clause, and the Privileges or Immunities Clause, to name but a few.⁹⁵ He has argued, on originalist grounds, for decades of precedent to be overturned in concurring and dissenting opinions, many times joined by no other Justice.⁹⁶ Even Justice Scalia has reportedly described him as not believing “in *stare decisis*, period.”⁹⁷

In some cases where he reluctantly follows precedent because no party has requested the Court to overrule prior doctrine, he proffers his own extraneous invitation to future litigants to raise constitutional issues that would attract his attention.⁹⁸ Justice Thomas thus rejects the restrained judicial role of the minimalist,

95. See, e.g., *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2751-61 (2011) (Thomas, J., dissenting) (freedom of speech for minors); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3058-88 (2010) (Thomas, J., concurring) (Privileges or Immunities Clause); *Morse v. Frederick*, 551 U.S. 393, 410-11 (2007) (Thomas, J., concurring) (freedom of speech in schools); *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 349-55 (2007) (Thomas, J., concurring) (negative Commerce Clause); *Randall*, 548 U.S. at 266 (Thomas, J., concurring) (campaign speech); *Rangel-Reyes v. United States*, 547 U.S. 1200, 1201 (2006) (Thomas, J., dissenting from denial of cert.) (trial by jury); *Kelo v. City of New London*, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting) (Takings Clause); *Gonzales v. Raich*, 545 U.S. 1, 57-74 (2005) (Thomas, J., dissenting) (Commerce Clause and Necessary and Proper Clause); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45-54 (2004) (Thomas, J., concurring) (Establishment Clause); *Zelman v. Simmons-Harris*, 536 U.S. 639, 676-80 (2002) (Thomas, J., concurring) (Establishment Clause); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (Commerce Clause); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 410 (2000) (Thomas, J., dissenting) (political speech); *Saenz v. Roe*, 526 U.S. 489, 521-23 (1999) (Thomas, J., dissenting) (Privileges or Immunities Clause); *Mitchell v. United States*, 526 U.S. 314, 341-43 (1999) (Thomas, J., dissenting) (Self-incrimination Clause); *Hudson v. McMillian*, 503 U.S. 1, 17-30 (1992) (Thomas, J., dissenting) (Cruel and Unusual Punishment Clause).

96. See *supra* note 95.

97. KEN FOSKETT, *JUDGING THOMAS* 281-82 (2004).

98. See, e.g., *F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819-22 (2009) (Thomas, J., concurring) (noting willingness to reconsider decisions regarding regulation of broadcast media); *Gonzales v. Carhart*, 550 U.S. 124, 168-69 (2007) (Thomas, J., concurring) (noting parties did not raise issue of congressional power over abortion methods); *United States v. Hubbell*, 530 U.S. 27, 49 (2000) (Thomas, J., concurring) (noting willingness to reconsider whether right against self-incrimination is limited only to testimony); *Mitchell v. United States*, 526 U.S. 314, 341-43 (1999) (Thomas, J., dissenting) (noting willingness to permit comment by the state on defendant's failure to testify); *Printz v. United States*, 521 U.S. 898, 937-38 & nn.1-2 (1997) (Thomas, J., concurring) (noting willingness to consider scope of Second Amendment); *E. Enters. v. Apfel*, 524 U.S. 498, 538-39 (1998) (Thomas, J., concurring) (noting willingness to reconsider the meaning of the Ex Post Facto Clause as established in 1798).

who decides only what is absolutely necessary to resolve the case before the Court to limit any impact on future cases or past precedent. Instead, Justice Thomas would reorder constitutional doctrine to restore his view of the framing principles.

D. Chief Justice Roberts

In contrast to the approximately twenty-year Supreme Court tenure of Justices Scalia, Kennedy, and Thomas, Chief Justice Roberts has served on the Court for less than six years as this Article is being written. As a result, a sketch of his jurisprudential philosophy may be premature, as Justices at times modify their approach after their first few terms. Nonetheless, his opinions and voting patterns have provided some insights regarding at least his current preferences.

He predominantly approaches constitutional precedent incrementally. So far, he has voted for or urged the overruling of constitutional precedent in only three cases,⁹⁹ and in one of these cases he penned a separate concurrence explaining in detail his justifications for doing so.¹⁰⁰ Although on a handful of other occasions he joined or authored opinions that arguably were inconsistent with the tenor of prior decisions,¹⁰¹ and in another case he wrote a

99. *Alabama v. North Carolina*, 130 S. Ct. 2295, 2317-19 (2010) (Roberts, C.J., concurring in part and dissenting in part) (urging that the decision in *Arizona v. California*, 460 U.S. 605 (1983), contravened both the text of the Constitution and more recent precedent); *Citizens United v. FEC*, 130 S. Ct. 876, 886, 913 (2010) (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and overruling in part *McConnell v. FEC*, 540 U.S. 93, 203-09 (2003)); *Montejo v. Louisiana*, 129 S. Ct. 2079, 2091 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625 (1986)). He also has voted, along with every other member of the Court, to no longer view the two-step procedure for resolving qualified immunity claims from *Saucier v. Katz*, 533 U.S. 194 (2001), as an inflexible command, but as within the discretion of the lower courts. *Pearson v. Callahan*, 555 U.S. 223, 227 (2009). Finally, he has voted to overrule past precedent in two statutory cases, voting in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 900-08 (2007), to overrule the antitrust per se rule of invalidity from *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), and in *Bowles v. Russell*, 551 U.S. 205, 214 (2007), to overrule the equitable exception doctrine for jurisdictional requirements from *Thompson v. INS*, 375 U.S. 384 (1964), and *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962).

100. *Citizens United*, 130 S. Ct. at 917-25 (Roberts, C.J., concurring).

101. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (plurality opinion); *Hein v. Freedom from Religion Found., Inc.* 551 U.S. 587 (2007) (plurality opinion); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (opinion of Roberts, C.J.); *Gonzales v. Carhart*, 550 U.S. 124 (2007). These decisions have frequently been criticized in academic literature. See, e.g., William D. Araiza, *Playing Well With Others - But Still Winning: Chief Justice Roberts, Precedent, and the Possibilities of a Multi-Member Court* (BROOKLYN L. SCH. LEGAL STUDIES RESEARCH PAPER NO. 220, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1758001; Stone, *supra* note 73, at 1538-40. But, as Professor Araiza

concurrence expressing some sympathy for reconsidering existing doctrine,¹⁰² he resisted overruling precedent in these and similar cases,¹⁰³ despite calls from Justices Scalia and Thomas to do so.¹⁰⁴ Instead, he has generally followed directly applicable precedent, even in situations in which it may clash with conservative ideological principles.¹⁰⁵

His record on the depth and breadth of his rulings is mixed. While he often abides by his frequently expressed preference to resolve cases on narrow grounds (sometimes perhaps artificially so),¹⁰⁶ he has on other occasions sought a deeper holding,¹⁰⁷ or joined

cautions, a few such examples of arguably undermining precedents without explicitly overruling them does not necessarily indicate a commitment to undoing the work of prior Courts. See Araiza, *supra*, at 2. Indeed, it can be argued that undermining such precedents—rather than explicitly overruling them—is entirely consistent with an incrementalist judicial philosophy. See *infra* Part III.A.

102. *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 213 (2008) (Roberts, C.J., concurring, joined by Scalia, J.).

103. See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (plurality opinion, joined by Roberts, C.J.).

104. See *Rothgery*, 554 U.S. at 218-36 (Thomas, J., dissenting); *Hein*, 551 U.S. at 618-37 (Scalia, J., concurring); *Wis. Right to Life*, 551 U.S. at 483-504 (Scalia, J., concurring); *Gonzales*, 550 U.S. at 168-69 (Thomas, J., concurring); *Randall*, 548 U.S. at 265-73 (Thomas, J., concurring).

105. See, e.g., *United States v. Comstock*, 130 S. Ct. 1949 (2010) (joining Justice Breyer's expansive opinion on scope of congressional power in full rather than the concurring opinions of Justices Kennedy and Alito or the dissenting opinion of Justice Thomas with Justice Scalia); *Jones v. Flowers*, 547 U.S. 220, 225 (2006) (holding, over the dissent of Justice Thomas, that the circumstances of the particular case must be examined to ascertain if due process requires additional efforts to inform the property owner when a tax sale notice is returned unclaimed).

106. See, e.g., *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2742-46 (2011) (Alito, J., concurring, joined by Roberts, C.J.) (declining to consider whether a properly drawn regulation preventing minors from purchasing violent video games would comport with the First Amendment); *Snyder v. Phelps*, 131 S. Ct. 1207, 1218-21 (2011) (holding that picketing at a military funeral is insulated from tort liability under the First Amendment without addressing Internet postings of picketers or validity of time, place, and manner restrictions); *Salazar v. Buono*, 130 S. Ct. 1803, 1820-21 (2010) (opinion of Kennedy, J., joined by Roberts, C.J.) (refraining from adopting "sweeping pronouncements" or "categorical rules" in Establishment Clause challenge to congressional land-transfer statute, instead remanding for the district court to conduct the appropriate fact-intensive inquiry); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2508 (2009) (deciding case on narrow statutory grounds despite expressing serious doubts regarding the constitutionality of the underlying statute); *Morse v. Frederick*, 551 U.S. 393, 403-06 (2007) (holding student speech promoting illegal drug use at school sponsored event without revisiting prior student speech rights cases). Sometimes this preference has rendered a complex issue relatively simple, such as in *Snyder*, where the Court's sole focus on the content of the picketers' signs and the conduct of their picketing masked more difficult issues regarding the personal attacks the picketers posted on the Internet. 131 S. Ct. at 1214 n.1.

107. See, e.g., *United States v. Stevens*, 130 S. Ct. 1577 (2010); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (plurality opinion).

an expansive judgment when he views a narrower ground as unjustified.¹⁰⁸ Many of his opinions extol the virtues of as-applied challenges rather than facial challenges,¹⁰⁹ but almost as frequently, he finds the extraordinary circumstances he believes warrants holding a statute facially unconstitutional.¹¹⁰ He typically reserves issues for subsequent resolution rather than deciding more than he believes is necessary in a particular case,¹¹¹ but his opinions are often deep and sometimes laced with forecasts regarding future controversies.¹¹²

He is attracted to rules, but his preferred rules are not necessarily the predictive variety favored by Justices Scalia, Thomas, and sometimes Kennedy. Although this difference is not evident when the current Republican-appointed Justices all agree that a claimed right simply does not exist,¹¹³ in other cases the breadth of the pronouncement has been divisive. In these cases, the Chief Justice articulates a precise rule resolving the case before the Court and similar future cases rather than the more encompassing approach preferred by some of his colleagues.¹¹⁴ Even when he

108. *Citizens United v. FEC*, 130 S. Ct. 876, 918-19 (2010) (Roberts, C.J., concurring).

109. *See, e.g., Doe v. Reed*, 130 S. Ct. 2811, 2817-21 (2010); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 459-62 (2008) (Roberts, C.J., concurring); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464-67 (2007) (opinion of Roberts, C.J.).

110. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828-29 (2011); *Stevens*, 130 S. Ct. at 1587-92; *Citizens United*, 130 S. Ct. at 918-19; *Davis v. FEC*, 554 U.S. 724, 736-44 (2008).

111. *See, e.g., Stevens*, 130 S. Ct. at 1592 (leaving open the possibility that a more narrowly crafted statute would be constitutional); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 492-93 (2006) (Roberts, C.J., concurring in part and dissenting in part) (refusing to take a position on whether political gerrymanders were justiciable when it was not necessary to the judgment).

112. *See, e.g., Stevens*, 130 S. Ct. at 1584-86 (using historical traditions to define unprotected categories of speech); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2511-13 (2009) (outlining "serious constitutional questions" raised by the extension of the preclearance requirement in Voting Rights Act before deciding case on statutory grounds); *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 65-66 (2006) (applying test requiring that conduct be "inherently expressive" to be entitled to First Amendment protection).

113. *Dist. Attorney's Office v. Osborne*, 129 S. Ct. 2308, 2322-23 (2009) (holding no substantive due process right to access DNA after a conviction); *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358-64 (2009) (holding unions had no First Amendment rights to political payroll deductions); *Samson v. California*, 547 U.S. 843, 857 (2006) (holding parolees were not protected from suspicionless searches by Fourth Amendment); *Hudson v. Michigan*, 547 U.S. 586, 591-99 (2006) (holding exclusionary rule inapplicable to knock-and-announce violations).

114. *See, e.g., Stern v. Marshall*, 131 S. Ct. 2594, 2608-19 (2011) (employing multi-factor precedential analysis rather than historical approach favored by Justice Scalia's concurrence); *Baze v. Rees*, 553 U.S. 35, 51-63 (2008) (plurality opinion) (employing rule that a method of execution violates the Eighth Amendment if it creates a substantial risk of severe pain that could be significantly reduced by alternative

appears to articulate a more comprehensive approach (such as in some of his free speech decisions),¹¹⁵ he often reserves an escape hatch for subsequent cases.¹¹⁶

Chief Justice Roberts employs standards more frequently than Justices Scalia and Thomas, especially when precedent supports weighing the facts and circumstances. While he objects when he believes a balancing standard will cause too much uncertainty,¹¹⁷ he employs such standards when necessary to comport with prior decisions.¹¹⁸ As a result, his preference for formalism does not appear quite as strong as it does for the other current Republican-appointed jurists.

Chief Justice Roberts possesses some sympathy for originalism, as he expressed in his confirmation hearing,¹¹⁹ but his has not been a historically frozen search for the original understanding. Instead, he has tempered the original understanding with judicial precedent and sometimes American traditions. Although he has concurred in an originalist approach to resolve open constitutional questions¹²⁰ or to

procedures, rather than the test proposed by Justice Thomas requiring a deliberate design to inflict pain); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 465-68 (2007) (opinion of Roberts, C.J.) (creating objective test for express advocacy in as-applied challenge rather than overruling earlier decision in *McConnell*); *Morse v. Frederick*, 551 U.S. 393, 403-10 (2007) (holding principal may restrict student speech at a school event when speech is “reasonably viewed as promoting illegal drug use[.]” but without impacting prior public school speech cases that Justice Thomas in his concurrence wanted to overrule).

115. See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (concluding speech in “a public place on matter of public concern . . . is entitled to ‘special protection’ under the First Amendment” and “cannot be restricted” because it causes emotional distress); *Stevens*, 130 S. Ct. at 1584-86 (identifying unprotected categories of speech through historical traditions).

116. See, e.g., *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2747 (2011) (Alito, J., concurring, joined by Roberts, C.J.) (distinguishing Roberts’ opinion in *Stevens*; *Snyder*, 131 S. Ct. at 1220 (emphasizing Court’s holding as limited to the particular facts in the record before the Court).

117. See, e.g., *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2269-72 (2009) (Roberts, C.J., dissenting) (listing numerous uncertainties left open by majority holding); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 265-66 (2007) (Roberts, C.J., dissenting) (lamenting that guidance from previous cases “amounted to—it depends”); cf. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1487 (2010) (Alito, J., concurring, joined by Roberts, C.J.) (complaining that the Court adopted a “vague, halfway test [that] will lead to much confusion and needless litigation”).

118. See, e.g., *Graham v. Florida*, 130 S. Ct. 2011, 2036-42 (2010) (Roberts, C.J., concurring); *Jones v. Flowers*, 547 U.S. 220, 226-37 (2006); cf. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (plurality opinion, joined by Roberts, C.J. and Kennedy, J.); *Randall v. Sorrell*, 548 U.S. 230 (2006) (plurality opinion, joined by Roberts, C.J. and Alito, J.).

119. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 159 (2005) [hereinafter *Roberts Hearing*].

120. See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036-44 (2010); District

provide an explanation for prior doctrine,¹²¹ he has not yet argued that the original understanding alone is a sufficient basis to overrule well-established precedents.¹²²

His jurisprudence so far could be described as somewhat cautious but with bolder strokes in certain areas, such as campaign finance regulation and affirmative action.¹²³ His bolder pronouncements are the source of the frequent complaint that Chief Justice Roberts has not abided by his confirmation testimony,¹²⁴ in which he famously compared the judicial role to a baseball umpire and expressed his intention to be a “modest judge” without an “agenda” or “platform.”¹²⁵ But in all fairness, Chief Justice Roberts’ jurisprudence to date, in most areas, generally comports with the tenor of his confirmation testimony—certainly more so than some other Justices serving on the Court.¹²⁶

E. Justice Alito

Justice Alito has even a shorter tenure on the Supreme Court than Chief Justice Roberts, which causes some pause before attempting to articulate his jurisprudential philosophy. The task is made more difficult because Justice Alito has demonstrated an affinity for several different axes of conservatism, without a clear indication as to which is paramount.

Justice Alito appears to embrace formalism to some degree, often articulating predictive rules to govern future controversies and lamenting holdings leading “to much confusion and needless

of *Columbia v. Heller*, 554 U.S. 570, 576-605 (2008).

121. See, e.g., *United States v. Stevens*, 130 S. Ct. 1577, 1584-86 (2010).

122. See, e.g., *Turner v. Rogers*, 131 S. Ct. 2507, 2520-21 (2011) (Thomas, J., dissenting, joined by Scalia, J.) (suggesting incompatibility of prior decisions with the original constitutional understanding in the portion of dissent not joined by Chief Justice Roberts). *But cf.* *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 213 (2008) (expressing that Justice Thomas’ originalist approach in his dissent was “compelling,” but a “sufficient case ha[d] not been made for revisiting [the contrary controlling] precedents”).

