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THE OCTOBER 2008 TERM: FIRST AMENDMENT AND THEN SOME

*Burt Neuborne**

I. INTRODUCTION: OF SYLLOGISMS AND JUDICIAL POWER

Liberals must acknowledge a dirty little secret about American constitutional law; a secret that the Warren Court made apparent, though it had existed from the day John Marshall asserted the power of judicial review in a Constitution that says nothing about it.¹ The secret is that there is no serious theory explaining or justifying what courts actually do when they strike down a statute as unconstitutional.² The Warren years were enormously important in moving the country forward. I do not know what we would have done without the wisdom and courage of the Court. But when you start looking for jurisprudential theory to explain what it was that the Warren Court was actually doing when it re-wrote most of American constitutional law, and what it has been doing during the Rehnquist and Roberts Court's attempted counter-reformation, when it re-wrote the rest, it is clear that there is neither textual support in the Constitution, nor a consensus political theory, that justifies much of judicial review.³

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¹ Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1263 (2004).

² *Id.* at 1258.

³ See David W. Tyler, *Clarifying Departmentalism: How the Framers' Vision of Judicial and Presidential Review Makes the Case for Deductive Judicial Supremacy*, 50 WM. &

The official story that we tell ourselves sounds absurd to sophisticated lawyers. It was just retold in mind-numbing detail at Justice Sotomayor's confirmation hearings. The story we heard was that Supreme Court Justices really do not have much power themselves; they just apply the law made by someone else.⁴ Under John Marshall's standard model, judging is described as the operation of a syllogism machine, in which the major premise is an external command that comes from a democratic actor like the legislature, or the Founders.⁵ The minor premise is an objective, pre-existing set of facts found by the Court; all the judge does in such a model is identify the external legal command, put it together with the objective facts, and reach a logically imposed conclusion—the judge is just a robotic operator of the syllogism machine.⁶

Anybody who has anything to do with law or language understands that the so-called external democratic commands are almost always ambiguous, sometimes terminally so, and that the so-called external facts are often constructed by the court; indeed, there is a serious philosophical question about whether there was ever an objective reality to find. In fact, the construction of the legal major premise often comes from inside the judge, and the factual minor premise is often a function of the perception of the judge or jury—not some objective reality.

The official version of what judges do is, however, very different.⁷ Heaven help a judge who stands up and honestly says, "My decision is not coming from outside me; it is coming from inside

MARY L. REV. 2215, 2230 (2009).

⁴ Thomas E. Baker, *Constitutional Theory in a Nutshell*, 13 WM. & MARY BILL RTS. J. 57, 66 (2004).

⁵ Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 421 (1992).

⁶ *Id.*

Pure formalists view the judicial system as if it were a giant syllogism machine, with a determinate, externally-mandated legal rule supplying the major premise, and objectively "true" pre-existing facts providing the minor premise. The judge's job is to act as a highly skilled mechanic with significant responsibility for identifying the "right" externally-mandated rule, but with little legitimate discretion over the choice of the rule.

Id.

⁷ See *id.* at 420 (stating—with regards to realism—that "[t]he value of her [the judge's] work is measured, not by the rigor of the search for proper ingredients, but by the extent to which the final product conforms to the tastes of the best customers.").

me.” Picture Justice Sotomayor telling such a story to the Senators. Picture the Democratic Senators holding their heads. Picture the Republican Senators all shaking their heads because they live (or pretend to live) in a cartoon world in which there is no ambiguity, and every text is an objectively knowable command. A world in which every fact is objective and well-known, in their cartoon world, every fact is objective and well-known and all a good judge has to do is avoid allowing subjective prejudice to warp the objectively existing commands that are coming from outside.

During the Sotomayor hearings, Democrats did not want to question this fantasy because they did not want to raise any hard questions. All they wanted to do was to run the clock out on the hearings. Justice Sotomayor was delighted to play along with a series of questions that essentially have fluff answers.⁸ In fairness to her repeated assertions that all she did as a lower court judge was to apply the law to facts found by the court, it may be that lower court judges are more constrained than Supreme Court Justices—there may be two institutionally different mechanisms here—, but Justice Sotomayor wisely did not want to get involved in that game.⁹

What is so interesting about the 2008 Term is watching the liberal Justices as they tried to conduct constitutional adjudication—in the absence of a theory that has some sort of consensus power to it—in the teeth of conservative Justices who insist that anything that goes beyond the syllogism machine is illegitimate judging. This is why Justice Scalia is such a devoted textualist.¹⁰ He claims that fidelity to literal (or originalist) text is the external command that authorizes a judge to act.¹¹ It is also why Justice Thomas is such a literalist.¹² He will not act without a command from outside.¹³ And it is why the liberals are so confused and foggy in their opinion writing, because they know they are not responding to an outside command.

⁸ Burt Neuborne, *Judging is Both Robotic and Discretionary: Senators Missed an Opportunity to Ask how Sotomayor will Approach a Case for Which Clear Guidance Does Not Exist*, NAT'L L.J., July 27, 2009, at 43.

⁹ See *id.*

¹⁰ Stephen Satterfield, *A New Interpretation, An Absurd Result: How HHS is Short-Changing Children with Severe Mental Illness*, 77 GEO. WASH. L. REV. 1114, 1131 (2009).

¹¹ Neuborne, *supra* note 5, at 435.

¹² Roderick M. Hills, Jr., *The Problem of Canonical Ambiguity in Ali v. Federal Bureau of Prisons*, 44 TULSA L. REV. 501, 504 (2009).

¹³ See *id.*

They are breaking ties about ambiguous external commands that can be plausibly read in at least two ways. But without a theory, such an exercise of judicial discretion simply cannot be admitted.¹⁴ Since they cannot admit to subjective decision-making, they have to pretend that they are responding to an external command from text or history.

Consider *District of Columbia v. Heller*.¹⁵ The conservative majority went through an elaborate exercise in discovering the “true” history of the Second Amendment. As though there was such a “true” history to be discovered, and as though what people thought about bore-loading muskets in the 18th century should govern what we think about 9mm Magnums in the 21st century¹⁶

The liberal dissent followed suit. Their history was different, leaving an originalist tie that had to be broken. The fact is that originalism in hard cases does not deliver any greater certainty about an external command than any other theory of judging.

No one talked about the real issue: how the Second Amendment should be read in a 21st century world.

Sadly, these originalist jurisprudential charades are not novel. In *Boumediene v. Bush*,¹⁷ a different majority—written by Justice Kennedy and supported the liberal Justices—went through a similar originalists charade discussing which English pre-revolutionary practice dealing with habeas corpus in the fifty years prior to the American Revolution governed the modern availability of the writ. One side pointed to the availability of habeas corpus for aliens confined on the Isle of Man. The other stressed the unavailability of habeas for aliens confined in Scotland¹⁸—as if 18th century pre-revolutionary British habeas corpus practice should tell us how to allocate habeas corpus to alleged enemy combatants detained by the Executive in the 21st century.¹⁹ In any event, as with *Heller*, history left us with a tie.

