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Reconceptualizing the Judicial Activism Debate as Judicial Responsibility: A Tale of Two Justice Kennedys

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RECONCEPTUALIZING JUDICIAL ACTIVISM AS JUDICIAL RESPONSIBILITY: A Tale of Two Justice Kennedys

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INTRODUCTION

Most academics and politicians who accuse the Supreme Court of judicial activism focus on specific results to support their arguments. Conservatives rail against Court decisions protecting privacy and other non-economic individual rights,[1] whereas liberals criticize the Court's federalism, pro-business, and affirmative action decisions.[2] Meanwhile, although a few law professors and political scientists have taken more nuanced multi-factor and empirical approaches to measure judicial activism, they also adopt as a central focus of their arguments attention to specific decisions by the Supreme Court.[3] Because these attempts to use the term *judicial activism* as a measure of something important (and usually

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† Professor of Law, Georgia State College of Law. I would like to thank Michael Dorf, Michael Gerhardt, Lori Ringhand, Mark Tushnet, and Patrick Wiseman for helpful comments on earlier drafts of this article, and Robert Ashe for invaluable research assistance. I feel obligated to note that several readers of this piece suggested that the title, which refers to "Two Justice Kennedys," is grammatically incorrect insofar as it should read "Two Justices Kennedy." The decision to not make that change was mine and mine alone.

1. *See, e.g.*, Michael J. Gerhardt, *The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights*, 10 WM. & MARY BILL RTS. J. 585, 620–28 (2002) (canvassing the right wing's critique of the Warren and Burger Court decisions and suggesting that Ronald Reagan made the issue of judicial activism part of his political campaign against the left); Jeffrey Toobin, *Swing Shift*, THE NEW YORKER, Sept. 12, 2005 (quoting James Dobson, director of the group Focus on the Family, as saying that Justice Kennedy was "the most dangerous man in America" because of his decisions on gay rights and abortion).

2. *See* Adam Cohen, *Last Term's Winner at the Supreme Court: Judicial Activism*, N.Y. TIMES, July 9, 2007, at A16 (describing the conservative victories during the 2006–07 Term as "judicial activism" and motivated by a "conservative ideology").

3. *See, e.g.*, William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1219–55 (2002) (setting forth seven kinds of activist behavior); Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43, 43–67 (2007) (employing an empirical analysis of voting behavior to determine activist Justices); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1144–61 (2002) (setting forth six broad categories of judicial behavior that could be characterized as activist).

negative) have generally failed to advance the debate over the proper role of the Court, some academics and judges have suggested that we abandon the phrase *judicial activism* altogether.[4]

The essential problem with this debate has been the shared assumption among liberals and conservatives that judicial activism can be measured in some meaningful way by examining how often the Court invalidates state and federal legislation; how frequently the Court overturns its own precedent; and under what circumstances the Court reverses the decisions of other political actors such as the President or administrative agencies. When scholars and politicians simply equate judicial activism with judicial invalidation of the works of the political branches or the reversal of precedent, however, these commentators do not reveal anything different than would a pure descriptive account of the Court's decision and rationale. In our post-realist legal environment, scholars and politicians should recognize how much discretion the Supreme Court possesses in constitutional law cases. The decisions reached by the Court cannot be right or wrong in any objective sense, nor can they be activist or not in any substantive sense of that term because there is no shared baseline to decide whether the Supreme Court should interfere with the work of the elected branches or under what circumstances it should reverse its own decisions.[5] As Judge Richard Posner has said so eloquently:

> When one uses terms like "'correct" and "incorrect" [to describe Supreme Court constitutional decisions], all one can actually mean is that one likes (approves of, agrees with, or is comfortable with) the decision in question or dislikes (disapproves of, disagrees with, or is uncomfortable with) it. One may be able to give reasons for liking or disliking the decision . . . and people who agree with the reasons will be inclined to say that the decision is correct or incorrect. But that is just a form of words. One can, for that matter . . . give reasons for preferring a Margarita to a Cosmopolitan. The problem, in both cases, is that there are certain to be equally articulate, "reasonable" people who disagree and can offer plausible reasons for their disagreement, and there will be no common metric that will enable a disinterested observer (if there is

4. *See* Randy E. Barnett, *Is the Rehnquist Court an "Activist" Court: The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275, 1275–81 (2002) (arguing that the phrase "judicial activism" is empty and unhelpful); *see also* Caprice Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567, 571, 576 (2007) (citing Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1403, 1409–10 (2002)).

5. *See* MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 112–13 (Hill and Wang 1998).

> such a person) to decide who is right. The most striking characteristic of constitutional debate in the courts, the classroom, and the media—and a sure sign that such debate eludes objective resolution—is its interminability. Everything is always up for grabs intellectually, though not politically.[6]

Assuming, as most everyone correctly does, that our constitutionally based representative democracy requires the Court to invalidate unconstitutional laws in some circumstances and to reverse precedent at least under some conditions, the Court's erroneous decision to refrain from overturning the decisions of other political actors or reversing its own cases may be just as activist as overturning those laws or cases that are not unconstitutional.[7] By appealing to allegedly incorrect outcomes (results with which they disagree) to define judicial activism, scholars and politicians cannot move beyond raw political value judgments.