123. See, e.g., *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2818-29 (2011); *Citizens United v. FEC*, 130 S. Ct. 876, 917-25 (2010); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 708-48 (2007) (plurality opinion).

124. See, e.g., RICHARD POSNER, *HOW JUDGES THINK* 81 (2008); J. Taylor Rushing, *Senate Democrats Regret Supporting Roberts, Alito*, THE HILL, (July 23, 2010, 5:00 AM), <http://thehill.com/homenews/senate/110499-senate-democrats-regret-supporting-roberts-alito>.

125. *Roberts Hearing*, *supra* note 119, at 55-56, 158.

126. See, e.g., Joyce A. Baugh & Christopher E. Smith, *Doubling Thomas: Confirmation Veracity Meets Performance Reality*, 19 SEATTLE U. L. REV. 455, 459-61 (1996) (highlighting that Justice Thomas’ positions on the Court are inconsistent with his testimony in his nomination hearings).

litigation.”¹²⁷ Although his articulated rules are sometimes narrower than the rules preferred by Justices Scalia and Thomas, they have occasionally been broader than the approach favored by Chief Justice Roberts.¹²⁸ He is also more inclined to distance himself from balancing standards than the Chief Justice, favoring rules in some cases where Roberts prefers balancing.¹²⁹

Even though he is attracted to formalism, he also exhibits traits of minimalism. He is respectful of directly applicable precedent, only voting twice to overrule constitutional cases, less than any other Republican-appointed jurist during his tenure.¹³⁰ He even authored a separate concurring opinion in a student speech case solely to urge adherence to precedent.¹³¹ On the other hand, though, he has penned and joined opinions distinguishing prior precedent on arguably questionable grounds¹³² and occasionally separately indicated

127. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1487 (2010) (Alito, J., concurring); *cf. J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2417 (2011) (Alito, J., dissenting) (complaining that the Court’s holding that the age of a child should be considered in ascertaining whether the child is in “custody” injected “a new, complicating factor into what had been a clear, easily applied prophylactic rule”).

128. *See, e.g., Salazar v. Buono*, 130 S. Ct. 1803, 1819-21 (2010) (Alito, J., concurring) (contending a broader judgment was more appropriate than contained in the controlling opinion by Justice Kennedy joined by Chief Justice Roberts); *Dist. Attorney’s Office v. Osborne*, 129 S. Ct. 2308, 2329 (2009) (Alito, J., concurring) (urging that a defendant declining to perform DNA testing at trial for tactical reasons categorically had no constitutional post-conviction right to testing).

129. *Graham v. Florida*, 130 S. Ct. 2011, 2058-59 (2010) (Alito, J., dissenting) (joining parts of Justice Thomas’ dissenting opinion rather than the concurring opinion of Chief Justice Roberts that employed a proportionality principle); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204-09 (2008) (Scalia, J., concurring, joined by Thomas and Alito, JJ.) (urging categorical approach to uphold voter identification laws by reserving strict scrutiny for laws that severely restrict the right to vote).

130. *Citizens United v. FEC*, 130 S. Ct. 876, 886, 913 (2010) (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and overruling in part *McConnell v. FEC*, 540 U.S. 93, 203-09 (2003)); *Montejo v. Louisiana*, 129 S. Ct. 2079, 2081, 2091-92 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625 (1986)). In *Montejo*, he authored a separate concurrence to respond to the dissent’s stare decisis plea, although his separate opinion predominantly attacked the inconsistency in the dissent’s approach to precedent in two different cases. 129 S. Ct. at 2092-94 (Alito, J., concurring). He also authored for the Court the unanimous opinion to view the two-step procedure from *Saucier v. Katz*, 533 U.S. 194 (2001), for resolving the assertion of a qualified immunity defense as within the discretion of the lower courts rather than as an inflexible command. *Pearson v. Callahan*, 555 U.S. 223, 227 (2009). Finally, he has voted to overrule past precedent in two statutory cases, voting in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007), to overrule the antitrust per se rule of invalidity from *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), and in *Bowles v. Russell*, 551 U.S. 205, 213-14 (2007), to overrule the equitable exception doctrine for jurisdictional requirements from *Thompson v. INS*, 375 U.S. 384 (1964), and *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962).

131. *Morse v. Frederick*, 551 U.S. 393, 422-25 (2007) (Alito, J., concurring).

132. *See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S.

discomfort with a precedent, foreshadowing his willingness to overrule or reconsider the doctrine in the appropriate case.¹³³ Moreover, despite his stated preference to reach only the issues necessary to resolve the case as presented by the parties,¹³⁴ he sometimes authors separate opinions to announce his views on matters that are not necessary to resolve the controversy before the Court.¹³⁵

Justice Alito is attracted to originalism, as he testified during his confirmation hearing.¹³⁶ He has written several opinions relying heavily on the original understanding of the constitutional text¹³⁷ and has joined separate writings articulating an originalist perspective.¹³⁸ But his jurisprudence to date has not sought a historically frozen original understanding. Instead, he has employed the original understanding along with judicial precedent and

701 (2007) (plurality opinion); *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007) (plurality opinion); *FEC v. Wis. Right to Life*, 551 U.S. 449 (2007) (opinion of Roberts, C.J.).

133. *Wis. Right to Life*, 551 U.S. at 482-83 (Alito, J., concurring) (foreshadowing holding in *Citizens United*); *cf.* *Randall v. Sorrell*, 548 U.S. 230, 263-64 (2006) (Alito, J., concurring) (refusing to join parts of plurality opinion reaffirming *Buckley* when not enough briefing was devoted to the issue); *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2540-41 (2011) (Alito, J., concurring) (specifying he was assuming only for the “sake of argument . . . that the [Court’s] interpretation of the Clean Air Act . . . [in a prior case was] correct”).

134. *See, e.g.*, *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2746 (2011) (Alito, J., concurring) (urging Court should only address the constitutionality of regulating the sale of violent video games to minors “only if and when it is necessary to do so”); *NASA v. Nelson*, 131 S. Ct. 746, 756 n.10 (2011) (defending decision to assume without deciding the existence of a federal constitutional right to informational privacy when the parties had not briefed the issue).

135. *See, e.g.*, *Doe v. Reed*, 130 S. Ct. 2811, 2822-27 (2010) (Alito, J., concurring); *Dist. Attorney’s Office v. Osborne*, 129 S. Ct. 2308, 2324 (2009) (Alito, J., concurring); *cf.* *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2418 (2011) (Alito, J., dissenting) (opining that the majority’s approach to custody for *Miranda* purposes might mean that other *Miranda* principles are “ripe for modification”).

136. *See generally The Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 357 (2006).

137. *See, e.g.*, *Nev. Comm’n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2355 (2011) (Alito, J., concurring) (contending legislative recusal rules were constitutional solely because they were “not regarded during the founding era as impermissible restrictions on . . . speech”); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036-44 (2010) (relying on original understanding of Fourteenth Amendment); *United States v. Comstock*, 130 S. Ct. 1949, 1969 (2010) (Alito, J., concurring) (relying on original practices of the First Congress); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 153-56 (2006) (Alito, J., dissenting) (relying on text of Sixth Amendment and original practices surrounding right to counsel).

138. *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 925-29 (2010) (Scalia, J., concurring, joined by Thomas and Alito, JJ.) (responding to original understandings arguments of dissent).

American traditions, without yet contending that the original understanding alone is a sufficient basis to overrule well-established precedents.¹³⁹

He thus evinces traits on all the axes of conservatism without a definitive hierarchy in his approach. Perhaps this is because case outcomes influence him more than maintaining consistency with a particular judicial philosophy—some empirical studies have concluded that he votes in favor of a criminal defendant or to invalidate a law favored by conservatives less frequently than any other member of the Court.¹⁴⁰ Or perhaps there are (yet unstated) pragmatic considerations that influence his methodology. All that is certain now is that the manifestations of his conservatism take a variety of forms.

F. Summary

The preceding short dissection of each Justice's methodological preferences indicates that any claim that the "conservatives" have a monolithic constitutional jurisprudential approach is false. Indeed, even without considering Justice Kennedy, distinctions exist between and among Chief Justice Roberts and Justices Scalia, Thomas, and Alito. Although all can be described as employing a "conservative" approach on at least one axis, each has his own preferences when the various strands of judicial conservatism conflict.

III. CONSERVATIVE MODERATION ON THE ROBERTS COURT

The question then becomes how to reconcile these conflicting preferences in establishing constitutional doctrine. One individual Justice cannot control either the case outcome or the resultant rationale—the rule of five must be satisfied. It is not dispositive, then, how a traditional practices originalist, or a minimalist, or a formalist, or a natural law originalist would decide the case, but how those Justices—along with the other members of the Court—can formulate binding legal doctrine.

This explains the dichotomy between a Court with a majority of conservative jurists and the relatively restrained impact the Roberts Court has had so far on most aspects of constitutional doctrine.

139. *E.g.*, *Turner v. Rogers*, 131 S. Ct. 2507, 2520-21 (2011) (Thomas, J., dissenting, joined by Scalia, J.) (suggesting incompatibility of prior decisions with the original constitutional understanding in a section of dissent not joined by Justice Alito).

140. *See* Emily Bazelon, *Mysterious Justice*, N.Y. TIMES SUNDAY MAG., Mar. 20, 2011, at MM13; *see also* Lee Epstein & Andrew D. Martin, *Is the Roberts Court Especially Activist? A Study of Invalidating (and Upholding) Federal, State, and Local Laws: 1969-2009 Terms*, 61 EMORY L. J. (forthcoming 2011), available at <http://epstein.law.northwestern.edu/research/RobertsActivism.pdf>. Professors Epstein and Martin further concluded that Justice Alito was the second most likely member of the Court behind Justice Thomas to invalidate a law favored by liberals. *Id.*

Although political scientists contend that the Roberts Court has five of the ten most conservative Justices in the last seventy-five years,¹⁴¹ the jurisdictional impact of the Roberts Court has been modest rather than revolutionary. While judgments or case outcomes—that is, who wins or loses—may be conservative in that governmental entities and businesses prevail somewhat more frequently than individual claimants, criminal defendants, and employees,¹⁴² constitutional legal doctrine for the most part has shifted only slightly in accord with several themes.

The first of these themes is that the Roberts Court as a whole has respected precedent in constitutional cases, explicitly overruling only two cases, although in a handful of other instances precedents were severely limited or perhaps too cleverly distinguished.¹⁴³ Second, the Court has exercised the power of judicial review sparingly, particularly at the state and local level, with significantly fewer laws being held unconstitutional than under the Warren, Burger, and Rehnquist Courts.¹⁴⁴ Third, the Court's rulings have been somewhat narrow outside the criminal and campaign finance contexts—both in those situations in which the Court invalidates legislation or other governmental actions and those cases upholding the constitutionality of governmental conduct.¹⁴⁵ When invalidating legislation either facially or as-applied, the Court typically leaves open the potential constitutionality of narrower legislation that might accomplish a similar purpose.¹⁴⁶ Conversely, when the government prevails, the disappointed litigant often has some possibility of obtaining the desired result under a different set of circumstances or through another remedial avenue.¹⁴⁷ Finally, the decisions seldom (except again in criminal and campaign expenditure cases) employ a formalist's preferred predictive rules controlling subsequent actions and future cases; instead, narrow rules or standards are the norm, allowing the incremental development of doctrine.¹⁴⁸ Each of these themes will be examined in turn.

A. *Respect for Precedent*

To date on the Roberts Court, two cases expressly overruled prior constitutional precedent, *Citizens United v. Federal Election*

141. See Liptak, *supra* note 1 (reporting that the Roberts Court has four of the six most conservative Justices since 1937, with Justice Kennedy also in the top ten).

142. See *id.*

143. See discussion *infra* Part III.A.

144. See discussion *infra* Part III.B.

145. See discussion *infra* Part III.C.

146. See *infra* notes 288-303 and accompanying text.

147. See *infra* notes 278-87 and accompanying text.

148. See discussion *infra* Part III.D.

Commission and *Montejo v. Louisiana*.¹⁴⁹ Sometimes precedent arguably has been distinguished on less than persuasive grounds—and frequently individual Justices would prefer to overrule constitutional precedents—but only in these two cases did the conservatives band together to do so.

1. Precedents Expressly Overturned

The *sine qua non* of the complaint that the current Republican appointees to the Roberts Court do not take precedent seriously is *Citizens United*.¹⁵⁰ In a five-to-four decision, *Citizens United* overruled both the holding in *McConnell v. Federal Election Commission* that corporate and union independent expenditures for certain electioneering communications may be banned, and the holding in *Austin v. Michigan Chamber of Commerce* that political speech may be prohibited based on corporate identity due to the distorting impact of corporate wealth on the election process.¹⁵¹

Citizens United has generated enormous political and media attention, although many critics have overstated its reach. While it did overrule some twenty years of Supreme Court precedent, it did not overturn a century of law, as has sometimes been implied.¹⁵² Indeed, the *Citizens United* holding actually comports with the views

149. *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and overruling in part *McConnell v. FEC*, 540 U.S. 93 (2003)); *Montejo v. Louisiana*, 129 S. Ct. 2079, 2091 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625 (1986)). The few other cases in which the Roberts Court has overruled precedents were not constitutional holdings. The Court relaxed the judge-made procedure for resolving qualified immunity defenses from *Saucier v. Katz*, 553 U.S. 194, 201 (2001), in the unanimous opinion in *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). The Court has also overruled past precedent in two statutory cases, overruling the antitrust per se rule of invalidity from *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 881 (2007), and overruling the equitable exception doctrine for jurisdictional requirements from *Thompson v. INS*, 375 U.S. 384 (1964) and *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), in *Bowles v. Russell*, 551 U.S. 205, 214 (2007). The fact that the Court has overruled as many statutory precedents as constitutional precedents is interesting due to the Court's oft-stated recognition that "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

150. See, e.g., Tribe, *supra* note 6.

151. *Citizens United*, 130 S. Ct. at 913.

152. Cf. Obama, State of the Union Address, *supra* note 4 ("[L]ast week, the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections."); *Kagan Hearing*, *supra* note 5, at 4 (statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary) (contending *Citizens United* "rejected 100 years of legal developments in order to open the door for massive corporate spending on elections").

of some liberal icons, who desired to hold decades ago that the predecessor statutory bans on the independent expenditures of corporations and labor unions were unconstitutional.¹⁵³ Moreover, *Citizens United* seriously considered stare decisis, devoting considerable effort over almost twenty pages to portray *Austin* and its anti-distortion rationale as an outlier that contravened decades of prior decisions (even if the effort may not have been convincing to its many critics).¹⁵⁴ The Court also took great pains to delineate that overruling *Austin* and part of *McConnell* comported with past explanations for overruling precedent, with Chief Justice Roberts penning a separate concurrence, joined by Justice Alito, partially to reinforce this point.¹⁵⁵ And although a portion of *McConnell* was overruled, *Citizens United* will not quickly lead to the complete dismantling of the Bipartisan Campaign Finance Reform Act (BCRA), as the Roberts Court subsequently affirmed the judgment of a three-judge district court denying a challenge to the propriety of the BCRA soft money ban upheld in *McConnell*.¹⁵⁶ Under these circumstances, the vitriol leveled at the Court's decision is more likely the result of a substantive disagreement with the possible

153. See, e.g., *United States v. UAW-CIO*, 352 U.S. 567, 593-98 (1957) (Douglas, J., dissenting, joined by Warren, C.J. and Black, J.); *United States v. CIO*, 335 U.S. 106, 155 (1948) (Rutledge, J., concurring, joined by Black, Douglas, and Murphy, JJ.).

154. 130 S. Ct. at 896-913. The Court's explanation, however, does appear to comport with typical justifications for overruling precedent. *Austin* concluded that the government possessed a compelling interest in stopping "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 494 U.S. at 660. This conclusion is problematic in a number of respects. It contravenes the longstanding principle that the government does not have an interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections." *Buckley v. Valeo*, 424 U.S. 1, 48 (1976). The same rationale would also allow censorship of media corporations, which likewise obtain benefits from the corporate form (unless decades of precedent interpreting the free press and free speech guarantees co-extensively were overruled). *Citizens United*, 130 S. Ct. at 905. Indeed, even then-Solicitor General Elena Kagan, who argued the case on behalf of the government, did not press the anti-distortion rationale, presumably due to her previous academic criticism of it. See, e.g., Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 465 (1996). While there may be legitimate disagreement regarding whether *Austin* should nevertheless have been retained, the Court adequately established that *Austin's* expressed rationale was in tension with other free speech precedents and that its logical implications were troublesome in certain contexts.

155. *Citizens United*, 130 S. Ct. at 912-13; *id.* at 917-24 (Roberts, C.J., concurring). The Court highlighted *Austin's* inconsistency with prior precedents, the failure of the government to defend its expressed reasoning, experiences since the decision, and the lack of reliance interests. *Id.* at 912-13 (majority opinion).

156. *Republican Nat'l Comm. v. FEC*, 130 S. Ct. 3544 (2010) (mem. order affirming *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010)). Justices Scalia, Kennedy, and Thomas, however, preferred to hear the case. See 130 S. Ct. at 3544.

ramifications of the Court's conclusion instead of a methodological concern with the Court's treatment of precedent.