To counter the majority’s originalist argument in *Heller*, the

¹⁴ See Alan Gura, *Heller and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvie Wilkinson*, 56 UCLA L. REV. 1127, 1134 (2009).

¹⁵ 128 S. Ct. 2783 (2008).

¹⁶ *Id.* at 2793, 2797, 2805.

¹⁷ 128 S. Ct. 2229 (2008).

¹⁸ *Id.* at 2249-51.

¹⁹ *Id.* at 2250-51.

liberals had to engage in their own historical charade.²⁰ Why? Because they do not have any other explanation for where their power comes from. Under the *Marbury* syllogism machine model, it had to come from an external source, which was the historical external source that Justice Scalia was pushing.²¹ Justice Stevens was forced to say, “no,” you have the wrong external source.²² Justice Scalia was looking to the Scottish external source, and Justice Stevens was looking to the Isle of Man external source. None of them would acknowledge that what was happening was a judicial risk allocation. In *Heller*, measuring the risks of guns in urban settings against the risk of government oppression if government can take the guns away.²³ In *Boumediene*, measuring the risk of releasing a potential terrorist against the risk of uncontrolled Executive detention.

The 2008 Term was a triumph of conservative thinking about Supreme Court decision-making.²⁴ It is Justice Scalia’s intellectual triumph after years of insisting that you must consult the text.²⁵ The text tells you what to do.²⁶ If you go beyond the text, you must have some very powerful reason and explanation.²⁷ Often, it is history that will let you go beyond the text.²⁸ Sometimes, it is deference to another institution that will let you go beyond the text, but you never

²⁰ See *Heller*, 128 S. Ct. at 2838-39 (Stevens, J., dissenting).

²¹ *Id.*

The Court’s reliance on Article VII of the 1689 English Bill of Rights—which, like most of the evidence offered by the Court today . . . is misguided both because Article VII was enacted in response to different concerns from those that motivated the Framers of the Second Amendment, and because the guarantees of the two provisions were by no means coextensive.

Id. (internal citation omitted).

²² See *Id.* at 2836-38.

²³ Pamela S. Karlan, *Bullets, Ballots, and Battles on the Roberts Court*, 35 OHIO N.U. L. REV. 445, 452 (2009) (“[W]hether the Court admits it or not, the Justices care about consequences. They engage in interest balancing: the social costs of permitting weapons into schools or government buildings—or onto airplanes or by minors or persons with criminal records—outweigh respect for the individual right to keep and bear arms.”).

²⁴ Gura, *supra* note 14, at 1127-28.

²⁵ Nancy S. McCahan, *Justice Scalia’s Constitutional Trinity: Originalism, Traditionalism and the Rule of Law as Reflected in His Dissent in O’Hare and Umbehr*, 41 ST. LOUIS U. L.J. 1435, 1436 (1997).

²⁶ *Id.* at 1436-37.

²⁷ See *id.* at 1438.

²⁸ *Id.* at 1439.

go beyond the external to go inside and consult your own values.²⁹ The liberals are baffled.³⁰ They know that such a description of the reality of judging is wrong, both descriptively and normatively.³¹ They know that is too limited a vision, but there is no coherent alternative on the horizon.³²

To me, the most interesting thing during the 2008 Term was the forty statutory construction cases.³³ Over half the Term's cases grappled with statutory text.³⁴ *Northwest Austin Municipal Utility District Number One v. Holder*³⁵ is so interesting because eight Justices finally appear to have come to a tentative agreement on the relationship between literalism, contextualism, structure, and democratic purpose in dealing with text.³⁶ Maybe the text wars are finally coming to an end.

That the issue of how to deal with text so dominates the Supreme Court's agenda is a triumph for Justice Scalia. While Justice Souter's stubborn insistence on holistic, purposive interpretation of text has significantly softened Scalia's initial formulations, the move to text and the possible truce in *Northwest Austin* was Justice Scalia's doing.³⁷ When Justice Scalia joined the Supreme Court and began to argue about text, he was laughed at.³⁸ After a career on the Court, Justice Scalia has everybody talking about text, even if they do not all say the same thing.³⁹ The liberals start with text; the conservatives start with text. All because, in the absence of a more sophisticated

²⁹ See *id.* at 1464, 1468.

³⁰ See Rachel Morris, *Tipping Back the Scales: How Obama can Reverse Justice's Long Slow Slide to the Right*, WASH. MONTHLY, Mar. 1, 2009, at 37.

³¹ See Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551, 1558 (2009).

³² See Morris, *supra* note 30, at 37.

³³ SCOTUSBLOG, END OF TERM "SUPER STAT PACK" (2009), <http://www.scotusblog.com/wp/wpcontent/uploads/2009/06/full-stat-pack.pdf> (analyzing the 2008 Term of the United States Supreme Court, including all trends, statistics, and decisions of the Court).

³⁴ *Id.* at 11, 13-27.

³⁵ 129 S. Ct. 2504 (2009).

³⁶ See *id.* at 2514-15, 2517.

³⁷ See Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 665, 684-85 (2009) ("[Originalism] raises profound questions both as to whether the original understanding can or should give authoritative guidance and, if so, how exactly one should go about mining that guidance.").

³⁸ Roger Colinvaux, *What is Law? A Search for Legal Meaning and Good Judging Under a Textualist Lens*, 72 IND. L.J. 1133, 1134-36 (1997).

³⁹ See Gura, *supra* note 14, at 1130, 1147-48; John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2014-15 (2009).

theory of judicial review, we need an external command.⁴⁰

There is a huge irony here. Every democracy since the Second World War, even Great Britain, has put a serious judicial review component into its constitution or organic law. Great Britain did it by treaty, giving its courts power to review legislation under the European Human Rights Convention.⁴¹ Even France, once the bastion of parliamentary supremacy, has a constitutionally established Conseil Constitutionnel, which functions very much as a Supreme Court.⁴² Virtually every democracy now has a constitutional court that is designed, in some way, to adopt (or adapt) the ‘American experience with judicial review,’ which is thought to be our most important contribution to political science and democratic governance.⁴³

Everywhere else, constitutional judges are considered protectors of individual rights and democracy, with the power to adapt the constitutional text to modern circumstances.⁴⁴ Ironically, the mother ship—the United States Constitution—has no textual support for such a role. There simply is no text in the Constitution granting the Supreme Court the power of judicial review.⁴⁵ Lacking a textual foundation, American judges are at a loss about where their power comes from.⁴⁶ In the absence of a better theory, the easiest explanation is John Marshall’s syllogism machine.⁴⁷ That is the Federalist Society’s intellectual position about what judges do.⁴⁸ In contrast, there is very little on the left that seeks to provide a coherent alternative to the syllogism machine.⁴⁹ One can see the Court shifting, as the law almost

⁴⁰ Gura, *supra* note 14, at 1134, 1148.