This problem with the judicial activism debate was recognized in what one scholar argues is the first article to use that phrase back in 1947.[8] In this article, Arthur Schlesinger characterized Justices Black, Douglas, Murphy, and Rutledge as "Judicial Activists," and located their jurisprudential preferences in the Yale Law School taught belief that "[t]he resources of legal artifice, the ambiguity of precedents, the range of applicable doctrine, are all so extensive that in most cases in which there is a reasonable difference of opinion a judge can come out on either side without straining the fabric of legal logic."[9] Because of this indeterminacy, one person's judicial activism is another's appropriate exercise of judicial power, and there exists no metric for privileging a right answer to that debate. This baseline problem suggests that we need to change the terms of the conversation to be consistent with a realistic view of how the Supreme Court operates in constitutional cases, and that is the primary goal of this article.

Instead of the current and relentless discussion of judicial activism, I suggest that we should focus more on what I will call *judicial responsibility*. The Court ought to write its decisions consistently with professional standards, adhere to basic rule of law principles, and, perhaps, engage in principled decision making while reaching results the public can at least

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6. Richard A. Posner, *Forward: A Political Court*, 119 HARV. L. REV. 32, 40–41 (2005).

7. *See* Kennan D. Kmiec, *The Origins and Current Meanings of "Judicial Activism,"* 92 CAL. L. REV. 1441, 1463–71 (2004).

8. *Id.* at 1446 (citing Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, FORTUNE, Jan. 1947, at 202, 208).

9. *Id.* at 1447 (citing Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, FORTUNE, Jan. 1947, at 201).

tolerate.[10] The latter two values are at stake in the judicial activism debate, but so far scholars have failed to reach a consensus as to how to analyze them properly.[11] The obligation that the Court adhere to professional judicial standards and basic, minimal rule of law principles, on the other hand, has been largely ignored by scholars and the media because of their obsession with results. This article suggests that we should begin debating whether the Court, in constitutional cases, does in fact satisfy these standards. In other words, instead of constantly focusing on whether the Court has reached the right results, we should begin asking whether the Court is properly acting as a court consistent with our judicial traditions.

Unlike the debate over judicial activism, there are commonly agreed upon baselines among scholars and politicians concerning how the Supreme Court should decide cases and write opinions in order to meet its obligation to exercise proper judicial responsibility. To take just a few obvious examples, Supreme Court Justices should not take bribes or decide cases based on partisan politics or on whether they have a personal relationship with the lawyers who argue the cases in front of them. Of course, with the exception of one exceptional historical event, no one seriously suggests that the Court acts in those ways.[12] But there are other core principles that the Court should follow but often does not. It should not blatantly mischaracterize or ignore prior relevant decisions, distort the factual record in the case before it, or make false statements about the past. When the Court misleads in these ways, its opinions lack transparency, an important rule of law value. Unfortunately, the Court does engage in this behavior more frequently than current scholarship suggests, and when it does, the Court can rightfully be accused of violating fundamental rules of proper judicial behavior and failing to exercise proper judicial responsibility. Although there will be some disagreement over when the Court violates these principles, there are, sadly, many examples where, when the Court's failings are brought to light, there will be a scholarly consensus that the Court has fabricated or wrongfully ignored the past.[13] This transparency problem has been largely overlooked by scholars and politicians because of the battles over correct results, but this is where the judicial activism/judicial responsibility debate should begin again, and it can fruitfully start with the often perplexing but critically important jurisprudence of Justice Anthony Kennedy.

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10. *See id.* at 1445–49.

11. *See infra* notes 66–72 and accompanying text.

12. Some scholars suggest that *Bush v. Gore*, 531 U.S. 98 (2000), was decided in a partisan manner. *See* Marshall, *supra* note 3, at 1245–47.

13. *See infra* notes 106, 107, 138 and accompanying text for examples.

Perhaps no Supreme Court Justice in recent history has engendered more controversy in both the popular media and academic circles than Justice Kennedy. The right views him as a traitor and judicial activist who makes but does not interpret the law,[14] whereas the left, though pleased with many of his decisions in the individual rights arena, is suspicious that he will turn more conservative on abortion, and, in any event, dislikes his views on affirmative action and federalism.[15] The conventional wisdom is that Justice Kennedy has adopted a judicial activist stance on issues of personal privacy, executive power, the death penalty, and federalism, but no one can persuasively make that case because, for reasons I will discuss in part I, to the extent that the charge of judicial activism suggests the Court is overstepping its proper boundaries in selecting results, there is no way to measure such a phenomenon in light of the open spaces the Court is required to fill. On the other hand, to the extent that proper judicial responsibility requires judges to transparently justify their decisions and not fabricate the past, these factors have been overlooked by scholars and the media in their evaluations of Justice Kennedy. Because Justice Kennedy's decisions reflect both extremes of the judicial responsibility scale, his jurisprudence provides an excellent vehicle for reconceptualizing the debate over the proper role of the Supreme Court and can provide valuable information to politicians, academics, and the public at large.[16]

Part I explains why the political and academic debate over judicial activism has failed to promote a more meaningful understanding of the

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14. *See* Matthew Continetti, *An Indecent Decision: Justice Kennedy's Atrocious Child Rape Ruling*, THE WEEKLY STANDARD, July 7, 2008, *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/015/269gzinz.asp?pg=2 (asking from a conservative perspective, "What are the scariest words in constitutional law these days?" and answering "Justice Kennedy delivered the opinion of the Court."); *see also* Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A03 (describing animus directed at Justice Kennedy by conservative leaders).