Although it received less attention, a more problematic overruling from a methodological perspective occurred in *Montejo v. Louisiana*. There, the Court, in another five-to-four decision, overruled the prophylactic rule from *Michigan v. Jackson* barring police from initiating an interrogation once a criminal defendant requests counsel at an arraignment or similar proceeding.¹⁵⁷ The Court did not attempt to establish that *Jackson* was inconsistent with prior or current precedents or that it had otherwise become outdated. Instead, the majority rebalanced the costs and benefits of the rule based on its own *ipse dixit* (rather than any empirical evidence) and further maintained that the rule's interpretation was problematic in those states in which counsel is appointed automatically rather than affirmatively requested.¹⁵⁸ The dissent, relying on an amici brief "submitted by lawyers and judges with extensive experience in law enforcement and prosecution," objected that the *Jackson* rule had been workable in practice and had only resulted in an insignificant number of suppressed statements.¹⁵⁹ The majority's eagerness to reconsider *Jackson* under these circumstances—especially when the overruling arose from its own initiative¹⁶⁰—is troublesome under the traditional respect owed to precedent in accord with principles of *stare decisis*.

Even so, the Roberts Court during its first six terms explicitly overturned constitutional precedent in just these two cases, with a mere three prior constitutional decisions overruled. This compares favorably to the rates of overturning by prior Courts over the last 100 years. Borrowing from the tabular compilation of every case overruling constitutional precedent prepared by Professor Michael J. Gerhardt for his insightful book, *The Power of Precedent*,¹⁶¹ twentieth and twenty-first century Courts have explicitly disavowed constitutional precedent at the following rates:

157. 129 S. Ct. 2079, 2091 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625 (1986)).

158. *Id.* at 2088-91.

159. *Id.* at 2098 (Stevens, J., dissenting).

160. *Montejo v. Louisiana*, 129 S. Ct. 1667 (2009) (mem. order directing supplemental briefing).

161. MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* app. at 206-45 (2008).

Court	White	Taft	Hughes	Stone
Time Period	1910-1921	1921-1930	1930-1941	1941-1946
Terms	11	8.5	11.5	5
Cases Overturning Precedent	3	3	17	8
Per Term Average	0.27	0.35	1.55	1.60
Precedents Overruled	3	4	25	10
Per Term Average	0.27	0.47	2.17	2.00

Court	Vinson	Warren	Burger	Rehnquist	Roberts
Time Period	1946-1953	1953-1969	1969-1986	1986-2005	2005-2011
Terms	7	16	17	19	6
Cases Overturning Precedent	6	23	35	32	2
Per Term Average	0.86	1.44	2.06	1.68	0.33
Precedents Overruled	11	32	76	39	3
Per Term Average	1.57	2.00	4.47	2.05	0.50

This table details that the Roberts Court has been overturning constitutional precedent at a rate per term that is extremely low by historical standards. Only the Taft and White Courts, occurring more than eighty years ago, can match the Roberts Court's record. Moreover, the Roberts Court's per-term averages are significantly lower than other recent Courts—more than four times lower than the

Rehnquist Court, more than six times lower than the Burger Court, and four times lower than the Warren Court.¹⁶²

Some caution is necessary with respect to these figures because the Roberts Court might become more comfortable overruling prior constitutional decisions as it progresses. Indeed, the Roberts Court did not expressly overrule a constitutional precedent during its first three terms, and then overruled one in *Montejo* in its fourth term, and two constitutional precedents in *Citizens United* in its fifth term. The Roberts Court still, though, compares favorably to the first six terms of the Burger and Rehnquist Courts: the Rehnquist Court in its first six terms overruled sixteen constitutional precedents in thirteen cases,¹⁶³ and the Burger Court during its first six terms overruled fourteen constitutional precedents in ten cases.¹⁶⁴ Yet the

162 See *id.*

163. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882-83 (1992) (overruling *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986)); *Quill Corp. v. North Dakota*, 504 U.S. 298, 307-08 (1992) (overruling *National Bella Hess, Inc. v. Illinois Dep't of Revenue*, 386 U.S. 753 (1967)); *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (overruling *Solem v. Helm*, 463 U.S. 277 (1983)); *Payne v. Tennessee*, 501 U.S. 808, 828-30 (1991) (overruling *South Carolina v. Gathers*, 490 U.S. 805 (1989), and *Booth v. Maryland*, 482 U.S. 496 (1987)); *California v. Acevedo*, 500 U.S. 565, 579 (1991) (overruling *Arkansas v. Sanders*, 442 U.S. 753 (1979)); *Collins v. Youngblood*, 497 U.S. 37, 47-52 (1990) (overruling *Thompson v. Utah*, 170 U.S. 343 (1898), and *Kring v. Missouri*, 107 U.S. 221 (1883)); *Healy v. Beer Inst.*, 491 U.S. 324, 343 (1989) (overruling *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966)); *Alabama v. Smith*, 490 U.S. 794, 803 (1989) (overruling *Simpson v. Rice*, 395 U.S. 711 (1969)); *Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989) (overruling *Procunier v. Martinez*, 416 U.S. 396 (1974)); *South Carolina v. Baker*, 485 U.S. 505, 524 (1988) (overruling *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895)); *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478 (1987) (overruling *Parden v. Terminal Railway*, 377 U.S. 184 (1964)); *Solorio v. United States*, 483 U.S. 435, 440-41 (1987) (overruling *O'Callahan v. Parker*, 395 U.S. 258 (1969)); *Puerto Rico v. Branstad*, 483 U.S. 219, 224 (1987) (overruling *Kentucky v. Dennison*, 65 U.S. 66 (1861)).

164. *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975) (overruling *Hoyt v. Florida*, 368 U.S. 57 (1961)); *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974) (overruling *Sterrett v. Mothers' & Children's Rights Org.*, 409 U.S. 809 (1972), *State Dep't of Health & Rehabilitative Serv. v. Zarate*, 407 U.S. 918 (1972), and *Shapiro v. Thompson*, 394 U.S. 618 (1969)); *N.D. Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156, 167 (1973) (overruling *Liggett Co. v. Baldridge*, 278 U.S. 105 (1928)); *Miller v. California*, 413 U.S. 15, 23 (1973) (overruling *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass.*, 383 U.S. 413 (1966)); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973) (overruling *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 (1928)); *Dunn v. Blumstein*, 405 U.S. 330, 337 n.7 (1972) (overruling *Pope v. Williams*, 193 U.S. 621 (1904)); *Perez v. Campbell*, 402 U.S. 637, 652 (1971) (overruling *Kesler v. Dep't of Public Safety*, 369 U.S. 153 (1962), and *Reitz v. Mealy*, 314 U.S. 33 (1941)); *Williams v. Florida*, 399 U.S. 78, 90-92 (1970) (overruling *Rasmussen v. United States*, 197 U.S. 516 (1905), and *Thompson v. Utah*, 170 U.S. 343 (1898)); *Price v. Georgia*, 398 U.S. 323, 330 (1970) (overruling *Brantley v. Georgia*, 217 U.S. 284 (1910)); *Ashe v. Swenson*, 397 U.S. 436, 445 (1970) (overruling *Hoag v. New*

Warren Court during its first six terms overruled only a single constitutional precedent in one case, *Brown v. Board of Education*,¹⁶⁵ before becoming much more active in overruling constitutional precedents during the 1960s.¹⁶⁶ As a result, prior experience counsels against overemphasizing the future treatment of precedent by the Roberts Court predicated on its performance during its first six years.

Nonetheless, the Roberts Court's rate of explicit overruling to date remains low by historical standards—the last time three or less constitutional precedents were overruled over the course of six terms was fifty years ago, during the early years of the Warren Court.¹⁶⁷ While the future paths of the Roberts Court cannot be foretold with confidence, its performance so far indicates a reluctance to overturn prior decisions, at least explicitly.

2. “Stealth” Overrulings

Although *Citizens United* and *Montejo* are the only constitutional cases to explicitly overrule a previous decision during the Roberts Court, this is not to say that all the outcomes in other constitutional cases fully respected precedent. Rather, there are a handful of examples of so-called “stealth” overrulings, in which precedents are hollowed or curtailed, occasionally to the extent that only a facade of the original holding remains.¹⁶⁸ While quantifying the prevalence of this practice is challenging, as its existence is somewhat in the eye of the beholder, the Roberts Court sometimes succumbs to its allure.

The two most infamous examples to date are *Federal Election Commission v. Wisconsin Right to Life, Inc.* and *Gonzales v. Carhart*. Two years before *Citizens United*, Chief Justice Roberts' controlling opinion in *Federal Election Commission v. Wisconsin Right to Life, Inc.* technically left *McConnell's* holding on the facial validity of restrictions on corporate and union independent expenditures intact, while invalidating the statute as applied to respondent's advertisements.¹⁶⁹ Yet the standard the Chief Justice adopted to govern as-applied challenges would also result in the facial

Jersey, 356 U.S. 464 (1958)).

165. 347 U.S. 483, 494-95 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

166. See GERHARDT, *supra* note 161, app. at 216-23 (listing twenty-two cases overruling thirty-one decisions during the Warren Court from 1960 to 1969).

167. See *id.* at 216-45.

168. See, e.g., Ronald Dworkin, *The Supreme Court Phalanx*, N.Y. REV. OF BOOKS, Sept. 27, 2007, at 92; Stone, *supra* note 73, at 1538-40.

169. 551 U.S. 449, 465-76 (2007) (opinion of Roberts, C.J.) (adopting test for “functional equivalent of express advocacy” in as-applied challenges requiring that the ad must be “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate”).

invalidation of the statute, as every other member of the Court recognized.¹⁷⁰ A similar incongruity divides the federal partial-birth abortion ban upheld in *Gonzales v. Carhart*,¹⁷¹ and the state ban invalidated in *Stenberg v. Carhart*.¹⁷² While the *Gonzales* Court strained to distinguish the two cases, the disparate judgments resulted from a change in the Court's membership that led to a different understanding of the undue burden test for abortion regulations.¹⁷³

Such precedential gamesmanship is not, however, confined to the current Republican appointees on the Roberts Court. *Arizona v. Gant* effectively overruled the bright-line rule from *New York v. Belton* permitting a warrantless search of the passenger compartment of an automobile as part of a lawful arrest,¹⁷⁴ instead holding that such a search was only permissible in two narrowly defined circumstances.¹⁷⁵ Although the *Gant* majority repeatedly asserted that it merely disavowed a "broad reading" of *Belton* without

170. *Id.* at 499 n.7 (Scalia, J., concurring) (noting that "seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so"); *id.* at 534 (Souter, J., dissenting) (arguing that "neither a theoretical nor a practical basis" exists for claiming *McConnell* survives). Justice Alito—the only member of the Court to join Chief Justice Roberts' opinion in its entirety—acknowledged that the Court probably would "be asked in a future case to reconsider the holding in *McConnell*." *Id.* at 482-83 (Alito, J., concurring).

171. 550 U.S. 124, 187-89 (2007) (Ginsburg, J., dissenting).

172. 530 U.S. 914, 930-31 (2000).

173. While the *Gonzales* majority correctly noted that more specific and precise text in the federal partial-birth abortion ban alleviated some of the constitutional infirmities of the state partial-birth abortion ban invalidated in *Stenberg*, the problem (at the very least) was that there was no exception for the health of the mother in the federal ban, which was one of the bases for the holding in *Stenberg* that the state ban was unconstitutional. Compare *Gonzales*, 550 U.S. at 163-68, with *Stenberg*, 530 U.S. at 930, 937-38. *Gonzales* attempted to sidestep this difficulty by narrowing its holding to the asserted facial challenge, leaving open the potential of pre-enforcement as-applied challenges in particular circumstances. 550 U.S. at 167-68. This was not the approach, however, employed in *Stenberg*, 530 U.S. at 930, although it does comport with the Court's usual reluctance to facially invalidate statutes on constitutional grounds in most other doctrinal areas. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 886-87 (1992) (concluding that "particularly burdensome" effects on some women of a twenty-four-hour waiting period before an abortion did not require facial invalidation of provision); *United States v. Raines*, 362 U.S. 17, 21-24 (1960) (listing cases). But see *Casey*, 505 U.S. at 894-98 (invalidating spousal notification requirement for abortions based on its impact on the 5% of married women who do not inform their husbands).

174. *New York v. Belton*, 453 U.S. 454, 462-63 (1981).

175. *Gant*, 129 S. Ct. 1710, 1719 (2009). The two circumstances were either when an arrestee was "unsecured and within reaching distance of the passenger compartment at the time of the search" or "when reasonable grounds existed to believe [that] evidence relevant to the crime of arrest" was present in the vehicle. *Id.*

overruling it,¹⁷⁶ five Justices disagreed—including one joining the majority opinion.¹⁷⁷ Similarly, *Central Virginia Community College v. Katz*,¹⁷⁸ which held that the Bankruptcy Clause authorized Congress to make states amenable in proceedings to recover preferential transfers without a statutory abrogation of state sovereign immunity, cannot be reconciled with *Hoffman v. Connecticut Department of Income Maintenance*, which held that a state's assertion of Eleventh Amendment sovereign immunity could not be overcome in a bankruptcy preference avoidance proceeding without, at the bare minimum, a sufficiently clear statutory abrogation.¹⁷⁹

These *sub silentio* overrulings raise legitimate concerns regarding the Court's candor and transparency. By reducing a precedent to an essential nullity without overruling it, the Court sends mixed signals to lower courts and governmental officials, which can create doctrinal confusion and harm the rule of law.¹⁸⁰ Although the prior precedent is technically good law, it has been confined, without justification, to its precise facts—often to facts that were not material to the decision. In *Gant*, for instance, the Court distinguished its prior precedent in *Thornton v. United States* based entirely on the fact the *Thornton* defendant “was arrested for a drug offense” instead of a license infraction,¹⁸¹ even though the nature of the offense was never mentioned once in *Thornton's* legal analysis.¹⁸² The Court's obfuscation of its prior precedent in these situations is disingenuous and difficult to defend as a normative matter; candor in overruling the prior decision is a better approach.

Nevertheless, a few instances of stealth overruling do not indicate a disdain for either precedent or an incremental judicial role. Even incorporating the situations in which the Roberts Court

176. *Id.* at 1718-22. Justice Stevens authored the opinion, joined by Justices Scalia, Souter, Thomas, and Ginsburg—although Justice Scalia did so predominantly to avoid “a 4-to-1-to-4 opinion that leaves the governing rule uncertain.” *Id.* at 1725 (Scalia, J., concurring).

177. *Id.* at 1724-25 (Scalia, J., concurring); *id.* at 1725-26 (Breyer, J., dissenting); *id.* at 1726 (Alito, J., dissenting, joined by Roberts, C.J., Kennedy, J., and Breyer, J.).

178. 546 U.S. 356, 378-79 (2006). Justice Stevens' majority opinion, joined by Justices O'Connor, Souter, Ginsburg, and Breyer, urged that the states acquiesced to amenability in preference proceedings and similar actions to enforce the in rem jurisdiction of bankruptcy courts by ratifying the Bankruptcy Clause of the Constitution. *See id.*

179. 492 U.S. 96, 104 (1989) (plurality opinion); *id.* at 105 (Scalia, J., concurring) (arguing immunity could never be overcome by statute).

180. *See* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 5-6 (2010).

181. *Gant*, 129 S. Ct. at 1722.

182. 541 U.S. 615, 619-24 (2004). The only mention in *Thornton* of the nature of the offense was in the recitation of the factual and procedural history of the case. *See id.* at 617-19.

reduced a constitutional precedent to a nullity, the cases in which constitutional precedents were overruled would still compare favorably to the treatment of precedent by other Courts. The Roberts Court under such a metric has overruled seven constitutional decisions in six cases over six years, a rate of approximately one per term, which bests any Court for more than five decades.¹⁸³ And this does not even account for the fact that because other Courts have likewise engaged in the practice of stealth overruling, their rates of explicit overruling would need to be adjusted upward as well to ensure a meaningful comparison.¹⁸⁴ Thus, these few examples do not trump the Roberts Court's overall record regarding fidelity to constitutional precedent.

Distinguished commentators have countered, though, that the Roberts Court engages more frequently in the practice of stealth overruling.¹⁸⁵ They adopt a broader perspective of the scope of the practice, including cases—such as *Hein v. Freedom from Religion Foundation, Inc.*,¹⁸⁶ *Arizona Christian School Tuition Organization v. Winn*,¹⁸⁷ *Morse v. Frederick*,¹⁸⁸ *Parents Involved in Community Schools v. Seattle School District No. 1*,¹⁸⁹ and *Berghuis v. Thompkins*¹⁹⁰—where the Court failed to extend a prior precedent to its logical conclusion.¹⁹¹

Although it is true that the Roberts Court in each of these cases did not extend one (or more) prior precedents to their logical ends, thereby weakening those lines of precedent, the Court at the same time abided by or even strengthened other lines of precedent.¹⁹² Adhering to precedent is not necessarily a mechanical task demanding a particular result—sometimes ascertaining which holding is more consistent with prior doctrine is difficult due to the gradual case-by-case accumulation of legal principles. *Hein* and *Winn* provide examples, as the Court was not faithful to the rationale of

183. See *supra* notes 149-67 and accompanying text.

184. See Friedman, *supra* note 180, at 4 (“Stealth overruling is assuredly not unique to the Roberts Court—the Warren Court, for example, did it as well . . .”).