⁴¹ See Miguel Schor, *Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty*, 16 MINN. J. INT’L L. 61, 100-01 (2007); Justin S. Teff, *The Judges v. The State: Obtaining Adequate Judicial Compensation and New York’s Current Constitutional Crisis*, 72 ALB. L. REV. 191, 214 (2009); Bernadette Meyler, *Daniel Defoe and the Written Constitution*, 94 CORNELL L. REV. 73, 73 n.1 (2008).

⁴² See Burt Neuborne, *Hommage À Louis Favoreu*, 5 INT’L J. CONST. L. 17, 22 (2007).

⁴³ See Schor, *supra* note 41, at 91, 100-01.

⁴⁴ Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 815 (1995).

⁴⁵ Tyler, *supra* note 3, at 2230.

⁴⁶ See Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional “Interpretation,”* 58 S. CAL. L. REV. 551, 601-02 (1985).

⁴⁷ See Neuborne, *supra* note 5, at 420.

⁴⁸ See Hon. Frank H. Easterbrook, *On Constitutional Changes to Limit Government*, 102 NW. U. L. REV. 469, 471 (2008).

⁴⁹ See Book Note, *The Constitution in Full Bloom*, 104 HARV. L. REV. 645, 648-49 (1990).

always does when one side has a set of powerful ideas, and there is nothing but intuition on the other.

Of all the constitutional courts (and gin joints) in the world, the only one that is afraid to interpret its constitutional text in a modern fashion is ours.⁵⁰ What an incredible irony.

II. FIRST AMENDMENT CASES

This was a very strange First Amendment term. Traditionally, there are almost always nine or ten First Amendment cases in a term.⁵¹ During the 2008 Term, there were only five⁵² and, of the five, only one may be considered important.⁵³ While *Citizens United v. FEC*, being heard on September 9, 2009, could become important,⁵⁴ there has not been a terribly significant set of First Amendment decisions thus far in the 2008 Term.⁵⁵

⁵⁰ See, e.g., Lindsay E. Lippman, Republican Party of Minnesota v. White: *The End of Judicial Election Reform?*, 13 CORNELL J.L. & PUB. POL'Y 137, 141 (2003) (arguing that judicial appointment and nomination is derived from the political process and, therefore, judges are reluctant to deviate from the directives of the party who elected them despite the decision's fairness).

⁵¹ See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploitation of Constitutional Salience*, 117 HARV. L. REV. 1765, 1792 n.139 (2004).

⁵² See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009); *Locke v. Karass*, 129 S. Ct. 798 (2009); *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009); *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093 (2009).

⁵³ *Fox Television*, 129 S. Ct. at 1805.

⁵⁴ See, e.g., *Citizens United v. Fed. Election Comm'n*, 129 S. Ct. 2893 (2009). Since the decision was announced after this talk, I will spare you my fulminations over *Citizens United*, and what a mockery it makes of any theory of judicial neutrality to treat large for-profit business corporations as creatures endowed with First Amendment rights.

⁵⁵ See *Ashcroft*, 129 S. Ct. at 1948 (noting that the Court has long found "[w]here the claim is invidious discrimination in contravention of the First and Fifth Amendment . . . the plaintiff must plead and prove that the defendant acted with discriminatory purpose"); *Fox Television*, 129 S. Ct. at 1805 (determining whether the Federal Communication Commission can adequately justify the prohibition of "indecent expletives even when the offensive words are not repeated"); *Pleasant Grove City*, 129 S. Ct. at 1129 (considering "whether the Free Speech Clause of the First Amendment entitles a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments were previously erected"); *Ysursa*, 129 S. Ct. at 1101 (holding that a State is not required to "affirmatively assist political speech by allowing public employees to administer payroll deductions for political activities"); *Locke*, 129 S. Ct. at 801-03 (considering whether a local union may charge nonmembers a fee that is paid to the union's national union organization without violating the First Amendment).

A. *FCC v. Fox Television Stations, Inc.*

The first case is *FCC v. Fox Television Stations, Inc.*, the “fleeting expletive case.”⁵⁶ The issue presented was whether the Federal Communications Commission (the “FCC”) has the power to punish a broadcaster for the fleeting use of expletives when they are covering a public event, and somebody at the public event unexpectedly uses an expletive.⁵⁷ Here, the two expletives were “fuck” and “shit.”⁵⁸ In one instance, Nicole Richie said, “Have you ever tried to get cow shit out of a Prada purse?”⁵⁹ The other instance was Cher, who said, “Fuck them.”⁶⁰ Both of these events occurred at Billboard Music Award ceremonies.⁶¹ Richie and Cher are show business figures who each used a single fleeting expletive.⁶² The issue is whether the FCC could impose sanctions.⁶³

Now, the important thing—from a First Amendment standpoint—is that the case said nothing about the First Amendment.⁶⁴ The Supreme Court declined to reach the First Amendment issue.⁶⁵ The case turns solely on an administrative law issue.⁶⁶

Over the years, the FCC had a rule saying that if fleeting expletives were broadcasted through no fault of the broadcaster, with no follow-up, with no connivance, and with no wink and naughty nods, there was no violation of any regulation.⁶⁷ They just happened. In fact, the regulation used to be called “the shit happens regulation.”⁶⁸ It seems that shit happened a little too often, so the FCC changed the

⁵⁶ *Fox Television*, 129 S. Ct. at 1809.

⁵⁷ *Id.* at 1805.

⁵⁸ *Id.* at 1808.

⁵⁹ *Id.* (noting that Richie also used the word “fuck” when she followed up the first utterance by saying, “It’s not so fucking simple.”).

⁶⁰ *Id.*

⁶¹ *Fox Television*, 129 S. Ct. at 1808 (noting that Cher’s utterance was in 2002 and Richie’s was in 2003).

⁶² *Id.* (noting that Cher is a singer and that Nicole Richie appeared on television series).

⁶³ *Id.* at 1805.

⁶⁴ *Id.* at 1811.

⁶⁵ *Id.* at 1819 (“We see no reason to abandon our usual procedures in a rush to judgment without a lower court opinion. We decline to address the constitutional questions at this time.”).

⁶⁶ *Fox Television*, 129 S. Ct. at 1819 (Thomas, J., concurring).

⁶⁷ *Id.* at 1807 (majority opinion).