15. *See* David Cole, *The 'Kennedy Court'*, THE NATION, July 14, 2006, *available at* http://www.thenation.com/doc/20060731/cole (noting Justice Kennedy's prior "conservative" rulings on abortion and affirmative action, and predicting that liberals and progressives would lament upcoming rulings by Justice Kennedy on those topics).

16. As Kermit Roosevelt has elegantly said, "the Constitution does not belong to judges . . . and it does not belong to political activists, as a set of incendiary talking points. It belongs to the people. It is our responsibility to judge the Court, and it is our judgment that must be decisive in the end." KERMIT ROOSEVELT, THE MYTH OF JUDICIAL ACTIVISM 7 (Yale Univ. Press 2006). Although some may argue that "the people" will not be able to judge when Supreme Court Justices transgress core transparency principles given the thickness of legal doctrine, constitutional law scholars can certainly help both the public and the media understand this problem. In any event, it is not clear how much the public understands the reality of the debate over the results reached by the Supreme Court.

Supreme Court. Part II sets forth a new paradigm of judicial responsibility to evaluate the work of the Court and when it exceeds its appropriate boundaries. Part III applies this analysis to the jurisprudence of Justice Anthony Kennedy, currently the swing vote on the Court and the most "powerful judge in America."[17] By applying this new view of judicial responsibility to the opinions of one particular Justice, I hope to begin a fresh debate over the Court as a whole.

I. THE DEBATE OVER JUDICIAL ACTIVISM

A. The Politicians

Although the debate over judicial activism among politicians is older than the Constitution,[18] the racial desegregation decisions of the Warren Court combined with the rise of the modern media generated a particularly strong public critique of the Supreme Court by conservatives of both parties during the 1950's and 1960's.[19] For example, Senator James Eastland of Mississippi said after *Brown* v. *Board Education* was decided, "[We] will not abide by nor obey this legislative decision by a political court."[20] In 1958, a number of state chief justices published a report criticizing the Warren Court's activism, and a few years later the Council on State Governments supported constitutional amendments that would allow state legislatures to amend the Constitution without federal interference and create a special tribunal composed of the chief justices of all fifty states that would be empowered to overrule the Supreme Court in cases involving state/federal power.[21] The Warren Court's later decisions on prayer in school,[22] one person/one vote,[23] and criminal procedure,[24] among many

17. *See* RICHARD POSNER, HOW JUDGES THINK 311 (Harvard Univ. Press 2007).

18. *See* Erica Weisberger, *Unpublished Opinions: A Convenient Means to an Unconstitutional Ends*, 97 GEO. L.J. 621, 634 n. 59 (2009) ("The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular proceeding from the legislative body.") (citing THE FEDERALIST NO. 78, at 427 (Alexander Hamilton) (E.H. Scott ed., 2002)).

19. Previous accusations of judicial overreaching were usually made by the political left in response to the Court's protection of economic liberties in the early twentieth century. *See infra* notes 32–34, and accompanying text.

20. Gerhardt, *supra* note 1, at 620 (citation omitted).

21. *Id.* at 623.

22. Engle v. Vitale, 370 U.S. 421, 424–25 (1962) (prohibiting prayers in public schools).

others, inflamed conservatives and led to repeated calls for an overhauling of the Supreme Court.[25] By the end of the 1960's, the political right's revolt against the Court culminated in Richard Nixon's successful campaign against the Warren Court and its liberal decisions.[26]

As a candidate, President Nixon used rhetoric that conservatives continue to use to describe the kind of Justices they believe should sit on the Court. President Nixon promised to appoint, "strict constructionists" who would see "their duty as interpreting law and not making law."[27] Later, Ronald Reagan repeatedly said that "the job of judges is to interpret the law of the Constitution, not make it."[28] Recently, while running for President, Rudolph Giuliani said that "We have to appoint strict constructionist judges because judges interpret the constitution. They should not be allowed to make it up . . . . They [should] not get it into their heads that they're really legislators and that they can go around changing things."[29] And, former President George W. Bush said that Supreme Court Justices should be "strict constructionists who . . . hew closely to the law rather than judicial activists . . . ."[30] This political anthem, that Supreme Court Justices should "interpret" but not "make" the law, has become a standard refrain of the political right's vocabulary and its attack on the Democratic Party.[31]

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23. Baker v. Carr, 369 U.S. 186, 207–08 (1962) (holding that the proper apportionment of state legislatures is not a political question paving the way for the Court to require a one person/one vote system).