185. See, e.g., Dworkin, *supra* note 168; Friedman, *supra* note 180, at 6-9; Stone, *supra* note 73, at 1538-40.

186. 551 U.S. 587 (2007).

187. 131 S. Ct. 1436 (2011).

188. 551 U.S. 393 (2007).

189. 551 U.S. 701 (2007).

190. 130 S. Ct. 2250 (2010).

191. See, e.g., Erwin Chemerinsky, *The Roberts Court and Criminal Procedure at Age Five*, 43 TEX. TECH L. REV. 13, 18-21 (2010); Dworkin, *supra* note 168; Friedman, *supra* note 180, at 6-9, 24-25; Stone, *supra* note 73, at 1538-40. Other cases have also been mentioned, including *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010), and *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007).

192. See Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C. L. REV. 1279, 1287-88 (2008).

some earlier cases by denying taxpayers standing for Establishment Clause challenges.¹⁹³ But, at the same time, the distinctions these cases embraced are supported by the holdings in other taxpayer standing precedents.

In *Hein*, Justice Alito, joined by Chief Justice Roberts and Justice Kennedy, did not overrule the *Flast v. Cohen* holding granting taxpayers standing to challenge congressional and state legislative enactments under the taxing and spending power as a violation of the Establishment Clause, but they nevertheless refused to extend its operation to funds that Congress appropriated for the general use of the executive branch.¹⁹⁴ A few years later, *Winn* held that because a state tax credit scheme for contributions made to scholarship funds for sectarian private schools differed from the “religious tax” the Establishment Clause was intended to prevent, the *Flast* exception did not grant taxpayers standing to challenge these credits.¹⁹⁵ Although such distinctions based on the source of funds and type of expenditure are subtle, *Flast* itself is in tension with a more extensive line of precedents outside the Establishment Clause context consistently rejecting taxpayer standing on separation of powers grounds.¹⁹⁶

Because of this tension, the Court has long interpreted *Flast* as a “narrow exception” to the bar against taxpayer standing,¹⁹⁷ only applying it to situations “on all fours” with *Flast*.¹⁹⁸ Over two decades before *Hein*, *Valley Forge Christian College v. Americans United for*

193. *Winn*, 131 S. Ct. at 1440; *Hein*, 551 U.S. at 593.

194. 551 U.S. at 614-15 (plurality opinion) (“We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it.”). Justice Kennedy, while joining the plurality opinion, opined in his separate concurrence that “the result reached in *Flast* is correct and should not be called into question.” *Id.* at 616 (Kennedy, J., concurring).

195. 131 S. Ct. at 1446-47. Awarding citizens a tax credit, according to Justice Kennedy’s opinion for the Court, allowed other citizens to retain control over their own funds in accordance with their own consciences, thereby avoiding *Flast*’s injury of extracting and spending “a conscientious dissenter’s funds in service of an establishment.” *Id.* at 1447. *Winn* also had to overcome an obstacle in addition to distinguishing *Flast*, as prior decisions of the Court had addressed on the merits Establishment Clause challenges to tax exemptions and deductions. *See, e.g.*, *Mueller v. Allen*, 463 U.S. 388, 390-91 (1983); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 789-94 (1973); *Hunt v. McNair*, 413 U.S. 734, 735-36 (1973); *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 666-67 (1970). Yet none of these cases had specifically addressed the jurisdictional issue, which, under longstanding Supreme Court practice, prevented them from being binding precedent on the scope of taxpayer standing. *See Winn*, 131 S. Ct. at 1448 (listing authorities). Nonetheless, the failure of prior Courts to recognize any distinction between tax expenditures and credits perhaps should have cautioned against *Winn*’s holding.

196. Gerhardt, *supra* note 192, at 1287-88.

197. *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988).

198. *See* Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061, 1082 (2009).

Separation of Church & State, Inc. rejected taxpayer standing for an Establishment Clause challenge to a disposal of property under the National Property Clause, reasoning “*Flast* limited taxpayer standing to challenges directed ‘only [at] exercises of congressional power’” under its taxing and spending authority.¹⁹⁹ So while the logic of *Flast* standing alone would appear to encompass *Hein*, and the economic consequences of *Flast*’s tax are virtually indistinguishable from *Winn*’s credit, both decisions followed *Valley Forge*’s limitation of *Flast*.²⁰⁰ While one can still argue that the Court in these cases should have employed *Flast*’s logic rather than *Valley Forge*’s restriction, the Court cannot fairly be charged with disrespecting precedent by obeying its most recent decision.

The same can be said for *Parents Involved*, which imposed barriers to governmental efforts to alleviate racial isolation in public schools, despite the Court’s previous decisions and dicta on the propriety of race-conscious student assignment plans.²⁰¹ But, on the other hand, numerous recent precedents over the last two decades have relied on *Brown v. Board of Education*²⁰² to subject any race-based classification to strict scrutiny,²⁰³ an exceedingly difficult standard to satisfy.²⁰⁴ And certainly the conclusion that the integration plans at issue in *Parents Involved* were not sufficiently closely drawn to satisfy strict scrutiny is not unreasonable under the Court’s typical analysis for this heightened level of review.²⁰⁵ The Court perhaps could be criticized for dampening the progressive vision of racial integration in public education,²⁰⁶ but its holding did not actually overrule—either implicitly or explicitly—prior decisions.

A similar dynamic is evident in *Morse v. Frederick*, which held that student expression during school or a school-sponsored event promoting illegal drug use was not protected by the First Amendment.²⁰⁷ Despite *Tinker v. Des Moines Independent School District*’s landmark holding that student expression could not be prohibited without a showing that the expression “materially and substantially interfere[d]” with school disciplinary requirements,²⁰⁸

199. 454 U.S. 464, 479 (1982) (alteration in original) (quoting *Flast v. Cohen*, 392 U.S. 83, 102 (1968)).

200. See *Winn*, 131 S. Ct. at 1442; *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 604 (2007).

201. 551 U.S. 701, 720-25 & n.10 (2007).

202. 347 U.S. 483 (1954).

203. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 522-23 (1989) (Scalia, J. concurring) (listing cases).

204. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995).

205. Gerhardt, *supra* note 192, at 1289-90.

206. See *Parents Involved*, 551 U.S. at 803-04 (Breyer, J., dissenting).

207. 551 U.S. 393, 397 (2007).

208. 393 U.S. 503, 509 (1969).

decisions during the ensuing decades had severely curtailed its reach. *Hazelwood School District v. Kuhlmeier* held that expression sponsored by the school or fairly characterized as part of the school curriculum could be regulated when “reasonably related to legitimate pedagogical concerns,”²⁰⁹ and *Bethel School District No. 403 v. Fraser* held that public school officials could punish sexually explicit or vulgar expression at school.²¹⁰ *Morse* merely engrafted another exception onto a doctrine riddled with exceptions, and its holding does no greater violence to *Tinker*’s logic than the prior decisions in *Hazelwood* or *Bethel*.

Finally, the somewhat counterintuitive holding in *Berghuis v. Thompkins*—that a suspect understanding his rights must unambiguously express his *Miranda* right to remain silent or it will be waived through any uncoerced statement—comports with the tenor of other recent decisions,²¹¹ even if it contradicts the expansive language of *Miranda*. *Miranda* famously held that criminal suspects had to be advised of their rights before custodial interrogation and required the government to prove the suspect “knowingly and intelligently” waived his rights.²¹² *Miranda* continued that “a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained,” especially after a lengthy interrogation.²¹³ But subsequent decisions during the Burger and Rehnquist Courts undercut the broader rationales of *Miranda*, holding that the *Miranda* right to counsel had to be invoked unambiguously,²¹⁴ and authorizing waivers of *Miranda* rights on less demanding showings.²¹⁵ As a result, *Berghuis* found some support in more recent precedents, despite contravening the expansive promise of *Miranda*.

Thus, *Hein*, *Winn*, *Parents Involved*, *Morse*, and *Berghuis* are not of the same species as those decisions that render a prior precedent a nullity. While the Court did not give full effect to the logic of prior precedents in these opinions, the stated rationales comported with other existing lines of precedent. Although one can legitimately argue (as the dissenters did) that the Court followed the less appropriate

209. 484 U.S. 260, 273 (1988).

210. 478 U.S. 675, 684-85 (1986).

211. 130 S. Ct. 2250, 2259-62 (2010).

212. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

213. *Id.* at 475.

214. *Davis v. United States*, 512 U.S. 450, 452 (1994). Although *Davis* involved the right to counsel, prior decisions had also highlighted the interrelationship between *Miranda*’s “right to counsel” and right to remain silent. *Solem v. Stumes*, 465 U.S. 638, 648 (1984) (citing *Michigan v. Mosley*, 423 U.S. 96, 104 n.10 (1975)).

215. See, e.g., *Colorado v. Connelly*, 479 U.S. 157, 167-68 (1986); *North Carolina v. Butler*, 441 U.S. 369, 373-76 (1979).

line of precedent, these cases hardly indicate disrespect for precedent. Rather, the Court adhered to all its prior holdings (even if it did not follow the broad dicta and underlying logic of each prior decision)—the hallmark of an incremental approach.²¹⁶

The Court's careful articulation of the various strands of precedents in these cases actually evidences a core commitment to precedent. Doctrinal arguments are ubiquitous in Roberts Court decisions, far outpacing any other constitutional modality, such as text, structure, history, ethos, or prudence.²¹⁷ Indeed, the Roberts Court has yet to view a historically frozen originalist understanding—the preferred constitutional approach of many conservative theorists—as an appropriate basis for overturning or modifying a prior decision. While Justices Scalia and Thomas have not been hesitant to call for overturning or reconsidering cases on originalist or formalist grounds, the other current Republican-appointed Justices generally decline the invitation.²¹⁸ Occasionally, cases in which the conservatives controlled the outcome contain a paean to the original understanding or longstanding traditions, but these historical arguments have been employed when no precedent is directly on point²¹⁹ or in order to synthesize prior precedent with the

216. Cf. Sunstein, *supra* note 22, at 7 (stating that “courts should follow prior holdings but not necessarily prior dicta” under judicial minimalism or incrementalism).

217. See Gerhardt, *supra* note 192, at 1282-86.

218. See, e.g., *Turner v. Rogers*, 131 S. Ct. 2507, 2520-21 (2011) (Thomas, J., dissenting, joined by Scalia, J.) (suggesting incompatibility of prior decisions with the original constitutional understanding in the section of dissent not joined by Chief Justice Roberts and Justice Alito); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449-50 (2011) (Scalia, J., concurring, joined by Thomas, J.) (calling for overruling *Flast v. Cohen* taxpayer standing exception); *Wilkins v. Gaddy*, 130 S. Ct. 1175, 1180-81 (2010) (Thomas, J., concurring, joined by Scalia, J.) (reiterating the belief that the Eighth Amendment did not apply to prison conditions); *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 618-37 (2007) (Scalia, J., concurring, joined by Thomas, J.) (arguing *Flast* should be overruled); *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 306 (2007) (Thomas, J., concurring) (noting he would overrule earlier decision in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001)); *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 349-55 (2007) (Thomas, J., concurring) (urging negative Commerce Clause should be disavowed); *id.* at 348 (Scalia, J., concurring) (urging negative Commerce Clause should be limited to facial discrimination and directly applicable precedent); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 280 (2007) (Scalia, J., dissenting, joined by Thomas, J.) (urging “limiting a jury’s discretion to consider all mitigating evidence does not violate Eighth Amendment” (quoting *Ayers v. Belmontes*, 549 U.S. 7, 24 (2006) (Scalia, J., concurring))); *Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Thomas, J., concurring, joined by Scalia, J.) (reiterating view that *Roe v. Wade* should be overruled); *Philip Morris USA v. Williams*, 549 U.S. 346, 361-62 (2007) (Thomas, J., dissenting) (calling for overruling decisions constraining the size of punitive damages); *Randall v. Sorrell*, 548 U.S. 230, 265-66 (2006) (Thomas, J., concurring, joined by Scalia, J.) (calling for overruling of *Buckley v. Valeo*).

219. See, e.g., *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2347-49 (2011);

original understanding,²²⁰ not to contravene precedent. Precedent thus appears to be the highest commitment for the Court as a whole, even in the decisions controlled by the Republican-appointed Justices.

The Court's commitment to constitutional precedent is reflected by the Supreme Court bar. The Court's institutional role, it should be remembered, is not to pronounce a grand constitutional theory or vision—the Court resolves actual disputes between adverse litigants that define their rights and obligations. Counsel for these parties, especially the repeat players specializing in Supreme Court practice, rely on the Court's signals regarding the respect owed to precedent in structuring their constitutional arguments. As a result, most of the granted certiorari petitions contain narrowly crafted arguments that avoid directly challenging past decisions. Indeed, even in those two cases in which the Roberts Court explicitly overruled precedent, neither party originally sought to overrule the precedents—rather, the Court itself requested supplemental briefing on the issue.²²¹ These pinched briefs generally reinforce the Court's preferred incremental approach, resulting in a gradual evolution of the law with minimal disavowal of prior decisions. Despite the occasional more sudden shifts in cases such as *Citizens United*, *Montejo*, and *Carhart*, then, the Roberts Court so far has adhered to prior constitutional doctrine better than any other Court in decades.

B. Sparing Judicial Review

The Roberts Court to date also invalidates laws enacted by the politically accountable branches relatively rarely. While no particular Justice—or bloc of Justices—subscribes to a Thayerian philosophy,²²² the Roberts Court as a whole is invalidating legislation at a markedly decreased rate in comparison to the Rehnquist, Burger, and Warren Courts.

During its first six terms, the Roberts Court invalidated federal, state, and local laws in whole or in part in twenty cases, striking down twenty-one laws, an average of three and a half laws per term.²²³ In contrast, the Rehnquist Court averaged almost six and

McDonald v. City of Chicago, 130 S. Ct. 3020, 3036-44 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 576-619 (2008).

220. See, e.g., *United States v. Stevens*, 130 S. Ct. 1577, 1584-86 (2010).

221. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 888 (2010); *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088 (2009); *Montejo v. Louisiana*, 129 S. Ct. 1667 (2009) (mem. order directing supplemental briefing).

222. See Thayer, *supra* note 23, at 144 (arguing that the Court should only invalidate laws “when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question”).

223. E.g., *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806

one-quarter invalidations per term, the Burger Court averaged about twelve invalidations per term, and the Warren Court averaged seven and one-half invalidations per term.²²⁴

Accordingly, the Roberts Court is striking down laws at almost half the average rate of the Rehnquist and Warren Courts and approximately one-third the rate of the Burger Court. This decline, however, cannot be attributed to a newfound restraint in invalidating federal laws enacted by a co-equal branch of government. The Roberts Court struck down in whole or in part eight federal laws

(2011) (invalidating state election financing law); *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (invalidating state law imposing restrictions on violent video games under free speech principles); *Stern v. Marshall*, 131 S. Ct. 2594 (2011) (invalidating portion of federal bankruptcy act on separation of powers grounds); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (invalidating state law that prohibited selling, disclosing, or using pharmacy records for marketing purposes under free speech guarantee); *Pepper v. United States*, 131 S. Ct. 1229 (2011) (invalidating the federal sentencing statute under the right to jury trial); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) (invalidating portion of federal law providing dual for-cause removal protection); *Graham v. Florida*, 130 S. Ct. 2011 (2010) (invalidating state law authorizing life without the possibility of parole for juvenile offenders); *United States v. Stevens*, 130 S. Ct. 1577 (2010) (invalidating federal animal cruelty law under First Amendment); *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (invalidating federal law prohibiting certain corporate and labor union independent campaign expenditures); *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277 (2009) (invalidating city personal property tax); *Haywood v. Drown*, 129 S. Ct. 2108 (2009) (invalidating state law barring actions against corrections officers for civil rights violations); *Davis v. FEC*, 554 U.S. 724 (2008) (invalidating federal election law on self-financed candidates); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (invalidating D.C.'s handgun ban); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (invalidating state law authorizing the death penalty for the rape of a child); *Boumediene v. Bush*, 553 U.S. 723 (2008) (invalidating federal law prohibiting habeas by Guantanamo detainees); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (invalidating race-based student assignment plans adopted in Seattle and Louisville); *FEC v. Wis. Right to Life*, 551 U.S. 449 (2007) (as-applied challenge to federal election law); *Cunningham v. California*, 549 U.S. 270 (2007) (invalidating state determinate sentencing law); *Randall v. Sorrell*, 548 U.S. 230 (2006) (invalidating state campaign contribution law); *Jones v. Flowers*, 547 U.S. 220 (2006) (as-applied challenge to state law notice procedure). By including both the as-applied challenge to the BCRA in *Wisconsin Right to Life* and the facial challenge in *Citizens United*, and the two separate ordinances invalidated in *Parents Involved*, my count is twenty cases invalidating twenty-one laws in whole or in part. I did not include *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), which technically did not strike down the gun ordinances at issue, even though such a result naturally flowed from the Court's decision incorporating the Second Amendment to apply against state and local governments. See *Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago*, 393 F. App'x 390 (7th Cir. 2010). Although the exact count may thus vary slightly depending on how some of the decisions are categorized, this is not material to the larger point that the Roberts Court is invalidating legislation at a markedly decreased rate than other recent Courts.