⁶⁸ *See id.* at 1827 (Stevens, J., dissenting) (noting that an occasional mishap is to be distinguished from a patent attempt at vulgarity).

rule.⁶⁹

The FCC was reacting, obviously, to a strong political constituency, which is one of the dangers of federal regulation.⁷⁰ Political capture can happen to any administrative agency. In this case, political capture happened to the FCC, and, as a result, it responded to a very strong groundswell from the Republican base about coarse language.⁷¹ As a result, the FCC changed its rule and made both Richie's and Cher's use of coarse language violations of the Act.⁷² After a derisory process, the FCC announced that it would prosecute and punish fleeting expletives.⁷³

The FCC prosecuted Fox Television ("Fox"), the network that aired the Billboard Music Awards, under the Act.⁷⁴ The FCC found Fox guilty, but imposed no sanctions. Nevertheless, Fox appealed from the FCC finding.⁷⁵ After all, a violation of the Act on a broadcaster's record is not a good thing, because if it happens again, there can be serious consequences.⁷⁶ The bulk of the Supreme Court's reasoning—the bulk of the writing—is about whether deference should be given to the FCC's judgment in this situation, as a matter of administrative law, in the absence of some special reason for having

⁶⁹ *Id.* at 1834 (Ginsburg, J., dissenting).

The FCC thus repeatedly made clear that it based its "fleeting expletive" policy upon the need to avoid treading too close to the constitutional line What then did it say, when it changed its policy, about *why* it abandoned this Constitution-based reasoning? The FCC devoted 'four full pages of small-type, single-spaced text,' . . . , responding to industry arguments that . . . changes in the nature of the broadcast industry made *all* indecency regulation, . . . , unconstitutional.

Id.

⁷⁰ *Fox Television*, 129 S. Ct. at 1815-16 (majority opinion) ("Indeed, the precise policy change at issue here was spurred by significant political pressure from Congress.").

⁷¹ See Keith Brown & Adam Candeub, *The Law and Economics of Wardrobe Malfunction*, 2005 BYU L. REV. 1463, 1464-65, 1488 (2005) (asserting that a great majority of complaints were sent by "a conservative political group with connections to the Republican Party").

⁷² *Fox Television*, 129 S. Ct. at 1807, 1809.

⁷³ *Id.* at 1808 ("On March 15, 2006, the [FCC] released Notices of Apparent Liability for a number of broadcasts that the Commission deemed actionably indecent, including the two described above.").

⁷⁴ *Id.*

⁷⁵ *Id.* at 1809-10.

⁷⁶ *Id.* at 1836 (Ginsburg, J., dissenting) ("The result is that smaller stations, fearing 'fleeting expletive' fines of up to \$325,000, may simply cut back on their coverage.").

changed the rules.⁷⁷

The Second Circuit essentially imposed an administrative law rule saying that in the First Amendment context, when an agency changes its mind and makes punishable speech that had not been previously punishable, it requires some serious explanation of why it is being done.⁷⁸ If it does not provide a serious explanation, it is a violation of administrative law.⁷⁹ This reasoning is akin to a canon of constitutional avoidance in the context of administrative law making, one which, however, the Supreme Court rejected.⁸⁰

Justice Scalia rejected this reasoning for a five-person majority.⁸¹ He said that the FCC is an administrative agency, and it gets to change its mind without having to explain itself.⁸² If the agency changes its mind and decides that something should be sanctioned, and if nobody challenges its statutory authorization, then the statutory authorization gives it the capacity to shift policy back and forth, even when it has First Amendment implications with relatively thin explanations.⁸³

The FCC did give some explanation, and it did go through some semblance of decision-making, which the Court found to be

⁷⁷ *Fox Television*, 129 S. Ct. at 1810-11 (majority opinion).

⁷⁸ *Id.* at 1810.

In overturning the Commission's judgment, the Court of Appeals here relied in part on Circuit precedent requiring a more substantial explanation for agency action that changes prior policy. . . . We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review.

Id.

⁷⁹ *Id.* at 1810.

⁸⁰ *Id.* at 1811 ("The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts.").

⁸¹ *Fox Television*, 129 S. Ct. at 1811-12.

⁸² *Id.* at 1811.

[An agency] need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.

Id.

⁸³ *Id.* at 1819.

enough.⁸⁴ The dissent wanted to establish a more intense set of norms that an administrative agency had to follow before it could change its rules.⁸⁵

Although the Court refrained from touching the First Amendment,⁸⁶ the First Amendment issue will probably come back to the Court on remand, so the issue is not over.⁸⁷ Interestingly enough, Justice Kennedy went with the majority—Justice Scalia.⁸⁸ If Justice Kennedy is still on the Court when it comes back up, he will likely have a strong opinion, since he has never seen a First Amendment issue that he did not think was important.⁸⁹ It is an open question whether Justice Kennedy will sustain this as a First Amendment matter, even though he was prepared to sustain it as an administrative law matter.⁹⁰

⁸⁴ *Id.* at 1818-19.

⁸⁵ *Fox Television*, 129 S. Ct. at 1830-31 (Breyer, J., dissenting).

To explain a change requires more than setting forth reasons why the new policy is a good one. It also requires the agency to answer the question, 'Why did you change?' And a rational answer to this question typically requires a more complete explanation than would prove satisfactory were change itself not at issue. An (imaginary) administrator explaining why he chose a policy that requires driving on the right-side, rather than the left-side, of the road might say, 'Well, one side seemed as good as the other, so I flipped a coin.' But even assuming the rationality of that explanation for an *initial* choice, that explanation is not at all rational if offered to explain why the administrator *changed* driving practice, from right-side to left-side, 25 years later.

Id. at 1830-31.

⁸⁶ *Id.* at 1819 (majority opinion) (commenting on the dissents' positions).

⁸⁷ *Id.*

⁸⁸ *Id.* at 1822 (Kennedy, J., concurring).

⁸⁹ See Richard G. Wilkins et al., *Supreme Court Voting Behavior: 2002 Term*, 31 HASTINGS CONST. L.Q. 499, 517 (2004) ("Typically, Justice Kennedy tops the chart in First Amendment cases, voting most often in favor of First Amendment claims.").

⁹⁰ *Fox Television*, 129 S. Ct. at 1824 (Kennedy, J., concurring).

Where there is a policy change the record may be much more developed because the agency based its prior policy on factual findings. In that instance, an agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so. An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.

Id.