24. Miranda v. Arizona, 384 U.S. 436, 444 (1966) (requiring the giving of certain warnings to all criminal defendants).

25. Conservatives in the Warren Court era "called for 'judicial restraint' or 'strict constructionism' in place of liberal judicial activism, contending that 'when liberal Courts overturn democratically enacted laws in favor of liberal, activist constititutionalism, they destroy citizens' rights to a democratic participation and self government." Frank Cross & Stephanie Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. Rev. 1752, 1756 (2007) (citations omitted).

26. *See* Gerhardt, *supra* note 1, at 623–25.

27. *Id.* at 625 (citation omitted).

28. Matthew J. Franck, *Originalist Thinking*, NATIONAL REVIEW ONLINE, June 9, 2004, http://article.nationalreview.com/?q=NmYwMzkxYzRjN2VlODdhM2Y3YmMyMjQzMDlkMDkwNDk=.

29. Chris Welch, *Giuliani Vows to Appoint 'Strict Constructionist' Judges*, CNN POLITICAL TICKER, July 18, 2007, http://politicalticker.blogs.cnn.com/2007/07/18/giuliani-vows-to-appoint-strict-constructionist-judges/.

30. Kmiec, *supra* note 7, at 1471 (citation omitted).

31. *See, e.g.*, Continetti, *supra* note 14 (noting the "political lesson" that "the fight to turn the Court from a capricious and imperious vanguard of liberalism into an impassive umpire is far from over," and encouraging the Republican nominee for President, Senator John McCain, to explain his judicial philosophy).

Long before Presidents Nixon, Reagan, and Bush railed against liberal Justices, however, left wing politicians accused the Supreme Court of the same kind of judicial activism that the right allegedly abhors. Progressives in the early 1900's and New Dealers in the 1930's repeatedly criticized the Court for exceeding constitutional boundaries by invalidating state and federal economic legislation.[32] In fact, the Socialist Party included in its 1912 platform a plea for "[t]he abolition of the power usurped by the Supreme Court of the United States to pass upon the constitutionality of the legislation enacted by Congress. [The platform said that] [n]ational laws [should] be repealed only by an act of Congress or by a referendum vote of the whole people."[33] In 1922, in a letter to Justice John H. Clarke, Woodrow Wilson was concerned with the "immediate danger" that "courts will more and more outrage the people's sense of justice and cause a revulsion against judicial authority . . . and I can see nothing which can save us from this danger if the Supreme Court is to repudiate liberal courses of thought and action."[34]

Of course, the Court eventually approved rather than repudiated the New Deal "liberal courses of thought and action." After President Roosevelt changed the personnel on the Court, and the new Justices changed their focus from economic to personal liberty, charges of judicial activism became the standard critique of the right. It was not until the late 1980's and 1990's, when the Rehnquist Court began issuing pro-state power federalism opinions,[35] overturning affirmative action programs,[36] and reversing many liberal precedents on criminal procedure,[37] that liberals again argued that the Court was engaging in far reaching judicial activism.[38]

This summary demonstrates that both liberal and conservative politicians throw out accusations of judicial activism whenever the Court decides cases with which they disagree. Despite this long history, however, perhaps the one decision that escalated the controversy over judicial activism more than

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32. *See* Roosevelt, *supra* note 16, at 14.

33. *See* Gerhardt, *supra* note 1, at 592 (citation omitted).

34. *Id.* at 603 (citation omitted).

35. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (reversing recent precedent and holding that Congress cannot abrogate states' sovereign immunity under the Commerce Clause.).

36. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (applying strict scrutiny to federal government's affirmative action program).

37. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808 (1991) (reversing decision outlawing victim impact statements in capital cases).

38. *See* THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM (Univ. of Chicago Press 2004); THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT (Herman Schwartz ed., Hill & Wang 2002).

any other was the Burger Court's decision in *Roe v. Wade*.[39] When former Presidents Reagan and Bush argued that the Supreme Court should interpret not make the law, in large part they were appealing to pro-life fundamentalists. This distinction between interpreting and making the law is now, sadly, part of our national vocabulary and often employed in the judicial activism debate by right-wing politicians.[40] In fact, the right conflates these terms to suggest that when Justices engage in judicial activism or judicial legislation it is because they are making not interpreting the law. This misleading rhetoric has infected recent Supreme Court nomination hearings to a considerable and unfortunate degree.[41]

This alleged distinction between Justices making and interpreting the law, however, does not meaningfully advance the debate over judicial review and should be discarded. For example, to the extent that the modern political right believes that Justices Scalia and Thomas are less likely to make than interpret the law than Justices such as Souter and Stevens, the argument is not persuasive. If judicial activism is defined as the Court overturning the acts of the elected branches and the States, as well as reversing its own precedent, then Justices Scalia and Thomas are just as activist as their more liberal colleagues.[42] The Court's recent Tenth Amendment, Eleventh Amendment, and affirmative action decisions involved the Court overturning acts of Congress, the States, and its own prior cases without much concern about judicial activism.[43] As Professor Ringhand has argued, there is simply no empirical basis to argue that certain Justices on the Court make, rather than interpret the law more than other Justices on the Court.[44] Therefore, it is not surprising that this political

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39. Roe v Wade, 410 U.S. 113 (1973).