224. See Lori A. Ringhand, *The Rehnquist Court: A "By the Numbers" Retrospective*, 9 U. PA. J. CONST. L. 1033, 1035-36, 1044 (2007).

during its first six terms,²²⁵ or 1.33 per term, a little more than the per term averages of the Warren and Burger Courts (1.18 per term and 1.24 per term, respectively), and approximately three-fourths of the Rehnquist Court's per term average of 1.79.²²⁶

The statistical inference that the Roberts Court is not adopting a new deferential posture towards Congress is buttressed by a doctrinal analysis of its cases invalidating federal statutes. Three cases involved federal campaign finance statutes, with the current Republican-appointed jurists banding together to provide less deference to congressional judgments than evidenced by the Rehnquist Court.²²⁷ The Roberts Court also has not deferred to Congress in separation of powers cases. *Free Enterprise Fund v. Public Accounting Oversight Board* split along ideological lines to invalidate a dual good-cause removal provision preventing the President, or an officer directly under the President's removal control, from making the decision whether cause existed for removing the members of the Public Accounting Oversight Board.²²⁸ *Stern v. Marshall*, with a similar five-to-four split, held that Congress violated separation of powers principles by authorizing bankruptcy courts to adjudicate, as core proceedings, state law counterclaims unnecessary to resolve a creditor's proof of claim.²²⁹ Two other cases from the Roberts Court, one invalidating a law banning depictions of animal cruelty on First Amendment grounds and the other a law prohibiting habeas corpus relief from detainees at Guantanamo Bay, also did not defer to Congress, although these holdings found some support from the other half of the ideological divide.²³⁰ In addition, the "liberal" Justices voted to strike down a federal land-transfer statute and a federal abortion law, but they were unable to secure the necessary fifth vote in either case.²³¹ All of the Justices on the Roberts Court are thus willing to hold federal laws unconstitutional, despite any deference owed to a co-equal branch of government.

225. *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Pepper v. United States*, 131 S. Ct. 1229 (2011); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010); *United States v. Stevens*, 130 S. Ct. 1577 (2010); *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Davis v. FEC*, 554 U.S. 724 (2008); *Boumediene v. Bush*, 553 U.S. 723 (2008); *FEC v. Wis. Right to Life*, 551 U.S. 449 (2007).

226. Ringhand, *supra* note 224, at 1036.

227. Compare, e.g., *Citizens United*, 130 S. Ct. at 903-13, *Davis*, 554 U.S. at 737-44, and *Wis. Right to Life*, 551 U.S. at 457, with *McConnell v. FEC*, 540 U.S. 93, 203-09 (2003), overruled by *Citizens United*, 130 S. Ct. at 913, and *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 458-65 (2001).

228. 130 S. Ct. at 3147.

229. 131 S. Ct. at 2620.

230. *Stevens*, 130 S. Ct. at 1577; *Boumediene*, 553 U.S. at 723.

231. *Salazar v. Buono*, 130 S. Ct. 1803, 1828 (2010) (Stevens, J., dissenting); *id.* at 1842 (Breyer, J., dissenting); *Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Ginsburg, J., dissenting).

The Justices merely differ on when deference to the congressional judgment is appropriate. Chief Justice Roberts and Justices Scalia, Thomas, and Alito typically defer to Congress' judgments on national security and traditional police power interests such as health, safety, and welfare,²³² but not to Congress' approach to separation of powers and campaign finance.²³³ Their approach could be defended as a desirable mechanism to subject the presumed self-interests of Congress to greater scrutiny—Congress arguably should not receive the same degree of judicial deference when adjusting the powers of other governmental branches, or limiting the financing available to potential challengers to incumbents because congressional motivations may clash with the interests of constituents.²³⁴ On the other hand, Justices Ginsberg, Breyer, Sotomayor, and Kagan provide less deference to Congress when they believe individual personal liberties are threatened²³⁵ and generally more deference to congressional judgments regarding structural and institutional affairs.²³⁶ Their approach emphasizes individual liberty over the relative institutional advantages of each branch of government. Justice Kennedy then borrows from both perspectives in ascertaining whether deference is due to the congressional judgment.²³⁷ These disparate views have coalesced to maintain, as compared to prior Courts, substantially the same rate of invalidation of federal laws.²³⁸

The real difference between the Roberts Court and prior Courts with respect to invalidating legislation is the precipitous decline in

232. See, e.g., *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724-28 (2010) (deferring to congressional and executive findings on necessity of material support statute); *Boumediene*, 553 U.S. at 826-31 (Scalia, J., dissenting) (highlighting deference owed to other branches of government regarding national security); *Carhart*, 550 U.S. at 161-67 (deferring to congressional findings on necessity of partial birth abortion procedure).

233. See, e.g., *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Free Enter. Fund*, 130 S. Ct. at 3138; *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Davis v. FEC*, 554 U.S. 724 (2008); *FEC v. Wis. Right to Life*, 551 U.S. 449 (2007).

234. See, e.g., *Free Enter. Fund*, 130 S. Ct. at 3156 (arguing that preventing congressional impairment of presidential removal power is necessary because “one branch’s handicap is another’s strength”); *Davis*, 554 U.S. at 742 (contending “it is a dangerous business for Congress to use the election laws to influence the voters’ choices”).

235. See, e.g., *Humanitarian Law Project*, 130 S. Ct. at 2732-39 (Breyer, J., dissenting); *Boumediene*, 553 U.S. at 765-66, 794-96; *Gonzales*, 550 U.S. at 171-80 (Ginsburg, J., dissenting).

236. See, e.g., *Stern*, 131 S. Ct. at 2625-29 (Breyer, J., dissenting); *Free Enter. Fund*, 130 S. Ct. at 3175-77 (Breyer, J., dissenting); *Citizens United*, 130 S. Ct. at 968-70 (Stevens, J., dissenting); *Davis*, 554 U.S. at 749-50 (Stevens, J., dissenting).

237. See, e.g., *Citizens United*, 130 S. Ct. at 904-13; *Boumediene*, 553 U.S. at 765-66, 794-96.

238. See *supra* notes 224-26 and accompanying text.

invalidating nonfederal laws. The Roberts Court has averaged invalidating slightly over two state, territorial, local, or municipal laws per term,²³⁹ a significant decrease from the approximately four and one-half laws invalidated per term by the Rehnquist Court, the almost eleven laws invalidated per term by the Burger Court, and the more than six laws invalidated per term by the Warren Court.²⁴⁰ A large factor in the decline is the dwindling number of cases the Court accepts dealing with constitutional challenges to nonfederal laws. In a similar vein as the decline in the Roberts Court's acceptance of state court cases for review,²⁴¹ the Roberts Court is accepting substantially fewer cases involving the constitutionality of state, territorial, local, and municipal laws. Indeed, the Roberts Court has *reviewed* substantially fewer nonfederal laws per term than the Burger and Warren Courts *invalidated* per term.²⁴²

239. My count is thirteen state, local, or territorial laws were invalidated in twelve cases over six terms: *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813 (2011) (invalidating state election financing law); *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741-42 (2011) (invalidating state law imposing restrictions on violent video games under free speech principles); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659 (2011) (invalidating state law that prohibited selling, disclosing, or using pharmacy records for marketing purposes under free speech guarantee); *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010) (invalidating state law authorizing life without the possibility of parole for juvenile offenders); *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277, 2280-81 (2009) (invalidating city personal property tax); *Haywood v. Drown*, 129 S. Ct. 2108, 2111-13 (2009) (invalidating state law barring actions against corrections officers for civil rights violations); *District of Columbia v. Heller*, 554 U.S. 570, 573, 635 (2008) (invalidating D.C.'s handgun ban); *Kennedy v. Louisiana*, 554 U.S. 407, 412-13 (2008) (invalidating state law authorizing the death penalty for the rape of a child); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709-11 (2007) (invalidating race-based student assignment plans adopted in Seattle and Louisville); *Cunningham v. California*, 549 U.S. 270, 274 (2007) (invalidating state determinate sentencing law); *Randall v. Sorrell*, 548 U.S. 230, 236-37 (2006) (invalidating state campaign contribution law); *Jones v. Flowers*, 547 U.S. 220, 239 (2006) (as-applied challenge to state law notice procedure).

240. Ringhand, *supra* note 224, at 1044.

241. Marcia Coyle, *For the Roberts Court, a Different Kind of Federalism*, NAT'L L.J. (Sept. 8, 2010).

242. By my count, the Roberts Court considered the constitutionality of nonfederal laws in the following thirty-one cases: *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011); *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011); *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *Doe v. Reed*, 130 S. Ct. 2811 (2010); *Graham v. Florida*, 130 S. Ct. 2011 (2010); *Dist. Attorney's Office v. Osborne*, 129 S. Ct. 2308 (2009); *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277 (2009); *Haywood v. Drown*, 129 S. Ct. 2108 (2009); *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093 (2009); *Locke v. Karass*, 555 U.S. 207 (2009); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Dep't of Revenue v. Davis*, 553 U.S. 328 (2008); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008); *Baze v. Rees*, 553 U.S. 35 (2008); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S.

A portion of this decline—at least in comparison to the Burger and Warren Courts—resulted from Congress abolishing the Supreme Court’s mandatory appellate jurisdiction for certain lower court decisions invalidating or upholding state statutes.²⁴³ Before 1988, the Supreme Court had to review appeals “by a party relying on a State statute held by a [federal] court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States,”²⁴⁴ and also by a party questioning a state high court decision on “the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.”²⁴⁵ Although earlier Courts sometimes attempted by artful devices to avoid this mandatory appellate jurisdiction,²⁴⁶ there is little doubt that jurisdictional requirements impacted the Court’s consideration of the constitutionality of state laws during the Warren and Burger Courts. But this still does not explain the entirety of the decline in accepting cases involving the constitutionality of nonfederal laws, nor does it explain the decline since the Rehnquist Court, which only had mandatory appellate jurisdiction during two of its nineteen terms.

The remaining decline also cannot be attributed to policing only the most egregious examples of unconstitutional legislation. Some of the cases invalidating nonfederal laws addressed novel constitutional claims without authoritative doctrinal support. For example, the Supreme Court had never recognized that the Second Amendment protected an individual’s right to bear arms for self-defense in the home before the Court both recognized this right and used it to invalidate a gun ordinance in *District of Columbia v. Heller*.²⁴⁷

701 (2007); *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177 (2007); *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007); *Cunningham v. California*, 549 U.S. 270 (2007); *Ayers v. Belmontes*, 549 U.S. 7 (2006); *Clark v. Arizona*, 548 U.S. 735 (2006); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Randall v. Sorrell*, 548 U.S. 230 (2006); *Kansas v. Marsh*, 548 U.S. 163 (2006); *Samson v. California*, 547 U.S. 843 (2006); *Jones v. Flowers*, 547 U.S. 220 (2006); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006). This averages to just over five per term, slightly exceeding the Rehnquist Court’s invalidation average of approximately four and one-half and less than the Burger and Warren Courts’ invalidation averages of almost eleven and more than six, respectively. See Ringhand, *supra* note 224, at 1044. Moreover, seven of these cases were decided in the Roberts Court’s first term, with some actually being granted by the Rehnquist Court. If the first term cases are removed, the Roberts Court has reviewed the constitutionality of nonfederal laws in twenty-four cases over five years, barely exceeding the Rehnquist Court’s rate of actually invalidating nonfederal laws.

243. Cf. DAVID CRUMP ET AL., *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 78-79 (5th ed. 2009).

244. 28 U.S.C. § 1254(2) (1982) (repealed 1988).

245. *Id.*

246. CRUMP ET AL., *supra* note 243, at 79.

247. 554 U.S. 570, 625-29 (2008).

Similarly, the Supreme Court extended Eighth Amendment doctrine past the holdings of prior doctrine in two cases to prohibit the imposition of certain punishments for nonhomicidal crimes.²⁴⁸ In these cases (and almost every other one invalidating a nonfederal law), the constitutional validity of the challenged law was a close question, as evidenced by the sharp division among the Justices, leading to three or more dissenting votes.²⁴⁹ As a result, the Court certainly has not adopted the type of judicial deference urged a century ago by Professor Thayer in adjudging the constitutionality of nonfederal legislation.²⁵⁰

A more likely explanation for the decline is that the Court is prioritizing the development of certain areas of the law in its docketing of cases, many of which are outside the constitutional sphere. Chief Justice Roberts indicated during his confirmation testimony that the “clarity and uniformity of the law” could be enhanced by increasing the docket of the Supreme Court, including nonconstitutional cases.²⁵¹ Although the docket of the Supreme Court has actually decreased slightly under Chief Justice Roberts,²⁵² the Court is deciding a higher percentage of cases related to business activities—such as antitrust, bankruptcy, public utilities, consumer protection, arbitration, and employment discrimination—than either the Rehnquist or Burger Courts.²⁵³ It has also appeared to be more interested in addressing procedural matters in civil cases, such as pleading standards, joinder, class actions, choice of law, personal jurisdiction, subject matter jurisdiction, and appellate review.²⁵⁴

248. *Graham v. Florida*, 130 S. Ct. 2011, 2029-30 (2010) (prohibiting life sentences for juveniles charged with nonhomicide crimes); *Kennedy v. Louisiana*, 554 U.S. 407, 469 (2008) (prohibiting imposing the death penalty on rapists).

249. *See, e.g.*, *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2829 (2011) (Kagan, J., dissenting); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2673 (2011) (Breyer, J., dissenting); *Graham*, 130 S. Ct. at 2043 (Thomas, J., dissenting); *Haywood v. Drown*, 129 S. Ct. 2108, 2118 (2009) (Thomas, J., dissenting); *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting); *Kennedy*, 554 U.S. at 447 (Alito, J., dissenting); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 803 (2007) (Breyer, J., dissenting); *Cunningham v. California*, 549 U.S. 270, 297 (2007) (Alito, J., dissenting); *Randall v. Sorrell*, 548 U.S. 230, 281 (2006) (Souter, J., dissenting); *Jones v. Flowers*, 547 U.S. 220, 239 (2006) (Thomas, J., dissenting).

250. Thayer, *supra* note 23, at 143-44.

251. *Roberts Hearing*, *supra* note 119, at 337.

252. Chemerinsky, *supra* note 191, at 13-14.

253. *See, e.g.*, Lee Epstein, William M. Landes & Richard A. Posner, *Is the Roberts Court Pro-Business?*, 3 (Dec. 17, 2010), <http://epstein.law.northwestern.edu/research/RobertsBusiness.pdf> (study prepared for the N.Y. TIMES); David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce’s Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019, 1055 (2009).

254. *See, e.g.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011) (personal jurisdiction); *J. McIntyre Mach. Ltd. v. Nicaastro*, 131 S. Ct. 2780

This does not mean that the Roberts Court will not consider constitutional challenges to state and local laws. But the Court so far is being selective in accepting cases raising such challenges. The Roberts Court has predominantly granted certiorari to review challenges to nonfederal laws in a handful of select constitutional areas, including gun rights,²⁵⁵ campaign and voting regulations,²⁵⁶ criminal sentencing and procedure,²⁵⁷ aspects of federalism,²⁵⁸ and reverse discrimination.²⁵⁹ In most other constitutional challenges to nonfederal laws, the Court appears content with the developed doctrine that is being applied to resolve the claims.

This comports with the Court's incremental approach to constitutional precedent. Although the Roberts Court is leaving its mark in some constitutional areas, such as campaign finance, the

(2011) (personal jurisdiction); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (class actions); *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011) (anti-suit injunction against class actions); *Matrixx Initiatives Inc. v. Siracusano*, 131 S. Ct. 1309 (2011) (pleading for a securities fraud claim); *Ortiz v. Jordan*, 131 S. Ct. 884 (2011) (appellate review after trial of interlocutory summary judgment denial); *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010) (diversity jurisdiction citizenship for corporations); *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010) (choice of law in federal court); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (pleadings); *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635 (2009) (appellate review of remand orders); *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008) (joinder); *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007) (appellate review of remand orders); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (pleadings); *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006) (appellate review of remand orders); *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006) (federal question jurisdiction); *Marshall v. Marshall*, 547 U.S. 293 (2006) (probate exception to diversity jurisdiction); *Wachovia Bank v. Schmidt*, 546 U.S. 303 (2006) (diversity jurisdiction citizenship for national banks); *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005) (removal jurisdiction); *Lincoln Property Co. v. Roche*, 546 U.S. 81 (2005) (removal of diversity cases); *see also generally* Howard Wasserman, *The Roberts Court and the Civil Procedure Revival* (FLA. INT'L L. SCH. LEGAL STUDIES RESEARCH PAPER No. 11-17, 2011), available at <http://www.ssrn.com/abstract=1914743>.

255. *E.g.*, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 636 (2007).

256. *E.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Doe v. Reed*, 130 S. Ct. 2811 (2010); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008); *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007); *Randall v. Sorrell*, 548 U.S. 230 (2006).

257. *E.g.*, *Graham v. Florida*, 130 S. Ct. 2011 (2010); *Dist. Attorney's Office v. Osborne*, 129 S. Ct. 2308 (2009); *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Baze v. Rees*, 553 U.S. 35 (2008); *Cunningham v. California*, 549 U.S. 270 (2007); *Ayers v. Belmontes*, 549 U.S. 7 (2006); *Clark v. Arizona*, 548 U.S. 735 (2006); *Kansas v. Marsh*, 548 U.S. 163 (2006); *Samson v. California*, 547 U.S. 843 (2006).