B. *Pleasant Grove City v. Summum*

The second case of importance this Term was *Pleasant Grove City v. Summum*. This case involved a fringe religious group that insisted that a town put a permanent monument to its religion in a public park because there were other such monuments in the park.⁹¹ The town had several permanent monuments, one of which was a Ten Commandments monument.⁹² Summum said, given all these other monuments, we have an equal right to have our monument in the park.⁹³ The Supreme Court said “no,” holding that the religious group was confusing two issues.⁹⁴ When the government acts as a regulator and creates a public forum for private speech, it cannot pick and choose what private speech to allow—it has to be equal.⁹⁵ Likewise, if permits are being given out to speak on a Friday night, or if the park is being set up for what is essentially a place for First Amendment speech—a public forum—the government cannot discriminate on the basis of content.⁹⁶ But, held the Court, when the government erects permanent monuments on its own property, even when the monuments are privately funded, the government is not running a public forum—the government, itself, is speaking.⁹⁷

The government is engaged in what the Court calls “government speech.”⁹⁸ The Court noted that since the government speaks all the time about supporting its policies,⁹⁹ putting a permanent monument in the park is just another example of the government speaking in favor of its policies. Thus, held the Court, the public forum doctrine does not apply.¹⁰⁰

Not only does the public forum doctrine not apply, but the Court held that government speech is not really First Amendment ac-

⁹¹ *Pleasant Grove*, 129 S. Ct. at 1129.

⁹² *Id.*

⁹³ *Id.* at 1130.

⁹⁴ *Id.* at 1131.

⁹⁵ *See id.* at 1132 (“[A]ny restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest . . .”).

⁹⁶ *Pleasant Grove*, 129 S. Ct. at 1132.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1133.

⁹⁹ *Id.* at 1141 (Souter, J., concurring) (citing *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)).

¹⁰⁰ *Id.* at 1131-32, 1134 (majority opinion).

tivity.¹⁰¹ The Court did not define exactly what legal category monument-building fell into, but noted it was an exercise of the government power, which is regulated, not by the Free Speech Clause, but by other provisions of the Constitution—the most important being the Establishment Clause.¹⁰² Justice Alito, writing for the majority, did not put any other checking norm into his opinion, just the Establishment Clause.¹⁰³ Some of the other concurring Justices stated that there must be additional checking legal norms because it would be dangerous to allow the government to speak with essentially no restrictions.¹⁰⁴ The concurring Justices speculated that there must be some equality check, maybe a due process check as well.¹⁰⁵

What comes out of *Pleasant Grove* is a new legal category—government speech.¹⁰⁶ I think the new category is trivial, and not likely to go anywhere. However, some people think it is dangerous.¹⁰⁷ Hypothetically, suppose some town decides it is going to have a monument in its park to honor great Democrats of the past—the Jefferson/Jackson monument. The Jefferson/Jackson monument is established, and the statue states that the Democratic Party is the best party. Now, the town Republicans say, “We would like a monument of the great Republicans of the past, as well.” The town council says, “Sure, if you can find one, the town will put up a great Republicans monument. But we do not think there are any great Republicans, so no monument for you.” In such a setting, I am confi-

¹⁰¹ *Pleasant Grove*, 129 S. Ct. at 1131 (“If petitioners were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.”).

¹⁰² *Id.* at 1131-32.

¹⁰³ *Id.* at 1132.

¹⁰⁴ *Id.* at 1139 (Stevens, J., concurring).

¹⁰⁵ *Id.*

For even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution’s other proscriptions, including those supplied by the Establishment and Equal Protection Clauses. Together with the checks imposed by our democratic processes, these constitutional safeguards ensure that the effect of today’s decision will be limited.

Pleasant Grove, 129 S. Ct. at 1139.

¹⁰⁶ *Id.* at 1141-42 (Souter, J., concurring) (“After today’s decision, whenever a government maintains a monument it will presumably be understood to be engaging in government speech.”).

¹⁰⁷ Christopher C. Lund, *Keeping The Government’s Religion Pure: Pleasant Grove City v. Summum*, 104 NW. U. L. REV. COLLOQUY 46, 51-52 (2009).

dent that equality and the First Amendment cannot be avoided just by labeling the Democratic Party monument government speech. There will probably be more litigation over this. But, in my opinion, the fear that it will somehow morph into a dangerous doctrine is small.

Where is the government speech doctrine announced in *Summum* likely to take us? What happens when there are a hundred groups saying they want their monument in the park? Under one reading of the case, the city can pick and choose whatever monuments it wants. If the park is publicly-owned land, and the government is setting aside such land for the use of a monument, the government is essentially blending both the city and the private person who built the monument into government speech.¹⁰⁸

Before *Summum*, I would have said that adopting a private person's speech is probably not a sufficient governmental commitment to turn it into government speech. However, in *Johanns v. Livestock Marketing Association*,¹⁰⁹ where the government was paying for "beef-related projects, including promotional campaigns" through a series of compelled "assessment[s] on cattle sales and importation,"¹¹⁰ the Court treated it as a form of taxpayer-supported government speech. In *Rust v. Sullivan*,¹¹¹ the case where the government speech issue first arose, government-subsidized doctors were treated by the Court as delivering a message about birth control and abortion. They were said to be government speakers.¹¹²

¹⁰⁸ *Pleasant Grove*, 129 S. Ct. at 1134.

¹⁰⁹ 544 U.S. 550 (2005).

¹¹⁰ *Id.* at 553-54.

¹¹¹ 500 U.S. 173 (1991).

¹¹² *Id.* at 200.

We need not resolve that question here, however, because the Title X program regulations do not significantly impinge upon the doctor-patient relationship. Nothing in them requires a doctor to represent as his own any opinion that he does not in fact hold. Nor is the doctor-patient relationship established by the Title X program sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice. The program does not provide post conception medical care, and therefore a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her. The doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the program. In these circumstances, the general rule that the Government may choose not to subsidize speech applies with full force.

In each case, there was a significant commitment of governmental resources to the dissemination of a government-selected message by a private speaker.¹¹³ The Court has not yet evolved a test to distinguish between merely assisting a private speaker, and subsuming a private speaker's message into government speech.¹¹⁴ The reasonable patient sitting in the room with the doctor in *Rust* did not think she was talking to a government official; she thought she was talking to her doctor.¹¹⁵ The challengers in *Johanns* thought they were dealing with a government-compelled subsidy of private speech.

The issue in *Rust* was whether the government could forbid the doctor from talking about abortion with her.¹¹⁶ The Supreme Court said yes, because the doctor is a government speaker delivering a pre-set government message.¹¹⁷ *Legal Services Corporation v. Velazquez*,¹¹⁸ can be distinguished in that although legal services lawyers are paid by the government, the government is not paying for them to deliver a government message.¹¹⁹ The government is paying for the lawyer to be the spokesperson for their clients; therefore, the government cannot regulate what the legal services lawyer could say, even if it can regulate a doctor.¹²⁰

The real battle in the future is how to tell when the government has co-opted private speech as its own, and when it is just facilitating the speech of someone else.