40. *See, e.g.*, Continetti, *supra* note 14; *see also* Klaus Marre, *McCain Lambastes Judicial Activism*, THE HILL.COM, May 6, 2008, http://thehill.com/homenews/campaign/1322-mccain-lambastes-judicial-activism; Herman Schwartz, *One Man's Activist: What Republicans Really Mean When They Condemn Judicial Activism GOP Lawmakers, Bob Barr, Orrin G. Hatch, and Majority Whip Tom DeLay Attack Judicial Activism*, WASH. MONTHLY, Nov. 1997, http://findarticles.com/p/articles/mi_m1316/is_n11_v29/ai_20017393/print?tag=artBody;col1.

41. *See* Roosevelt, *supra* note 16, at 1–3.

42. *See* Ringhand, *supra* note 3, at 45–46.

43. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (overturning affirmative action plans by local school districts under Equal Protection Clause); Printz v. United States, 521 U.S. 898 (1997) (overturning federal gun control law on federalism grounds); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (overturning federal gaming law on federalism grounds).

44. *See* Ringhand, *supra* note 3, at 45 ("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.").

debate about judicial activism is more about rhetoric and partisan advantage than anything that makes a substantive difference.

More importantly, there is no merit to the charge that even in those cases where the Court overturns political decisions, the Supreme Court makes and does not interpret the law. As I will argue in more detail in the next section, the implication by politicians on both sides of the aisle is that when the Court incorrectly overturns the actions of the elected branches, it is somehow making law. But this conclusion rests on several erroneous assumptions. First, in most constitutional cases decided by the Supreme Court, the "law" as defined to mean text, precedent, history, tradition, and structure, either runs out or is ambiguous, leaving a large hole in the doctrine under consideration.[45] Therefore, although one can agree or disagree with a Court decision for valid reasons, reasonable people also can disagree about what should be the correct result. As Judge Posner has pointed out, for example, change a Justice here or there, put Judge Bork in Justice Kennedy's place, or simply leave Earl Warren off the Court for a few more years, and many landmark decisions such as *Brown v. Board of Education*,[46] *Texas v. Johnson*,[47] and *U.S. Term Limits, Inc. v. Thornton*,[48] might have been decided differently. Yet, to suggest that the Court was making law in all of those cases rather than interpreting the law begs the very questions that make those cases difficult. A judicial philosophy that leads to the conclusion that the Constitution bars affirmative action, prohibitions on abortion, or term limits for members of Congress no more makes law than the opposite philosophies because there is no clear answer to those questions based on the traditional sources of constitutional interpretation. Rather, one's conclusions about these questions are much more a matter of values than logic.[49]

We would have an improved political debate over Supreme Court nominees and the resulting performance of the Court if politicians stopped treating constitutional issues as if they implicated some objectively right or wrong view of the Court's institutional role and instead argued about these questions directly. Whether term limits are constitutional or seventeen year-olds can constitutionally be executed for capital crimes are the kinds of difficult political and policy questions the Supreme Court must decide without significant help or constraint from pre-existing positive law sources. Perhaps if politicians debated the questions directly, the judicial

45. *See* Posner, *supra* note 6; *see also infra* note 75 and accompanying text.
46. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).
47. Texas v. Johnson, 491 U.S. 397 (1989).
48. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).
49. *See* Posner, *supra* note 6.

activism merry-go-around might spin a little slower and a little less often. Perhaps if we change the terms of the debate, we might even be spared the insult and indignity of listening to the President of the United States and those running for that Office employ the useless rhetoric that we need Justices "who will interpret and not make the law."[50]

B. The Academic Debate Over Judicial Activism

Most constitutional scholars share two basic premises about the judicial activism debate. First, they argue that we need a more precise definition of what we mean by judicial activism because all too often it simply means "a decision one does not like."[51] Academics have suggested that the term is "elusive,"[52] "readily manipulable,"[53] and "slippery."[54] These descriptions understate how difficult it has been for commentators to agree on what exactly constitutes judicial activism. As Professor Gerhardt stated in his brilliant article detailing the history of scholarly and political critique of the Supreme Court, "the same themes—abuse of power, judicial usurpation and restraint, and unprincipled activism—have been sounded throughout the past century . . . ."[55] It appears that one principle everyone can agree on is that we need a more coherent and transparent definition of judicial activism in order to successfully carry on the debate over the appropriate role of the Supreme Court.