258. *E.g.*, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011); *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277 (2009); *Haywood v. Drown*, 129 S. Ct. 2108 (2009); *Dep't of Revenue v. Davis*, 553 U.S. 328 (2008); *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007).

259. *E.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

right to bear arms, criminal procedure, and affirmative action, for the most part the Court has not indicated by the cases it is accepting for review any desire to fundamentally alter other aspects of constitutional doctrine. And even in those cases in which it does review, the Court has often proceeded with some restraint.

C. Narrow Dispositions

The holdings of the Roberts Court have predominantly been rather constrained, even when controlled by the current Republican-appointed members of the Court. Although the rationales are sometimes deep, especially in free speech and criminal procedure cases, the Court's actual dispositions seldom foreclose all remedial avenues, but only the particular method to obtain the sought-after result.

The trend started the first term of the Roberts Court. In what many believed would be a contentious abortion decision, the Court issued a narrow holding unanimously reversing the invalidation of a parental notification law in its entirety, while acknowledging that the law presented constitutional problems in certain contexts.²⁶⁰ Several other decisions that first term likewise avoided broad pronouncements,²⁶¹ a practice that has continued in the Court's subsequent terms.²⁶² The Roberts Court employs several devices for obtaining these limited holdings, such as avoiding constitutional issues, rendering judgments on an as-applied basis, and detailing the issues left open or not impacted by its holdings.

The Roberts Court typically avoids constitutional issues by articulating statutory grounds for decisions and assuming the

260. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 331-32 (2006).

261. *See, e.g., Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410, 412 (2006) (per curiam) (vacating and remanding for district court's consideration of as-applied constitutional challenge to Bipartisan Campaign Reform Act); *United States v. Georgia*, 546 U.S. 151, 159 (2006) (holding Title II of the Americans with Disability Act validly abrogates state sovereign immunity for actual constitutional violations).

262. *See, e.g., Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (holding First Amendment shields protestors at military funeral from tort liability for their picketing under the facts of the case without considering an Internet posting by the protestors or the validity of time, place, or manner restrictions in general); *NASA v. Nelson*, 131 S. Ct. 746 (2011) (assuming without deciding that a federal right to informational privacy exists); *Doe v. Reed*, 130 S. Ct. 2811 (2010) (holding disclosure of referendum petitions in general does not violate First Amendment without foreclosing the possibility of relief with respect to the disclosure of a particular petition); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009) (noting serious constitutional concerns raised by extension of Voting Rights Act but deciding case on narrow statutory grounds); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008) (upholding state's primary election system against facial challenge while highlighting the possibility of as-applied challenges); *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007) (avoiding constitutional issue by determining allegedly defective indictment was not defective).

resolution of issues without actually deciding them. Chief Justice Roberts' nearly unanimous opinion in *Northwest Austin Municipal Utility District No. One v. Holder* avoided the constitutional challenges to the 2006 extension of the Voting Rights Act by relying solely on the appropriate interpretation of the statute (although the Court did warn that the extension raised "serious constitutional questions").²⁶³ The Court also employed statutory grounds to bypass the constitutional issue in *Ricci v. Destafano*, with the Justices splitting on whether the firefighter plaintiffs suffered actionable discrimination under Title VII when a promotion examination was not certified due to concerns regarding its racially disparate impact.²⁶⁴ While the Court is not hesitant to reach (and even invite) a constitutional holding if the statutory grounds are perceived as unavailing, the Court in such cases still addresses the statutory arguments first.²⁶⁵

Another common avoidance technique is assuming the resolution of a constitutional issue without actually deciding it. Justice Alito's opinion for the Court in *NASA v. Nelson* provides an example where the Court assumed—but did not decide—that a constitutional right to informational privacy existed over the protestations of Justices Scalia and Thomas that the Constitution did not protect any such right.²⁶⁶ While in cases like *Nelson* this technique coalesced near consensus on an otherwise divisive issue,²⁶⁷ the same approach also has been employed when the Court remained divided, once again indicating some reluctance to decide more than necessary to resolve each pending cause.²⁶⁸

The unanimous decision in *Pearson v. Callahan* also evinces the

263. 129 S. Ct. at 2513-14.

264. 129 S. Ct. 2658, 2673-81 (2009) (holding, over the dissent of four Justices, that the city violated Title VII by refusing to certify a test based solely on racially disparate impact without reaching Equal Protection Clause challenge).

265. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 888-96 (2010).

266. 131 S. Ct. at 751.

267. See, e.g., *id.*; *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2496-97 (2011) (limiting holding regarding Petition Clause to issues presented by the parties in the context of a public employee grievance); *United States v. Georgia*, 546 U.S. 151, 157 (2006) (assuming without deciding that plaintiff's claims alleged actual constitutional violations by state agents).

268. See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2603-04 (2010) (plurality opinion) (arguing concurrences improperly assumed without deciding whether judicial takings were cognizable); *Dist. Attorney's Office v. Osborne*, 129 S. Ct. 2308, 2318-19 (2009) (assuming, without deciding, claim for post-conviction access to DNA for testing could be maintained under 42 U.S.C. § 1983). The Court subsequently decided the issue left open in *Osborne*, holding that such a post-conviction access claim could be maintained under § 1983 in the limited circumstances in which a procedural due process challenge would be appropriate. *Skinner v. Switzer*, 131 S. Ct. 1289, 1298-1300 (2011).

Court's typical disdain for unnecessary judicial decisionmaking.²⁶⁹ *Pearson* allowed lower courts discretion to deviate from the mandated two-step sequence for resolving qualified immunity claims from *Saucier v Katz*²⁷⁰ when the sequence contravened "the general rule of constitutional avoidance."²⁷¹ As *Pearson* recognized, in some instances a determination on *Saucier*'s first step (the existence of a constitutional right) is not necessary to the ultimate disposition of the immunity claim, especially when the existence of the right is highly uncertain or fact-bound.²⁷² The Court therefore, while recognizing the value of the *Saucier* protocol in certain contexts, granted lower courts flexibility that comported with the "older, wiser judicial counsel 'not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'"²⁷³

When the Court does address such unavoidable constitutional issues, the resulting holdings—even when the current Republican-appointed jurists control the outcome—typically have been relatively narrow. For example, in *Morse v. Frederick*, Chief Justice Roberts, joined by Justices Scalia, Kennedy, Thomas, and Alito, held only that student speech at a school event that is reasonably viewed as promoting illegal drug use can be prohibited, without upsetting prior public school speech doctrine (although Justice Thomas' concurrence sought to dispense entirely with public school students' free speech rights).²⁷⁴ In *Hein v. Freedom from Religion Foundation*, the Court's judgment merely held that taxpayers did not have standing to challenge general appropriations to the executive branch, rather than overruling *Flast v. Cohen* or reconsidering taxpayer standing in Establishment Clause cases (as Justices Scalia and Thomas urged).²⁷⁵ Similarly, the controlling opinion of Justice Kennedy in *Salazar v. Buono* merely remanded the case for reconsideration without any "sweeping pronouncements" or "categorical rules" regarding the Establishment Clause.²⁷⁶ A final example—although many more could be listed²⁷⁷—is the narrowly crafted holding in the five-four decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, which held that the exceedingly rare

269. 555 U.S. 223, 236-38 (2009).

270. 533 U.S. 194, 201 (2001).

271. 555 U.S. at 241.

272. *Id.* at 237.

273. *Id.* at 241 (quoting *Scott v. Harris*, 550 U.S. 372, 388 (2007)).

274. 551 U.S. 393, 409-10 (2007); *id.* at 420-22 (Thomas, J., concurring).

275. 551 U.S. 587, 599 (2007).

276. 130 S. Ct. 1803, 1820 (2010) (Kennedy, J., joined by Roberts, C.J.) ("To date, this Court's jurisprudence in this area has refrained from making sweeping pronouncements, and this case is ill suited for announcing categorical rules.")

277. See, e.g., *Beard v. Kindler*, 130 S. Ct. 612, 619 (2009); *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 213 (2008); *Medellín v. Texas*, 552 U.S. 491, 523 n.13 (2008).

creation of multiple layers of for-cause removal insulation from the President for officers of the United States in the Sarbanes-Oxley Act violated the separation of powers, without articulating a broader judgment invalidating the Act, the Board created by it, or other types of civil service or military officers.²⁷⁸

These narrow holdings comport with the Court's frequently stated preference for legislation to be challenged on an as-applied rather than facial basis.²⁷⁹ The Roberts Court's preference for as-applied challenges extends to the abortion context, where facial challenges were the previous norm.²⁸⁰ The unanimous Court in *Ayotte v. Planned Parenthood of Northern New England*, while recognizing the constitutional infirmity of a New Hampshire parental consent statute without a health exception, concluded that "partial rather than facial invalidation" is the "normal rule" as long as a partial invalidation accords with legislative intent.²⁸¹ The Court accordingly remanded the case for a determination of whether the state "legislature intended the statute to be susceptible to such a remedy."²⁸² Likewise, *Gonzales v. Carhart* upheld the federal partial-birth abortion ban against a facial challenge, while leaving open the possibility that an as-applied challenge might be available if "in discrete and well-defined instances" the procedure was necessary to protect the health of the mother.²⁸³ The Court found that facial attacks were typically improper because as-applied challenges were the generally appropriate vehicle to adjudge the constitutionality of statutes, including abortion statutes.²⁸⁴

Numerous subsequent Roberts Court decisions have employed this fundamental distinction between facial and as-applied challenges to uphold statutes facially or under the presented circumstances, while acknowledging the possibility of as-applied

278. 130 S. Ct. 3138, 3154-61 (2010). The Court concluded that the Board could continue to function as before, but its members could be removed at will by SEC Commissioners. *Id.* at 3161-62.

279. See, e.g., *United States v. Williams*, 553 U.S. 285, 301-04 (2008); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 201-03 (2008) (plurality opinion); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-51 (2008); *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007).

280. See Gillian E. Metzger, *Facial and As-Applied Challenges under the Roberts Court*, 36 *FORDHAM URB. L.J.* 773, 774 (2009). Although the Court's failure to employ facial challenges in these cases may partially reflect an attempt to limit the scope of the abortion right, *Ayotte v. Planned Parenthood of Northern New England* was unanimous, indicating that, at the very least, the propriety of facial challenges was an independent consideration. See 546 U.S. 320, 329 (2006).

281. 546 U.S. at 329.

282. *Id.* at 331.

283. 550 U.S. at 165-68.

284. *Id.* at 167.

challenges in other situations.²⁸⁵ The plurality in *Baze v. Rees*, for instance, upheld the lethal injection protocol employed by Kentucky and most other states but noted that lethal injection or other execution methods could violate the Eighth Amendment if there were a substantial demonstrated risk of severe pain compared to other available alternatives.²⁸⁶ *Doe v. Reed* similarly held that the public disclosure of signatories of referendum petitions in general did not violate the First Amendment but allowed for the possibility that such disclosure could be unconstitutional in certain circumstances.²⁸⁷ *Washington State Grange v. Washington State Republican Party* denied a facial pre-enforcement challenge to a state initiative that allowed primary candidates to self-designate a political party preference on the ballot but acknowledged the potential propriety of an as-applied challenge if the ballot generated voter confusion.²⁸⁸ *Holder v. Humanitarian Law Project* provides another example, with the Court holding that the statute prohibiting material support to designated terrorist groups was constitutional as applied to the particular activities the challengers sought to pursue, although the Court did not “address the resolution of more difficult cases that may arise under the statute in the future.”²⁸⁹

Yet despite such frequent paeans, the Roberts Court does invalidate statutes facially. But outside the criminal law context, the facial invalidations typically highlight other issues that are either not impacted or left unresolved by the holding, providing other potential avenues to accomplish the government’s objectives.

Take *Citizens United*, for instance. While *Citizens United* facially invalidated the corporate and union bans on certain independent electioneering communications, the Court did uphold the provisions regulating such speech through disclaimer and disclosure requirements.²⁹⁰ The Court thus allowed the possibility of further such regulations tailored to specific governmental interests in protecting shareholders and informing the electorate, which will be constitutional unless the regulations are too onerous or in reasonable probability will cause threats, reprisal, or harassment.²⁹¹ Moreover, the Court’s holding invalidating the bans is not as dramatic a change in the conduct of elections as sometimes indicated. Under the previous bans, corporations and labor unions could independently expend money outside the one- or two-month window right before an

285. See, e.g., *United States v. Williams*, 553 U.S. 285, 302 (2008); *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 189-91 (2007).

286. 553 U.S. 35, 49-50 (2008) (plurality opinion).

287. 130 S. Ct. 2811, 2819-21 (2010).

288. 552 U.S. 442, 457-59 (2008).

289. 130 S. Ct. 2705, 2711-12 (2010).

290. 130 S. Ct. 876, 916-17 (2010).

291. See *id.* at 914-16.

election and could continue to engage in express advocacy even during that window.²⁹² The fear that *Citizens United* will provide a new avenue allowing for-profit corporations to employ their vast resources to drown out the views of the electorate is overstated when the prior ban was easy to circumvent and more than half the states already authorized independent expenditures by for-profit corporations.²⁹³ Most for-profit corporations have little to gain by expending money to support candidates and would be even more hesitant if Congress enacted legislation to ensure the identification of the source of those expenditures or to provide the corporation's owners (i.e., shareholders) more control over corporate political spending.

The Court's other decisions invalidating campaign finance laws similarly left open alternative avenues for regulation. *Davis v. Federal Election Commission*, despite facially invalidating the so-called Millionaire's Amendment that raised the contribution limits for opponents of candidates who exceeded a threshold of expenditures of personal funds, opined that there would be no constitutional infirmity if the contribution limits for both candidates were raised equally.²⁹⁴ While this approach may not be the preferred legislative solution, it provides an alternative means to assist candidates facing a self-financed opponent. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* invalidated Arizona's matching funds scheme triggered by an opponent's expenditures, but it did not question the constitutionality of a standard public financing scheme such as the one provided by federal law for presidential elections.²⁹⁵

Other facial invalidations on free speech grounds are likewise limited. *United States v. Stevens*, which invalidated a broad statute banning depictions of animal cruelty, expressly left open whether Congress could enact more narrowly tailored legislation to criminalize the impetus behind the statute.²⁹⁶ *Sorrell v. IMS Health*

292. See, e.g., 2 U.S.C. § 441(b) (2006); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469-76 (2007); *McConnell v. FEC*, 540 U.S. 93, 122-29 (2003), *overruled in part by Citizens United*, 130 S. Ct. at 885-86.

293. *Citizens United*, 130 S. Ct. at 908-10. Plus, corporate expenditures are typically balanced from the other side by unions, with unions even perhaps exceeding disclosed for-profit corporate expenditures for identifiable candidates in the 2010 election cycle, although current disclosure loopholes prevent an accurate accounting. See, e.g., T.W. Farnum, *Unions Spending Big on Campaign Ads; Corporate Giving is Less Than Predicted After Court Freed Up Money*, WASH. POST, July 7, 2010, at A4; Brody Mullins & John D. McKinnon, *Campaign's Big Spender—Public-Employees Union Now Leads All Groups in Independent Election Outlays*, WALL ST. J., Oct. 22, 2010, at A1.

294. 554 U.S. 724, 737-38 (2008); 26 U.S.C. § 9006(a) (2006).

295. 131 S. Ct. 2806, 2828 (2011).

296. 130 S. Ct. 1577, 1591-92 (2010). The legislative history of the statute predominantly focused on crush videos, which depict women slowly crushing small animals to death. *Id.* at 1583.

Inc. struck down a state law prohibiting the sale, disclosure, and use of pharmacy records for marketing purposes, while highlighting that the state might have a stronger position if the ban applied more broadly.²⁹⁷ *Brown v. Entertainment Merchants Ass'n*, in the course of holding a law prohibiting the sale or rental of violent video games to minors unconstitutional, emphasized the industry's own voluntary regulations as precluding the necessity of the regulation.²⁹⁸

The highly publicized opinions recognizing an individual constitutional right to bear arms for self-defense purposes and facially invalidating a handgun ban are similarly—at least at this juncture—constrained. Whatever might be said about the Court's analysis of the original understanding,²⁹⁹ the holding in *District of Columbia v. Heller* was not all that revolutionary, striking down a ban of all handguns and operable firearms in the home, where the “need for [self-defense] is most acute.”³⁰⁰ The Court cautioned that the right to keep and bear arms is not “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”³⁰¹ As a result, its holding did not, for example, “cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”³⁰² And it also limited its rationale to arms for self-defensive purposes “in common use at the time” rather than those that were “dangerous [or] unusual.”³⁰³ The decision in *McDonald v. City of Chicago* merely extended the *Heller* right to the states—most of which already have similar state constitutional protections for the right to bear arms—with the Justices in the majority even unable to agree on the appropriate incorporation vehicle.³⁰⁴ In neither case did the Court articulate the standard of review for the right, leaving many issues to be resolved in the ongoing dialogue between the political and judicial branches.³⁰⁵

297. 131 S. Ct. 2653, 2672 (2011).