C. *Ysura v. Pocatello Education Ass'n & Locke v. Karass*

Two other important cases are *Ysura v. Pocatello Education Ass'n* and *Locke v. Karass*. Both cases deal with the long-running

Id.

¹¹³ See Brief of Petitioners at 2, *Rust*, 500 U.S. 173 (No. 89-1391) [hereinafter Brief of Petitioners].

¹¹⁴ See *Rust*, 500 U.S. at 183 (demonstrating that the Court was primarily concerned with whether, facially, the regulations were authorized by the Public Health Service Act).

¹¹⁵ See Brief of Petitioners, *supra* note 113, at 21-23.

¹¹⁶ *Rust*, 500 U.S. at 177-80.

¹¹⁷ See *id.* at 192-93.

¹¹⁸ 531 U.S. 533 (2001).

¹¹⁹ *Id.* at 542.

¹²⁰ *Id.* at 548 ("The Constitution does not permit the Government to confine litigants and their attorneys in this manner.").

fight between labor and management on check-offs on behalf of public employees.¹²¹ *Ysura* holds that a state can ban public employee check-offs for political activities even when the local government wants to do it.¹²² The *Ysura* Court recognized that private employers cannot be banned from agreeing to check-offs.¹²³ If a private employer and the union have a deal where there was a check-off for political activity, the government cannot object to that¹²⁴ because such an objection would be a violation of the First Amendment.¹²⁵ But, noted the *Ysura* Court, government can restrict check-offs if the government is the employer.¹²⁶ *Ysura* was a mixed case where a local governmental employer was willing to administer a check-off, but where state law banned the practice.

The Supreme Court upheld that state ban,¹²⁷ holding that the decision to permit a check-off is essentially a decision about whether or not to allow a subsidy.¹²⁸ As long as it is a government entity that is being targeted, the government can decide not to allow the subsidy.¹²⁹

While Justice Souter, in his last dissent on the Court, argued that the state ban was viewpoint based, and should be declared unconstitutional because it was aimed at labor unions being able to engage in political activity,¹³⁰ the Court held that the government could prohibit the check off.¹³¹

The other check-off case, *Locke*, ended a long-running battle about whether a national union could require a local to charge local members a fee that is not only designed to subsidize bargaining at the

¹²¹ *Ysura*, 129 S. Ct. at 1096; *Locke*, 129 S. Ct. at 802.

¹²² *Ysura*, 129 S. Ct. at 1096 (“Idaho’s law does not restrict political speech, but rather declines to promote that speech by allowing public employee check-offs for political activities. Such a decision is reasonable in light of the State’s interest in avoiding the appearance that carrying out the public’s business is tainted by partisan political activity.”).

¹²³ *Id.* at 1097.

¹²⁴ *Id.* at 1107 (Stevens, J., dissenting).

¹²⁵ *Id.* at 1101 (majority opinion).

¹²⁶ *Id.*

¹²⁷ *Ysura*, 129 S. Ct. at 1100-01.

¹²⁸ *Id.* at 1101.

¹²⁹ *Id.*

¹³⁰ *Id.* at 1105 (Stevens, J., dissenting) (“Because it is clear to me that the restriction was intended to make it more difficult for unions to finance political speech, I would hold it unconstitutional in all its applications.”).

¹³¹ *Id.* at 1096 (majority opinion).

local level, but is also designed to support national litigation.¹³² The Supreme Court said yes,¹³³ resolving a bitterly disputed issue in labor law.¹³⁴ The Supreme Court held that as long as the national litigation is in some way connected with the ability to do collective bargaining at the local level, and as long as all of the locals pay for it, not just one particular local, the affiliation fee is lawful.¹³⁵

D. *Citizens United v. Federal Election Commission*¹³⁶

The last case, *Citizens United v. Federal Election Commission*, is the case that is still yet to come, and it is the crucial case. *Citizens United* is a challenge to the provisions of the McCain-Feingold Act that ban corporate-funded electioneering communications very close to an election.¹³⁷ With respect to the statutory provisions, there are three blackout periods: the general election has a sixty-day ban; the convention has a thirty-day ban; and the primaries have a thirty-day ban.¹³⁸

If a communication essentially says to vote for or against a candidate, is funded in whole or in part with corporate treasury funds, and is targeted to the relevant electorate, it becomes an electioneering communication and cannot be disseminated through the electronic media during the blackout period.¹³⁹ The Act states that the corporation has to use other means of dissemination.¹⁴⁰ The electioneering

¹³² *Locke*, 129 S. Ct. at 802.

¹³³ *Id.* at 807.

¹³⁴ *See id.* at 803-04.

¹³⁵ *Id.* at 802 (“[T]he litigation charge is reciprocal in nature, i.e., the contributing local reasonably expects other locals to contribute similarly to the national’s resources used for costs of similar litigation on behalf of the contributing local if and when it takes place.”).

¹³⁶ Recall that these remarks were made on August 4, 2009.

¹³⁷ *Citizens United*, 129 S. Ct. at 2893.

¹³⁸ 2 U.S.C.A. § 434 (West 2009). The statute states in relevant part:

(II) is made within—

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate

Id. § 434(f)(3)(A)(i)(II)(aa) & (bb).

¹³⁹ *Id.* § 434(f)(3).

¹⁴⁰ *Id.*

communication has to be electronic; it has to be on the radio or television.¹⁴¹ The ban does not cover the Internet, nor does it cover books.¹⁴²

When the case was argued in the Supreme Court for the first time, the Deputy Solicitor General, was pushed into a position of saying that, theoretically, the government was asserting the power to cover books as well.¹⁴³ In other words, Congress could outlaw books funded by corporations during the blackout periods.¹⁴⁴ When the assertion was made, shock came over the faces of the Justices, because that is an enormously broad assertion of governmental authority.¹⁴⁵ Everyone was waiting for a decision.¹⁴⁶ Instead of a decision, there was an order from Chief Justice Roberts and the Court on June 29, 2009, asking that two issues be argued. First, should *Austin v. Michigan Chamber of Commerce*,¹⁴⁷ the case that upheld the constitutionality of bans on independent expenditures by corporate treasuries, be

¹⁴¹ See *id.* § 434(f)(3)(A)(i) (“ ‘electioneering communication’ means any broadcast, cable, or satellite communication”); but see 2 U.S.C.A. § 431(22) (West 2009) (“The term ‘public communication’ means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.”).

¹⁴² See 2 U.S.C.A. §§ 434(f)(3)(A)(i), 431(22) (demonstrating that neither definition provides to cover books or the internet).