Because of this lack of consensus among scholars as to what constitutes judicial activism, there has been a spate of recent articles employing complicated and multi-faceted approaches to defining the phrase. Although the tests vary in style and substance, one common theme is the importance of examining the results reached by the Supreme Court. For example, William Marshall has suggested that a helpful definition of judicial activism should include the following factors:

> (1) Counter-Majoritarian Activism: the reluctance of the courts to defer to the decisions of the democratically elected branches;
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> (2) Non-Originalist Activism: the failure of the courts to defer to some notion of originalism in deciding cases, whether that

50. *See* Roosevelt, *supra* note 16, at 1–3.
51. Marshall, *supra* note 3, at 1217.
52. Roberts, *supra* note 4, at 570.
53. Young, *supra* note 3, at 1141.
54. Kmiec, *supra* note 7, at 1442.
55. Gerhardt, *supra* note 1, at 638.

> originalism is grounded in a strict fealty to text or in reference to the original intent of the framers;
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> (3) Precedential Activism: the failure of the courts to defer to judicial precedent;
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> (4) Jurisdictional Activism: the failure of the courts to adhere to jurisdictional limits on their own power;
>
> (5) Judicial Creativity: the creation of new theories and rights in constitutional doctrine;
>
> (6) Remedial Activism: the use of judicial power to impose ongoing affirmative obligations on the other branches of government or to take governmental institutions under ongoing judicial supervision as a part of a judicially imposed remedy; and
>
> (7) Partisan Activism: the use of judicial power to accomplish plainly partisan objectives.[56]

Professor Marshall does not intend for these factors to supply a normative judgment about the workings of the Court but instead as a general measurement of the "court's activism."[57] After applying these various factors (all of which have to do with looking at results) to the workings of the Supreme Court, Professor Marshall reaches the conclusion that both conservative and liberal Justices engage in judicial activism, and neither's record "fairly appraised" can "be characterized as excessive," compared to the judicial activism of the other side.[58] In other words, his discussion of judicial activism and the application of his seven factors leads to no firm conclusions about the workings of the Court, other than it frequently exercises its power to engage in judicial activism.

In another detailed, scholarly account of judicial activism, Ernest Young attempted to come up with a definition of the phrase that would focus "attention on the judiciary's institutional role rather than the merits of particular decisions."[59] In focusing on the Court's role rather than on particular decisions, Professor Young argued that words like "activist" and

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56. Marshall, *supra* note 3, at 1220.

57. *Id.* at 1221.

58. *Id.* at 1255. In fairness to Professor Marshall, the major thesis in his article is not that conservatives are more activist than liberals, or visa-versa, but rather that conservative politicians are hypocritical when they suggest that conservative Justices engage in less judicial activism than liberal or moderate Justices. He is no doubt correct on this point.

59. Young, *supra* note 3, at 1141.

"restrained," will be more useful to describe specific aspects of decisions rather than evaluating the "overall record of the Supreme Court over a particular period of time."[60] Although this insight is no doubt correct in that within the same decision, or line of decisions, the Court can be both activist and deferential at the same time, it also underscores the failings of a result-centered definition of judicial activism. Here are Professor Young's "many faces" of activism, which sound similar to the list compiled by Professor Marshall: "(1) second-guessing the federal political branches or state governments; (2) departing from text and/or history; (3) departing from judicial precedent; (4) issuing broad or "maximalist" holdings rather than narrow or "minimalist" ones; (5) exercising broad remedial powers; and (6) deciding cases according to the partisan political preferences of the judges.[61]

As these factors demonstrate, Professor Young also argues that judicial activism is in some way linked to the degree to which the Court interferes with the other branches of government. Young makes this clear by arguing that the above-listed behaviors are "linked by a common thread: they all involve a refusal by the Court deciding a particular case to defer to other sorts of authority at the expense of its independent judgment about the correct legal outcome."[62] This linkage between judicial activism and the frequency with which the Court defers or does not defer to the other branches of government, the states, and its own prior decisions is the second shared assumption among academics writing about judicial activism, and nowhere is this phenomenon more pronounced than among those scholars engaging in an empirical analysis of the Supreme Court. In a recent article, Professor Ringhand purported to measure judicial activism by employing a statistical approach to the Rehnquist Court era. She clearly stated the goals of her article:

> This paper attempts to quantify one of the most deeply contested terms in constitutional law: "judicial activism." Most discussions of "judicial activism" define activism either in reference to a particular political ideology (such as complaints about "liberal activist judges") or a particular method of constitutional interpretation (such as assertions that a decision was "activist" because it was not based on the original meaning of the Constitution). This paper sidesteps those debates, focusing instead on an empirical examination of how recent U.S. Supreme Court justices have in fact exercised their judicial power. I do this by

60. *Id.* at 1143.
61. *Id.* at 1144.
62. *Id.* at 1145.