298. 131 S. Ct. 2729, 2740-42 (2011).

299. See, e.g., Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 625 (2008); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 103-108 (2000).

300. 554 U.S. 570, 628-29 (2008).

301. *Id.* at 626.

302. *Id.* at 626-27.

303. *Id.* at 627 (citations omitted).

304. 130 S. Ct. 3020, 3036-42 (2010). Justice Thomas championed using the Fourteenth Amendment's Privileges or Immunities Clause, *id.* at 3059 (Thomas, J., concurring), while Justice Alito, joined by Chief Justice Roberts and Justices Scalia and Kennedy, employed the Due Process Clause. *Id.* at 3044-48 (plurality opinion).

305. See Charles W. “Rocky” Rhodes, *McDonald v. City of Chicago: The Second*

But while the Court has limited its holdings to some extent in these facial invalidations, the foundational normative theories are still often deep, containing potential implications for future controversies. The campaign finance regulation cases adopt the theory that expenditures for political campaigns are pure political speech, with the Court even suggesting in *Citizens United* that the First Amendment may impose a per se ban on any substantially burdensome regulations.³⁰⁶ The Court's view of a "substantial burden" is not onerous, encompassing governmental regulatory or financial assistance to an opponent that may chill expenditures to some degree, without requiring caps or comparable regulations on expenditures.³⁰⁷ Other free speech decisions likewise rely on deeper theoretical principles, such as adopting a historical approach to identify categories of unprotected speech,³⁰⁸ disapproving almost all "content- and speaker-based" expressive discrimination,³⁰⁹ and evaluating the inherent expressiveness of conduct for First Amendment coverage.³¹⁰ The Second Amendment opinions also stem from a normative theory, the necessity of a historical approach to ascertain the scope of pre-existing constitutional rights.³¹¹ So while these cases left open issues that can be revisited by the Court without overruling binding precedent, the opinions outlined a theoretical approach that might be applicable.

The Roberts Court's criminal procedure and sentencing decisions extend even further, tending to be both broad and deep. In several cases, the current Republican appointees provided law enforcement personnel more leeway to conduct investigations, typically relying on a normative cost-benefit analysis to establish wider ex ante guidance for future situations.³¹² Yet the other members of the Court are no

Amendment Applies to State and Local Governments, 2010 EMERGING ISSUES 5195, at 8-9 (LexisNexis July 2010); Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 267-69 (2008).

306. *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010).

307. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2818-24 (2011); *Davis v. FEC*, 554 U.S. 724, 738-40 (2008).

308. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733-37 (2011); *United States v. Stevens*, 130 S. Ct. 1577, 1584-86 (2010).

309. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663-67 (2011); *Citizens United*, 130 S. Ct. at 898-99.

310. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66-67 (2006).

311. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036-42 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 579-92 (2008).

312. See, e.g., *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260-65 (2010) (holding on habeas review that a suspect's invocation of the right of silence must be explicit and unambiguous and that waiver of the right may be inferred from a subsequent statement); *Maryland v. Shatzer*, 130 S. Ct. 1213, 1226 (2010) (holding the presumption that waivers after invocation of the right to counsel are involuntary expires after fourteen days); *Montejo v. Louisiana*, 129 S. Ct. 2079, 2086-91 (2009)

less likely to favor broad and deep rulings in this area. The Court, often with shifting coalitions from across the ideological spectrum, has afforded criminal defendants greater protections against out-of-court testimonial statements, denials of their choice of counsel, punishment enhancements without jury findings, the imposition of the severest punishments, and ineffective counsel.³¹³ So while the criminal decisions could fairly be described as more maximalist than minimalist, the conservative outcomes here can hardly be accused of evidencing a greater breadth than the liberal ones.³¹⁴

More important, the limited nature of these exceptions helps confirm the thesis that the decisions of the Roberts Court *tend*, on the whole, to be narrow and shallow. This is not to say that every decision from the Roberts Court has been incremental or that in some cases a narrower disposition was not feasible (indeed, a narrower disposition is almost always at least theoretically feasible). Nor are all the current Republican-appointed Justices satisfied with these results. But on a multi-member Court, the different perspectives of these Justices have tempered the potential for broad, deep, and revolutionary rationales, except in a couple of limited

(holding appointment of counsel at an arraignment or similar proceeding does not bar the police from attempting to elicit incriminating statements); *Herring v. United States*, 555 U.S. 135, 145-47 (2009) (expanding the scope of the good-faith exception to the exclusionary rule to include negligent violations attenuated from the search); *Hudson v. Michigan*, 547 U.S. 586, 599 (2006) (holding failure to knock-and-announce did not warrant exclusion of evidence under a cost-benefit analysis).

313. *See, e.g.*, *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2713-18 (2011) (holding admission of forensic laboratory report for testimonial purposes supported by the in-court testimony of an analyst who neither signed the report nor performed or observed the reported test violated the Confrontation Clause); *Pepper v. United States*, 131 S. Ct. 1229, 1243-45 (2011) (holding right to jury trial violated by judicial fact-finding that increases a defendant's sentence beyond the punishment range specified for the offense established by the jury's verdict or supported by the defendant's guilty plea); *Graham v. Florida*, 130 S. Ct. 2011, 2030-34 (2010) (holding Eighth Amendment categorically prohibits imposition of life imprisonment without the possibility of parole for nonhomicidal juvenile offenses); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482-87 (2010) (holding Sixth Amendment requires criminal defense attorneys to advise immigrant clients of the straightforward deportation consequences of a guilty plea); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531-33 (2009) (holding admission of sworn certificates regarding forensic analysis of seized substances violated the Confrontation Clause); *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (holding Eighth Amendment categorically prohibits the death penalty for the crime of nonhomicidal child rape); *Giles v. California*, 554 U.S. 353, 361-68 (2008) (holding defendant does not forfeit Sixth Amendment right to confrontation by making witness unavailable to testify from a wrongful act not done for the purpose of preventing the testimony of the witness); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006) (holding denial of choice of counsel was structural error requiring reversal without harmful error analysis).

314. *Cf.* *Turner v. Rogers*, 131 S. Ct. 2507, 2521 (2011) (Thomas, J., dissenting) (noting that majority's holding finding a due process violation was based on a ground never raised by the parties and suggested only by the United States as *amicus curiae*).

doctrinal areas where their disparate approaches have coalesced to formulate more consequential doctrine. In most other constitutional areas, one or more of these Justices have hesitated before adopting a broader rationale.

An example is *Parents Involved in Community Schools v. Seattle School District No. 1*, where Chief Justice Roberts' plurality opinion would have largely (if not entirely) prevented school districts from alleviating de facto racial isolation in public schooling.³¹⁵ But Justice Kennedy's concurrence disagreed that the government was prohibited from undertaking such actions when the measures were narrowly tailored to serve compelling governmental interests (which, according to Justice Kennedy, had not been satisfied by the school districts' plans under review).³¹⁶ Although the school districts still lost, the differing perspective of one of the current Republican-appointed jurists prevented an approach essentially ending all such efforts from becoming a rule of law.

J. McIntyre Machinery, Ltd. v. Nicastro illustrates the same principle.³¹⁷ Here, Justice Kennedy's plurality opinion would have required a defendant to submit to the authority of a state for adjudicative jurisdiction to be proper and only found such submission for the transmission of goods in the forum if the defendant itself specifically targeted the forum market.³¹⁸ But Justice Alito joined Justice Breyer's concurring opinion, which viewed "it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences."³¹⁹ Once again, although the outcome was "conservative" in that the corporation was protected from defending the suit, the different approach of one conservative Justice prevented a broad and deep holding from becoming law.

Because of the difficulty in coalescing five different jurisprudential approaches to constitutional law, the Republican-appointed Justices frequently are faced with a choice: moderate their views in a narrow holding or be content with a nonprecedential plurality opinion. A predictive rule of law is seldom an option.

D. Incremental Rules and Standards

The Roberts Court's majority opinions seldom articulate a predictive, precise, and categorical rule of law outside a few specific contexts. In noncriminal cases in which the current Republican-appointed Justices join other members of the Court to forge a coalition announcing new doctrine, a standard—rather than a rule—

315. 551 U.S. 701, 725-33 (2007) (plurality opinion).

316. *Id.* at 788-90 (Kennedy, J., concurring).

317. *See* 131 S. Ct. 2780 (2011).

318. *Id.* at 2786-90 (plurality opinion).

319. *Id.* at 2791 (Breyer, J., concurring).

often is applied. Even in those cases controlled by the current Republican-appointed jurists, their disparate views regarding when predictive, rule-based adjudication is preferable typically prevent a clear-cut categorical approach.

The Roberts Court frequently announces standards when securing a majority holding necessitates maintaining the utmost flexibility and leeway for resolving future controversies. *United States v. Comstock* provides one example, where Justice Breyer's majority opinion, joined by Chief Justice Roberts and Justices Stevens, Ginsburg, and Sotomayor, upheld congressional power to enact a post-sentence civil commitment statute for mentally ill, sexually dangerous federal prisoners based on five separate "considerations, taken together": (1) congressional authority under the Necessary and Proper Clause, (2) the longstanding history of prison-related mental health statutes, (3) the reasonableness of committing mentally ill and sexually dangerous former prisoners, (4) the accommodation of state interests in the statute, and (5) the statute's narrow scope.³²⁰ Of course, such an ambiguous five-part standard provides little guidance for future cases, as frequently one or more of these considerations may not exist.³²¹ But this approach was apparently necessary to ensure Chief Justice Roberts did not write separately.³²² In a similar vein, standards are typical in cases in which one of the current Republican-appointed jurists authors an opinion joined by the Court's other wing. For instance, Justice Kennedy's opinion in *Caperton v. A.T. Massey Coal Co.* held that judicial campaign contributions or expenditures by a litigant or attorney in extraordinary cases may, depending on the relative size, timing, and impact of the financial support, arouse such a probability of bias that a judge must recuse in order to comport with due process.³²³ This standard, though, provides scant—if any—"clear, workable guidance for future cases."³²⁴ Such guidance is also absent from Justice Kennedy's opinion in *Boumediene v. Bush*, which employed a functional standard to determine the constitutional scope

320. 130 S. Ct. 1949, 1956-63 (2010); *cf.* *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011) (limiting the holding that appointment of counsel was not required for civil contempt proceedings based on failure to pay child support to cases in which the custodial parent was unrepresented by counsel and some type of other adequate alternative procedural safeguards existed).

321. *Cf. Comstock*, 130 S. Ct. at 1974-75 (Thomas, J., dissenting) (arguing that the majority's five-part standard creates more questions than answers).

322. *Cf. id.* at 1965-66 (Kennedy, J., concurring) (agrees with majority, but "withhold[s] assent from certain statements and propositions of the [majority's] opinion"); *id.* at 1968-69 (Alito, J., concurring).

323. 129 S. Ct. 2252, 2263-65 (2009).

324. *Id.* at 2269 (Roberts, C.J., dissenting). The dissent illustrated the uncertainties caused by the opinion with a listing of forty unanswered questions that lower courts will have to resolve. *Id.* at 2269-72.

of habeas corpus rights for noncitizen detainees outside the sovereign territory of the United States, examining the process that the detainees had received, the nature of the locales where they were apprehended and detained, and “the practical obstacles” to judicial resolution.³²⁵ The new standards adopted in these cases resolve little more than the pending factual circumstances, the antithesis of a predictive rule of law.³²⁶

Despite these cases, though, the Court’s typical preference is to employ rules to the extent possible in cases where a standard is not compelled by prior doctrine.³²⁷ But the rules the Court adopts outside the criminal and campaign expenditure contexts are almost never predictive, but instead they are either narrowly crafted or subject to an uncertain underlying categorization scheme allowing for discretion in future cases.

This holds true even when the Court closely divides along political identity lines, a situation viewed as conducive to consequential precedent.³²⁸ Narrow rules have been adopted by the current Republican-appointed jurists, for instance, in fractured decisions such as *Free Enterprise Fund*, *Heller*, and *Morse*.³²⁹ *Free Enterprise Fund* adopted a rule holding that multi-level, for-cause limitations on the President’s removal power for officers of the United States violate separation of powers principles, although the Court noted that its holding was limited to executive officers rather than other types of governmental officers, such as civil service

325. 553 U.S. 723, 766 (2008). The majority continued to hold that the Detainee Treatment Act of 2005 was not an adequate substitute for habeas corpus relief, although it admittedly failed to “endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus.” *Id.* at 779. The dissents complained about the uncertainties caused for future cases by these standards. *See id.* at 824-26 (Roberts, C.J., dissenting); *id.* at 834-43 (Scalia, J., dissenting).

326. This is also true of the standards articulated in controlling plurality opinions with cross-ideological support. *See, e.g.,* *Baze v. Rees*, 553 U.S. 35 (2008) (plurality opinion); *Randall v. Sorrell*, 548 U.S. 230 (2006) (plurality opinion).

327. *See, e.g.,* *Free Enter. Fund v. Pub. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3154-57 (2010) (adopting rule preventing dual for-cause limitations on the President’s removal power for certain executive officers of the United States); *District of Columbia v. Heller*, 554 U.S. 570, 628-35 (2008) (adopting rule allowing possession of certain arms for self-defensive purposes in the home); *Philip Morris USA v. Williams*, 549 U.S. 346, 353-57 (2007) (employing rule that punitive damages cannot be based on harm to nonparties); *Garcetti v. Ceballos*, 547 U.S. 410, 422-26 (2006) (announcing rule that official job duty speech of public employees receives no constitutional protection from adverse employment action).

328. *See, e.g.,* Lee Epstein, Barry Friedman & Nancy Staudt, *On the Capacity of the Roberts Court to Generate Consequential Precedent*, 86 N.C. L. REV. 1299, 1302 (2008) (contending “that ideologically close majorities are more able to produce consequential decisions”).

329. *See Free Enter. Fund*, 130 S. Ct. 3138 (2010); *Heller*, 554 U.S. 570 (2008); *Morse v. Frederick*, 551 U.S. 393 (2007).

employees, administrative law judges, and military officers.³³⁰ The rule from *Heller* invalidates total bans on handgun possession and operable firearms in the home, but it provides no guidance regarding the constitutionality of other gun control measures (other than noting the potential importance of historical practices).³³¹ *Morse*'s rule allows educators to restrict student speech during school or at a school event that is "reasonably viewed as promoting illegal drug use" but without impacting the myriad of other types of student expression.³³² Thus, even though a sharply divided Court employed rules in each of these cases, the specificity of the articulated rules will provide the Court flexibility in ascertaining whether to extend them to other related contexts, diminishing their predictability for future controversies.

In other cases, the Roberts Court adopts a rule that superficially appears predictive but is subject to an underlying categorization requirement that contravenes much of the provided guidance. As one example, *Garcetti v. Ceballos* held, in a closely divided opinion, that the First Amendment does not protect the speech of government employees made pursuant to their official job duties from retaliatory adverse employment actions.³³³ But the Court did not provide any meaningful guidance regarding the scope of "official job duties," merely referring to it as a "practical" query, which has led to conflicting methodological approaches in the lower courts.³³⁴ Thus, the imposition of a rule in this situation has not assisted predictability in many public employee speech cases, but it has limited judicial discretion once the determination is made that the speech was part of the employee's professional responsibilities.³³⁵

Another example is *Philip Morris USA v. Williams*, which was authored by Justice Breyer and joined by Chief Justice Roberts and Justices Kennedy, Souter, and Alito.³³⁶ *Philip Morris* announced a rule preventing the imposition of punitive damage awards predicated on harm to nonparties, while allowing such nonparty harm to be considered for ascertaining the reprehensibility of the defendant's actions.³³⁷ Despite the subtlety of this distinction, the Court provided

330. 130 S. Ct. at 3160-61.

331. 554 U.S. at 628-35.

332. 551 U.S. at 403-09.

333. 547 U.S. 410, 420-24 (2006).

334. See, e.g., Rhodes, *supra* note 69, at 1181-98.

335. See, e.g., Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 11-20 (2009); George Rutherglen, *Public Employee Speech in Remedial Perspective*, 24 J.L. & POL. 129, 164-67 (2008); Paul Secunda, *Whither The Pickering Rights of Federal Employees?*, 79 U. COLO. L. REV. 1101, 1108 (2008).

336. 549 U.S. 346 (2007).

337. *Id.* at 353-57.

scant clues on its implementation, necessitating future judicial discretion.³³⁸ Likewise, the broad rule requiring a historical tradition to support the exclusion of a category of utterances from the scope of the First Amendment pronounced in the nearly unanimous holding in *United States v. Stevens* does not provide as much guidance as the Court indicated.³³⁹ Indeed, the opinion's author disagreed with its application in a case the very next year.³⁴⁰ Moreover, the scope of one of these traditional exceptions, the criminal conduct exception, is potentially very broad, and neither its historical nor precedential scope has been definitively resolved.³⁴¹ So, even when employing rules, the Court frequently leaves issues open for future resolution rather than establishing a predictive rule for future controversies.