¹⁴³ Transcript of Oral Argument at 29, *Citizens United*, 129 S. Ct. 594 (No. 08-205). The transcript reads in relevant part:

JUSTICE KENNEDY: Just to make it clear, it’s the government’s position that under the statute, if this kindle device where you can read a book which is campaign advocacy, within the 60-30 day period, if it comes from a satellite, it’s under—it can be prohibited under the Constitution and perhaps under this statute?

MR. STEWART: It—it can’t be prohibited, but a corporation could be barred from using its general treasury funds to publish the book and could be required to use—to raise funds to publish the book using its PAC.

CHIEF JUSTICE ROBERTS: If it has one name, one use of the candidate’s name, it would be covered, correct?

MR. STEWART: That’s correct.

Id.

¹⁴⁴ *Id.* at 29, 35-36.

¹⁴⁵ *Id.* at 36-38.

¹⁴⁶ See Robert G. Kaiser, *Will Deep Pockets Always Win? It’s in Roberts’ Court*, WASH. POST, Sept. 5, 2009, at Bus. Sec. 1.

¹⁴⁷ 494 U.S. 652 (1990).

reconsidered?¹⁴⁸ Second, should *McConnell v. Federal Election Commission*,¹⁴⁹ which is a 2003 case that declined to declare the McCain-Feingold law facially unconstitutional, be reconsidered?¹⁵⁰ The order asked for briefing of those two issues.¹⁵¹

The whole area of corporate campaigning and the existence of the McCain-Feingold statute are now up for reconsideration. In sum, there could be a decision by October or November that will strike away the entire campaign finance structure on First Amendment grounds.¹⁵²

It is not likely to happen for two reasons. First, there is a perfectly good as-applied argument for its protection.¹⁵³ The communication in question is a 90 minute movie put out by a grass roots advocacy organization that raised 99% of the money from individuals and less than 1% from corporations;¹⁵⁴ as such, there is only a trace amount of corporate funds in the first place.

Second, there are two very important statutory restrictions.¹⁵⁵ The first statutory restriction says it has to be “targeted to the relevant electorate.”¹⁵⁶ The election trigger is the Democratic primary.¹⁵⁷ The distribution mechanism is a video-on-demand, where the viewer has to go onto her cable’s on-demand channel and click on to this particular movie to download it onto her personal cable box.¹⁵⁸

The question is whether this can be considered targeted to the relevant electorate.¹⁵⁹ How many voters in a Democratic primary are going to assert the energy to find the movie, click on it, and download it for a ninety-minute hatchet job on one of the most popular

¹⁴⁸ See *id.* at 654-55 (summarizing the reasoning and holding of the *Austin* Court).

¹⁴⁹ 540 U.S. 93 (2003).

¹⁵⁰ *Id.* (finding that as-applied challenges to the bill remain available, but declining to strike the bill down on its face).

¹⁵¹ *Citizens United*, 129 S. Ct. at 2893.

¹⁵² See Adam Liptak, *Justices to Revisit ‘Hillary’ Film, and Corporate Cash in Politics*, N.Y. TIMES, Aug. 30, 2009, at A1.

¹⁵³ See Brief of Appellant at 32-33, *Citizens United*, 129 S. Ct. 2893 (2009) (No. 08-205) [hereinafter Brief of Appellant].

¹⁵⁴ *Id.*

¹⁵⁵ See 2 U.S.C.A. § 434.

¹⁵⁶ *Id.* § 434(f)(3)(A)(i)(III).

¹⁵⁷ See Aaron Harmon, *Hillary: The Movie: Corporate Free Speech or Campaign Finance Corruption?*, 4 DUKE J. CONST. L. PUB. POL’Y SIDEBAR 331, 332 (2009).

¹⁵⁸ Brief of Appellant, *supra* note 153, at 25-26.

¹⁵⁹ See *id.* at 12.

people in the party—Hillary Clinton. Since the definition of “targeted to a relevant electorate” is that it must be heard by 50,000 persons,¹⁶⁰ it must be assumed that 50,000 people who are eligible to vote in a state Democratic primary are going to download this movie.

Moreover, even if the minimum number is met, the Court should hold that there is an implicit *de minimis* exception where there is just a trace amount of corporate funding that would trigger the statute. A second statutory restriction calls into question whether this communication should fall within the statute at all.¹⁶¹ Here, “less than 1% [of Citizens United’s funding] was donated by for-profit corporations.”¹⁶²

If the communication does fall within the statute, then it is clearly outside the scope of what *Austin* was about.¹⁶³ *Austin* involved a Chamber of Commerce communication on the eve of a local election. The Chamber of Commerce was 75% funded by corporate treasury funds, and the communication clearly articulated a message for or against the candidate in the local election.¹⁶⁴ The *Austin* Court’s was concerned about spending vast amounts of corporate treasury funds, which had been amassed through economic transactions, having nothing to do with politics, on the eve of an election in a way that would distort the democratic process.¹⁶⁵

Austin’s reasoning does not apply to an organization that is made up almost exclusively of individuals, and where less than 1% of the money comes from corporations; especially, where the distribution mechanism is volitional—the communication is on cable televi-

¹⁶⁰ 2 U.S.C.A. § 434.

¹⁶¹ See Brief of Appellant, *supra* note 153, at 32.

¹⁶² *Id.* at 33 (citation omitted) (“Twenty-five persons gave more than \$1,000 to Citizens United for that purpose Of the more than \$200,000 raised from these large donors, only \$2,000—less than 1%—was donated by for-profit corporations.”).

¹⁶³ See *id.* at 31-32.

¹⁶⁴ See *Austin*, 494 U.S. at 656.

¹⁶⁵ See *id.* at 659-60.

[The] regulation aims at a different type of corruption in the political arena: 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 The Act does not attempt “to equalize the relative influence of speakers on elections . . . ; rather, it ensures that expenditures reflect actual public support for the political ideas espoused by corporations.

Id.

sion, but you have to push a button to view the program.¹⁶⁶ Such a communication is just like taking a book out of a library. That is why oral argument questioning went to books, because if this is covered, then books can be covered, even though you have to have a volitional decision to open it and read it.¹⁶⁷ Thus, it seems clear that there is an as-applied First Amendment issue here. The Supreme Court should say that this communication is not covered by the statute, and is not a violation of *Austin*.¹⁶⁸

The liberals are hoping the Court will do what it did in *Northwest Austin*: no statutory coverage exists here, and therefore, there is no need to look at any constitutional issues.¹⁶⁹ Chief Justice Roberts is an extraordinarily conservative man, and a very strong conservative justice.¹⁷⁰ He is seriously committed to the enterprise of judging, and appears to be committed to the enterprise of the Supreme Court. He is not likely to be so quick to jump and overturn recent Supreme Court precedent in a case in which there is an alternative way to protect the First Amendment interests. If he does so in *Citizens United*, the case will be a signal of things to come. If Chief Justice Roberts and Justice Alito are prepared to overrule past constitutional precedent in a facial review of the case, instead of as-applied review,¹⁷¹ even though there are clear non-constitutional and as-applied ways of protecting the First Amendment rights,¹⁷² then an extraordinary judicial earthquake should be expected. It will not just destabilize campaign finance, but it means that Chief Justice Roberts and Justice Alito do not mean what they say when they talk about their commitment to limited judging.¹⁷³ If they are prepared to over-

¹⁶⁶ Brief of Appellant, *supra* note 153, at 25, 33.