> examining the voting records of the individual justices in three areas: how often did the justices vote to invalidate federal legislation, how often did they do so in relation to state legislation, and how often did they vote to overturn existing judicial precedents? I also examine the issue areas in which each of the justices cast these votes and the ideological direction of the votes.[63]

After engaging in this empirical analysis, Professor Ringhand concluded, like Professor Marshall and most other academics, that "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."[64] In fact, most recent academic scholarship seems to be devoted to proving that the conservative wing of the Court is just as activist as the liberal/moderate wing, and academics employing both empirical analysis as well as detailed doctrinal review inevitably reach that conclusion.[65]

Although Professor Ringhand's conclusion about liberals and conservatives is undoubtedly correct, it adds little to the judicial activism debate because it equates the overturning of the decisions of the elected branches and the reversal of Court precedent with judicial activism. But unless that phrase is drained of all substantive and normative content, there is no way to determine whether a Court decision to invalidate another political actor's preference is activist because there is no commonly agreed upon baseline to support such a conclusion. For example, many conservatives viewed the Court's decision in *Lawrence v. Texas*[66] as a classic example of judicial activism. According to the critics, Justice Kennedy's opinion not only reversed the fairly recent landmark case of *Bowers v. Hardwick*,[67] but it also invalidated Texas's prohibition on same sex sexual conduct without any clear basis in text, history, structure or precedent.[68] On the other hand, to the extent that the liberty provision of the 14th Amendment protects fundamental, private decisions about procreation, intimacy, and bodily functions, a proposition for which there is both textual

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63. Ringhand, *supra* note 3, at 43–44 (footnotes omitted). For another empirical analysis of the Court's decisions in the context of the judicial activism debate, *see* Cross & Lindquist, *supra* note 25.

64. Ringhand, *supra* note 3, at 45.

65. *See, e.g.*, Marshall, *supra* note 3, at 1255; Ringhand, *supra* note 3, at 45; Cross & Linquist, *supra* note 25, at 1753.

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

67. *See id.*

68. *See id.* at 587, 594–95, 599 (Scalia, J., dissenting).

and precedential support,[69] the Court would have been remiss in its role, or to put it another way, would have acted outside its institutional boundaries, to allow Texas to put people in jail for conduct protected by the Constitution. Whether invalidating the Texas statute was more activist than allowing it to stand is a question which simply does not yield a right or wrong answer. Yet, Professor Ringhand, as well as the other academics involved in this debate, would clearly define *Lawrence* as an activist decision.[70]

Another example from the other side of the political spectrum is the Court's decision in *United States v. Lopez*.[71] Liberals castigated the Court for refusing to allow Congress to outlaw guns around schools and suggested that the decision was judicially activist.[72] If we use the definitions of judicial activism suggested by Professors Marshall, Young, and Ringhand, that description is obviously accurate. The Court invalidated an Act of Congress while at the same time casting great doubt on much of its own Commerce Clause jurisprudence. However, to the extent that the Court is supposed to police the appropriate boundaries between state and federal power, and to the extent that the Gun Free School Zones Act transcended that line because of its tenuous relationship to the national economy, the Court's duty was to invalidate the law. Again, there is no method of resolving the debate over whether the Court acted correctly. All we can say is that the Court did overturn an act of Congress, and if that means the same thing as saying it engaged in judicial activism, then we are not saying very much at all but just describing what the Court did.

It turns out that the Supreme Court, whether in liberal, conservative or moderate times, has throughout history invalidated the acts of other political actors and reversed its own precedent, and any definition of judicial activism that is based on an examination of how often, or in what cases, the Court overturns legislation and prior decisions will in the end duplicate substantive critique of the Court's legal doctrine. That is why both academic and political claims that the Court has exceeded its institutional role have been constant throughout American history. Professor Gerhardt

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69. *See* Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21 (2003).

70. *See* Ringhand, *supra* note 3, at App. B.

71. United States v. Lopez, 514 U.S. 549, 567 (1995).

72. Justice Souter's dissent makes this argument. *See id.* at 604, 611 (Souter, J., dissenting); *see also* Michael C. Dorf, *They Are All Activists Now*, FINDLAW.COM, May 1, 2000, http://writ.news.findlaw.com/dorf/20000501.html; Donald H. Zeigler, *The New Activist Court*, 45 AM. U. L. REV. 1369, 1389–1401 (1996).

has ably summarized the history of the accusations of judicial activism by politicians and academics across the political spectrum:

> In Thayer's classic plea of 1893 for judicial self-restraint; in President Roosevelt's impassioned radio "chat" of March 9, 1937, calling for re-organization of the federal judiciary; in the unsuccessful crusade in 1957 to curb judicial enforcement of certain provisions of the Bill of Rights; in Senator Everet Dirksen's repeated attempts to undo by constitutional amendment the 1964 "one man, one-vote" ruling on state legislative apportionment; and underlying the proposed constitutional amendments to outlaw busing, overturn *Roe*, authorize states to outlaw flag-burning, eliminate life tenure for federal judges, and make Supreme Court decisions overturning state and federal laws subject to a congressional veto. Judicial restraint is no more the singular province of conservatives than activism is the penchant of only liberals.[73]

If the judicial activism debate is to mean something different than a substantive disagreement with Court decisions, we must move in a new direction. We must try to find some generally accepted baseline conduct, other than the review of specific outcomes, against which we can measure the Court and its opinions. The next section of this article suggests such a framework.