The predominant exceptions to this practice are the criminal procedure, criminal sentencing, and campaign expenditure decisions. Yet the predictive rules in criminal cases are split between liberal and conservative outcomes. The most predictive and categorical rules announced so far by the Roberts Court—issued over the dissent of several of the Republican-appointed jurists—preclude the imposition of the death penalty or life without the possibility of parole for certain nonhomicidal crimes.³⁴² The Court also adopted a per se rule that the denial of a criminal defendant's "choice of counsel" is automatically reversible error,³⁴³ while continuing two lines of predictive rules favoring criminal defendants that first appeared during the Rehnquist Court. One of these rules prohibits, as a violation of the right to be tried by a jury, judicial factfinding that

338. See, e.g., Michael P. Allen, *Of Remedy, Juries, and State Regulation of Punitive Damages: The Significance of Philip Morris v. Williams*, 63 N.Y.U. ANN. SURV. AM. L. 343, 378-381 (2008).

339. 130 S. Ct. 1577, 1584-86 (2010). The Court explained that, as a historical and traditional matter, certain categories of utterances were outside the typical First Amendment protections, such as obscenity, defamation, fraud, incitement, and "speech integral to criminal conduct." *Id.* at 1584. The Court rejected the government's attempt to add depictions of animal cruelty as an unprotected category under a cost-benefit analysis, instead reasoning that such unprotected categories required a documented historical tradition of being outside constitutional protection. *Id.* at 1585-86.

340. See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2747 (2011) (Alito, J., concurring, joined by Roberts, C.J.).

341. See Charles W. "Rocky" Rhodes, *The Historical Approach to Unprotected Speech and the Quantitative Analysis of Overbreadth in United States v. Stevens*, 2010 EMERGING ISSUES 5227 (LexisNexis July 2010); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1311-26 (2005).

342. See *Graham v. Florida*, 130 S. Ct. 2011, 2030-34 (2010) (holding Eighth and Fourteenth Amendments categorically prohibit imposition of life imprisonment without the possibility of parole for nonhomicidal juvenile offenses); *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (holding Eighth Amendment categorically prohibits the death penalty for the crime of nonhomicidal child rape).

343. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145-52 (2006).

increases a defendant's sentence beyond the punishment range specified for the offense established by the jury's verdict or supported by the defendant's guilty plea.³⁴⁴ The other rule (although it now depends on an underlying multi-factor categorization standard)³⁴⁵ employs the Confrontation Clause to protect criminal defendants from the admission of testimonial evidence in the absence of witness unavailability and an opportunity for cross-examination.³⁴⁶ These rules favoring criminal defendants are no less formalistic than the Court's rules supporting law enforcement investigations, such as a suspect's invocation of the right to remain silent must be explicit and unambiguous;³⁴⁷ the bar against a subsequent waiver after asserting the right to counsel expires after fourteen days;³⁴⁸ the good faith exception to the exclusionary rule encompasses both negligent mistakes attenuated from the search and reliance on binding appellate precedent;³⁴⁹ a search of a parolee may be conducted without suspicion;³⁵⁰ the failure to knock-and-announce does not warrant exclusion of any subsequently attained evidence;³⁵¹ and the exigent circumstances exception to the warrant requirement applies even if police officers contributed to the exigency, assuming the officers did not actually violate or threaten to violate the Fourth

344. *Pepper v. United States*, 131 S. Ct. 1229, 1243-45 (2011).

345. *Michigan v. Bryant*, 131 S. Ct. 1143, 1155-62 (2011). Justice Sotomayor's majority opinion explained that, for a statement to police to be a "testimonial statement" under the Confrontation Clause, it had to be "procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Id.* at 1155. In making this primary purpose determination, the Court highlighted numerous relevant factors, including standard rules of hearsay and, in the context of an ongoing emergency, the statements and actions of the declarant and the interrogators and all the circumstances of the encounter, including "the scope of the emergency," the danger posed by the emergency, the type of crime involved and weapons used, "the victim's medical state," the formality of the interrogation, and the overall reliability of the statement. *Id.* at 1155-62. Justice Scalia's dissent objected stringently to this multi-factor balancing approach. *See id.* at 1174-76 (Scalia, J., dissenting).

346. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2713-19 (2011) (holding admission of forensic laboratory report for testimonial purposes supported by the in-court testimony of an analyst who neither signed the report nor performed or observed the reported test violated the Confrontation Clause); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531-33 (2009) (holding admission of sworn certificates regarding forensic analysis of seized substances violated the Confrontation Clause); *Giles v. California*, 554 U.S. 353, 361-68 (2008) (holding defendant does not forfeit Sixth Amendment right to confrontation by making witness unavailable to testify due to a wrongful act not done for the purpose of preventing the testimony of the witness).

347. *Berghuis v. Thompson*, 130 S. Ct. 2250, 2260-65 (2010).

348. *Maryland v. Shatzer*, 130 S. Ct. 1213, 1226-27 (2010).

349. *Davis v. United States*, 131 S. Ct. 2419, 2426-34 (2011); *Herring v. United States*, 555 U.S. 135, 145-48 (2009).

350. *Samson v. California*, 547 U.S. 843, 850-52 (2006).

351. *Hudson v. Michigan*, 547 U.S. 586, 599 (2006).

Amendment.³⁵²

The Court's preference for articulating categorical constitutional criminal procedure rules might be defended on the basis that the need for predictability is enhanced in this context. Rules are preferable, as a general matter, when a judicial decision must be applied by numerous actors (especially outside the legal profession) and under circumstances preventing the reflection required for a balancing standard.³⁵³ Because many of the Court's criminal procedure decisions are directed at law enforcement, such as determining when a search is reasonable or whether a suspect has properly invoked the right of silence or waived the right to counsel, the articulation of categorical rather than incremental rules is preferable, providing better guidance in advance of subsequent police conduct, which often must be made on a split-second basis.³⁵⁴ Although this does not provide a ground for evaluating the propriety of the content or substance of the announced rules, it does support the Court's preference for predictive rules in this context over its typically more minimalist approach.

This same rationale could also support the Court's preference for predictive rules in campaign expenditure cases, another frequently recurring, time-sensitive situation requiring *ex ante* guidance. The Court's campaign expenditure decisions acknowledge the chilling effect that vague or complex standards have on political speakers attempting to disseminate a particular message, especially under the short time frames inherent in influencing political elections.³⁵⁵ Once again, this does not support the content or substance of the announced campaign expenditure rules but may explain the need for predictive rules over the incremental rules typically favored by the Court.

Yet this leads to another question: why does the Roberts Court

352. *Kentucky v. King*, 131 S. Ct. 1849, 1862-63 (2011).

353. *Cf.* Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1913 (2006).

354. *Cf. King*, 131 S. Ct. at 1859-61 (rejecting various approaches to exigent circumstances searches that would enhance uncertainty); *Arizona v. Gant*, 129 S. Ct. 1710, 1724 (2009) (Scalia, J., concurring) (discussing need to provide clear guidance to arresting officers). This rationale does not, however, support the Court's categorical approach to banning the imposition of certain sentences. The Court in these cases has highlighted the necessity of a rule, even though it may be overinclusive, to prevent any intolerable risk of a sentence in violation of the Eighth Amendment. *Graham v. Florida*, 130 S. Ct. 2011, 2030-33 (2010); *Kennedy v. Louisiana*, 554 U.S. 407, 420-21 (2008).

355. *See Citizens United v. FEC*, 130 S. Ct. 876, 889-95 (2010). The decisions highlight that the First Amendment's guarantees do "not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day." *Id.* at 889.

prefer, in the absence of contrary precedent, to employ incremental rules in resolving most constitutional claims? As discussed previously, these narrow rules provide minimal predictability in advance of an actor's conduct.³⁵⁶ At the same time, these rules do not provide the same degree of flexibility as a standard.³⁵⁷ So what purpose do they serve?

One potential purpose is to respect the judicial function and restrain the judiciary, while at the same time establishing a dialogue between the Court and the political branches. By ruling narrowly, with a foreshadowing of the Court's future direction and an opportunity to obtain the public's response, the Court is ensuring that it maintains its legitimacy and remains within the proper confines of its institutional role in the separation of powers. The narrow rules provide some cabining of judicial discretion, yet still provide an opportunity for the Court to limit or modify outcomes if the Court did not initially have the requisite information for a predictive rule, the announced rule becomes unworkable in certain respects, or the rule's extension proves contrary to the larger American constitutional tradition. While a modest and flexible approach, the use of incremental rules still better comports with the conception of the rule of law than balancing standards, which provide essentially no constraint on future case outcomes.

On the other hand, it is conceivable that there is another purpose underlying the Court's current preference for incremental rules. By continually crafting narrow rules, each of which individually appears moderate, the Court might eventually be able to construct an entirely new constitutional architecture. Thus, the narrow holding in *Northwest Austin Municipal Utility District No. One v. Holder* subsequently becomes the foundation to invalidate the Voting Rights Act;³⁵⁸ the holding in *Citizens United* eventually dismantles campaign contribution as well as expenditure limits;³⁵⁹ and *Salazar v. Buono* is the first step in fundamentally altering Establishment Clause jurisprudence.³⁶⁰

It is too early in the Roberts Court to know definitively which purpose these incremental rules will serve. The Court on the whole typically has been minimalist (with some exceptions), but whether this minimalism is intended to create or will result in a new constitutional edifice decades from now is uncertain. Perhaps the answer partially depends on the particular constitutional claim at issue—even though the Roberts Court has not inaugurated a

356. See *supra* notes 327-32 and accompanying text.

357. See *supra* notes 333-41 and accompanying text.

358. See 129 S. Ct. 2504, 2512-13 (2009); see also *supra* Part III.C.

359. See 130 S. Ct. 876, 916-17 (2010); see also *supra* Part III.C.

360. See 130 S. Ct. 1803, 1819-21 (2010); see also *supra* Part III.C.

conservative constitutional revolution, the evolution of some aspects of constitutional doctrine is ongoing.

IV. THE FUTURE OF THE ROBERTS COURT?

The caricatures of the Roberts Court as a revolutionary conservative constitutional bastion do not withstand scrutiny. The Roberts Court has a better record of adhering to constitutional precedent than any other Court in the last fifty years.³⁶¹ It has been selective in reviewing the constitutionality of state and local laws, invalidating fewer laws than any other Court since the Korean War.³⁶² Its decisions typically comport with the precepts of minimalism, avoiding constitutional issues when possible, respecting the holdings of prior decisions, resolving controversies in small steps, relying on incremental rules, and providing an opportunity for a dialogue on constitutional meaning.³⁶³

Although there are notable exceptions to this approach, the resulting changes in constitutional doctrine are not even consistently conservative, much less revolutionary. While the Court has granted more leeway for law enforcement personnel to conduct investigations,³⁶⁴ it has simultaneously provided greater protections to criminal defendants from out-of-court witness statements and from the imposition of certain punishments.³⁶⁵ The Court is recognizing greater protections for some individual rights favored by political conservatives, such as campaign speech rights, protections against reverse discrimination, and self-defensive gun rights, but it has not disavowed protections for other rights and liberties favored by liberals, including particularly free speech rights.³⁶⁶

The most notable change to constitutional doctrine under the Roberts Court after six years is the heightened scrutiny of political and electoral expenditures. The Court embraces the view that expenditures for the independent dissemination of a political message—even messages related to political candidates—constitute pure political speech.³⁶⁷ As a result, direct restrictions on expenditures, and even indirect restrictions that chill expenditures to some degree, are presumptively invalid and may be sustained only if the government proves that no other mechanism exists to serve its compelling public objectives.³⁶⁸ Yet despite this change from the

361. *See supra* Part III.A.

362. *See supra* Part III.B.

363. *See supra* Part III.C-D.

364. *But see* *Arizona v. Gant*, 129 S. Ct. 1710, 1719 (2009) (restricting law enforcement's ability to search vehicles of a recent arrestee).

365. *See supra* Part III.C-D.

366. *See supra* Part III.

367. *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 898-900 (2010).

368. *See, e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct.

Rehnquist Court's less rigorous scrutiny of regulations governing campaign expenditures,³⁶⁹ the Court is not poised to invalidate campaign contribution limits or disclosure requirements that are closely drawn to serve sufficiently important interests.³⁷⁰ Indeed, the Court summarily affirmed a lower court's judgment upholding BCRA's soft money ban to political parties.³⁷¹ While direct or indirect restrictions on independent expenditures to disseminate a message related to a political campaign will be invalidated under strict scrutiny, reasonable campaign contribution limits and disclosure requirements apparently will be upheld.

The Roberts Court likewise will continue to apply exacting scrutiny to any governmental racial classification, preference, or consideration, even those designed to secure diversity in higher education or racially-integrated learning environments.³⁷² While these diversity objectives apparently will be viewed as compelling governmental objectives, the Court will demand that governments use race in the least restrictive means feasible to accomplish these goals.³⁷³ This more rigorous scrutiny, rather than the less demanding approach used in some Rehnquist Court decisions,³⁷⁴ will invalidate some—but not all—state-sponsored diversity measures that might have been upheld previously.

Some gun control regulations will fall under the Second Amendment's right to bear arms for individual defense, but not to the extent desired by gun enthusiasts. Although the Court has not fully outlined the applicable scope of Second Amendment protections

2806, 2818-28 (2011) (invalidating public financing scheme providing matching funds based on expenditures on opponent's behalf); *Davis v. FEC*, 554 U.S. 724, 738-40 (2008) (holding federal law raising the campaign contribution limits for an opponent when a self-financing candidate exceeded certain expenditure limits imposed an unconstitutional penalty on the exercise of First Amendment rights).

369. *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part by Citizens United*, 130 S. Ct. at 913.

370. *See, e.g., Citizens United*, 130 S. Ct. at 886; *Randall v. Sorrell*, 548 U.S. 230, 243-44 (2006) (plurality opinion). But Justices Scalia, Kennedy, and Thomas would prefer to overrule limitations on campaign contributions, *Randall*, 548 U.S. at 264 (Kennedy, J., concurring) & 265-66 (Thomas, J., concurring). Justice Alito has not expressed an opinion. *Id.* at 263 (Alito, J., concurring).

371. *Republican Nat'l Comm. v. FEC*, 130 S. Ct. 3544 (2010) (mem. order affirming *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010)). "Justice Scalia, Justice Kennedy, and Justice Thomas would [have] note[d] probable jurisdiction and set the case for oral argument." *Id.*

372. *Cf. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (reaffirming the rule that government actions based on race will be subject to strict scrutiny).

373. *See id.* at 720-22, 735.

374. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 327-44 (2003) (upholding a law school's use of race as a "plus factor" in the admissions process because it was narrowly tailored to achieve a compelling interest).

for individuals, locations, and weapons, the Court specified that “felons and the mentally ill,” “sensitive places such as schools and government buildings,” and “dangerous and unusual” weapons are outside this constitutional guarantee.³⁷⁵ The Court has also not specified either the type of regulations that infringe on the self-defensive right or the applicable level of scrutiny for infringements but has noted that “conditions and qualifications on the commercial sale of arms” are valid.³⁷⁶ These limitations generally comport with pre-existing state jurisprudence regarding similar state constitutional individual self-defensive arms rights, which the Court presumably will rely upon to invalidate complete bans on common self-defensive weapons in nonsensitive areas while upholding most other types of firearms regulations.³⁷⁷

A shift in Establishment Clause jurisprudence is also likely under the Roberts Court, allowing government greater leeway to include additional religious symbolism in public places and events. Although the Roberts Court so far has refrained from making any “sweeping pronouncements” or “categorical rules” regarding the Establishment Clause, the current Republican-appointed Justices favor relaxing the limits on governmental religious symbolism.³⁷⁸ Assuming such symbolism is not an effort to proselytize, the Court presumably will allow it, disavowing the endorsement test and instead examining whether the government is pressuring nonadherents.³⁷⁹ But the Court is not poised to accept either government-sponsored prayer and daily Bible reading in the public schools or state-supported taxation for religious purposes.³⁸⁰

A few aspects of constitutional doctrine are thus undoubtedly evolving in a politically conservative direction under the Roberts Court. But none of this evolution is revolutionary, either in timing or degree. The conservative doctrinal changes generally are proceeding incrementally, one step at a time, respecting most prior precedent. Their impact is not vast—nothing like the conservative constitutional world preferred by Justice Thomas, which would hold unconstitutional any regulations of political campaigns or governmental consideration of race, while upholding any

375. *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008) (citations omitted).

376. *Id.*

377. *Cf. id.* at 629-30 (relying on state laws and state judicial decisions).

378. *Salazar v. Buono*, 130 S. Ct. 1803, 1816-20 (2010) (opinion of Kennedy, J.); *id.* at 1821 (Alito, J., concurring).

379. *Id.* at 1816 (citing *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring)). I've referred to this approach as the “look away” standard. Charles W. “Rocky” Rhodes, *Public Displays of Religious Imagery & Symbols*, TEX. LYCEUM 22D PUB. CONF. J. 29, 35 (2007), available at http://www.texaslyceum.org/media/staticcontent/journals/Journal_-_2007_Pubcon.pdf.

380. *Lee v. Weisman*, 505 U.S. 577 (1992).

governmental action promoting a state-sponsored religion or restricting abortion or underage speech rights.³⁸¹ Even assuming some other current Republican-appointed jurists share in part Justice Thomas' sentiments, the Roberts Court as a whole understands—and has abided by—Justice Robert H. Jackson's advice: "Moderation in change is all that makes judicial participation in the evolution of the law tolerable."³⁸² Under the present makeup of the Court, a conservative constitutional revolution is neither here nor imminent.

381. See *supra* Part II.C.

382. Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 334 (1944).