¹⁶⁷ Transcript of Oral Argument, *supra* note 143, at 28.

¹⁶⁸ See Brief of Appellant, *supra* note 153, at 32-33. "The individual donors who provided virtually all of the funding for Citizens United's documentary knew that they were supporting the documentary and donated precisely for that reason [Therefore,] [i]t is inconceivable that these donations gave Citizens United any 'unfair advantage in the political marketplace.' " *Id.* at 33-34 (citation omitted).

¹⁶⁹ Boy was I wrong!

¹⁷⁰ See David E. Rosenbaum, Jr., *An Advocate for the Right*, N.Y. TIMES, July 28, 2005, at A16 ("[S]ometimes[] he took positions even more conservative than those of his prominent superiors.").

¹⁷¹ Richard H. Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1368 (2000) (explaining that the Court's traditional way of approaching these cases is the as-applied method).

¹⁷² *Id.*

¹⁷³ See Kenneth W. Starr, *The Roberts Court at Age Three: A Response*, 54 WAYNE L.

turn precedent in *Citizens United*, they are likely going to do it elsewhere, which means that we are going to see real *stare decisis* erosion in the years to come.

Finally, in thinking about the issues raised in *Citizens United*, it is important to look at the Law of Democracy, as well as the First Amendment. It is unfortunate that the Law of Democracy in the United States is the accidental intersection of the series of doctrinal legal questions where no one asks whether the outcome would be a good thing for democracy. This point is reflected in *Ysura*, the employment case that I discussed earlier.¹⁷⁴ Judges look at whether the First Amendment requires it, whether the Equal Protection Clause requires it, whether the Fifteenth Amendment requires it, whether the Thirteenth Amendment requires it, and whether the Voting Rights Act requires it. However, nobody takes a step back and asks if we are helping or hurting the functioning of democracy. I believe that the Law of Democracy should be seen as a more robust, freestanding concept, rather than as the accidental confluence of unconnected doctrines.

That observation makes one of the cases that has not been discussed—*Bartlett v. Strickland*¹⁷⁵—one of the most important cases of the Term.

The Court in *Bartlett*, in a 3-2-4 decision, held that the vote dilution provisions of section 2 of the Voting Rights Act does not require the creation or preservation of “crossover districts,” where a minority bloc with slightly less than 50% of the electorate could join with other groups in a coalition.¹⁷⁶ Section 2 requires that when there is a minority-majority district—when there is a majority of black voters in a particular area—the voting lines must be drawn to allow them “to elect the[] candidate[s] of their choice.”¹⁷⁷ Attacking a majority-minority district is a classic vote-dilution case.¹⁷⁸ The Supreme Court refused to apply vote dilution several years ago to something called an “influence district,” where there was a pocket of 15% – 20% of black voters who would have the ability to throw their weight around

REV. 1015, 1021 (2008) (“[T]he Alito-Roberts partnership has proven potent . . .”).

¹⁷⁴ See *Ysura*, 129 S. Ct. at 1107.

¹⁷⁵ 129 S. Ct. 1231 (2009).

¹⁷⁶ See *Id.* at 1248-49 (“Our holding that § 2 does not require crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion.”).

¹⁷⁷ *Id.* at 1242.

¹⁷⁸ See *Id.* at 1239.

and, therefore, become much more politically viable.¹⁷⁹ The Court said no, this is not covered by the Voting Rights Act.¹⁸⁰

Bartlett was an intermediate case dealing with a district of approximately 40% black voters.¹⁸¹ The question was what to do when a 40% black district exists, where you can statistically predict that there will be a sufficient number of white crossover voters so that the black voters will dominate the election. Does section 2 of the Voting Rights Act require an effort to achieve such a result?¹⁸² Three members of the Court said no as a matter of statutory construction.¹⁸³ Two members of the Court said no, because preventing racial vote dilution is wrong from the very beginning; there should not be any vote dilution claim, even in majority-minority settings.¹⁸⁴ Four members of the Court said that “crossover districts” were covered by section 2, because failing to create such possibilities for black voters is exactly what the vote dilution is about.¹⁸⁵

After *Bartlett*, we now have a perfect Republican storm. Republicans now can take section 2 of the Voting Rights Act and pack over 50% black districts with an excess of black, reliably Democratic voters. They can “use up” these excess black Democratic votes in majority-minority districts. These districts are often gerrymandered by Republican state legislators, who are delighted to do so because “packing” black Democratic voters into a majority-minority district increases the probability of having Republicans elected in the surrounding districts. Without thinking about the impact on democracy generally, or about the general purpose of helping racial minorities to recover from two centuries of oppression, the Supreme Court has now held that there is no obligation to maximize black voting power in connection with the “influence districts,” and no obligation to do it

¹⁷⁹ *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 445-46 (2006).

¹⁸⁰ *Id.*

¹⁸¹ *Bartlett*, 129 S. Ct. at 1239.

¹⁸² *Id.* at 1238.

¹⁸³ *Id.* at 1248 (“When we address the mandate of § 2, however, we must note it is not concerned with maximizing minority voting strength, . . . ; and, as a statutory matter, § 2 does not mandate creating or preserving crossover districts.”).

¹⁸⁴ *See id.* at 1250 (Thomas, J., concurring) (“The text of § 2 of the Voting Rights Act of 1965 does not authorize any vote dilution claim, regardless of the size of the minority population in a given district.”) (citation omitted).

¹⁸⁵ *See id.* at 1253 (Souter, J., dissenting) (“And a functional analysis leaves no doubt that crossover districts vindicate the interest expressly protected by § 2: the opportunity to elect a desired representative.”).

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in “crossover districts.”¹⁸⁶ The result is exactly what a Republican strategist would want: pack Democrats into black districts, and then draw the other districts in a way that will minimize the overall black vote. I fear that *Bartlett*, will have a lasting impact on the 2010 reapportionment.¹⁸⁷

See you next year.

¹⁸⁶ See *Bartlett*, 129 S. Ct. at 1248-49.

¹⁸⁷ See Press Release, American Legislative Exchange Council, Supreme Court’s Ruling Upholds Integrity of State Legislators’ Redistricting Authority (Mar. 16, 2009).