II. THE PARADIGM OF JUDICIAL RESPONSIBILITY

As I demonstrated in the prior Section, the judicial activism debate is not furthered by politicians and academics who use the phrase simply as a measure of how often the Court reverses the decisions of other political actors. If the measurement is how much or how little deference the Court gives to other institutions, there is no agreed upon baseline to determine whether the Court in a particular case, or era, is appropriately activist or not. However, if we change our perspective to an analysis of how we expect the Court to write its decisions and justify its outcomes, most scholars and politicians will agree on certain fundamental principles. Apart from the obvious rules of judicial ethics, which no scholar has suggested the Court has violated in any significant way, we should expect the Court to explain its decisions with a minimum degree of transparency, coherency, and honesty. These requirements are important because if the Court distorts verifiable factual or legal events, it undermines the Court's credibility and

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73. Gerhardt, *supra* note 1, at 638.

possibly suggests that the Court is reaching results for illegitimate reasons. This in turn makes it difficult to evaluate whether the Court is treating similarly situated people similarly, a core requirement of the rule of law.[74] Moreover, when the Court fabricates facts or ignores or distorts material arguments, it is not acting like a Court—or to put it another way, it is not adequately exercising judicial responsibility. As H. Jefferson Powell has recently written:

> Because of the inescapability of judgment in the interpretation and application of the Constitution, candor is essential if the justices . . . are to ask the rest of us to take them seriously . . . . Only if you and I understand the true grounds of the decision can we assent to its correctness . . . to its validity as the outcome of our system even though we think it wrong in substance. Because the Constitution is not a crossword puzzle with only one right answer . . . playing the constitutional law game fairly demands that the players be clear about why they give the answers they do. Candor is indispensable if the system is to retain its moral dignity . . . . The constitutional virtue of candor, therefore, goes beyond honesty . . . . It is the disposition to seek . . . a congruity between the mind grappling with the constitutional issue before it and the language in which that struggle and its resolution is expressed . . . .[75]

The most serious objection to this framework may be that there will be no agreement on when the Court fails to act in a minimally transparent manner or when it fabricates or distorts historical facts. In response to these possible objections, I will give examples of Court opinions that by any reasonable standard contain these failings. After providing these examples, I will try to show why such decision-making is harmful, and demonstrate, through the jurisprudence of Justice Kennedy, the value of asking these kinds of questions.

The most common way the Court distorts the past is to mischaracterize, beyond any reasonable doubt, a prior case. A classic example of this type of phenomenon is Justice Black's majority opinion in *Younger v. Harris*.[76] The issue in the case was whether the plaintiff could seek an injunction in federal court against a state court prosecution for distributing anti-

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74. *See* William B. Barker, *The Three Faces of Equality: Constitutional Requirements in Taxation*, 57 CASE W. RES. L. REV. 1, 35 (2006).

75. H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE 90 (Univ. of Chicago Press 2008).

76. 401 U.S. 37 (1971).

government leaflets.[77] For most of our history, the Supreme Court has not allowed federal court injunctions against state court prosecutions absent a showing of bad faith, which was not at issue in *Younger*. In 1965, however, a majority of the Court in *Dombrowski v. Pfister*[78] plainly held that the bar against state court injunctions would be lowered if the plaintiff alleged that the statute he was being prosecuted under was facially overbroad under the First Amendment. This part of the opinion was not dicta[79] and led to numerous post-*Dombrowski* attempts to enjoin local prosecutions of civil rights activities under statutes challenged as being overbroad under the First Amendment.[80]

By the time the Court heard *Younger*, the Court was obviously concerned with how intrusive these federal lawsuits were on state law enforcement.[81] The Court held in *Younger* that allegations by a plaintiff that a statute was overbroad under the First Amendment did not constitute an exception to the rule that federal courts should not enjoin state court criminal prosecutions.[82] To reach that decision the Court had to wrestle with the opposite holding in *Dombrowski*. The Court could have simply reversed the decision but declined to do so. The Court said the following:

> The District Court . . . thought that the *Dombrowski* decision substantially broadened the availability of injunctions against state criminal prosecutions and that under that decision the federal courts may give equitable relief, without regard to any showing of bad faith or harassment, whenever a state statute is found 'on its face' to be vague or overly broad, in violation of the First

77. *Id.* at 38–42.

78. 380 U.S. 479, 492 (1965).

79. The Court said: "A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. . . . Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression – of transcendent value to all society, and not merely to those exercising their rights – might be the loser." *Id.* at 486 (citations omitted).

80. *See* Ada Sheng, *Analyzing the International Criminal Court Complementarity Principle Through a Federal Courts Lens*, 13 ILSA J. INT'L & COMP. L. 413, 429 (2007); Michael Wells, *Positivism and Antipositivism in Federal Courts Law*, 29 GA. L. REV. 655, 689 n. 173 (1995).

81. *Younger*, 401 U.S. at 42–45.

82. *Id.* at 52–53.

> Amendment. *We recognize that there are some statements in the Dombrowski opinion that would seem to support this argument.*[83]

The Court then went on to explain why it thought that the part of *Dombrowski* relied on by the district court was simply dicta. The *Younger* Court said that the injunction was appropriate in *Dombrowski* because the plaintiffs had alleged bad faith enforcement of the law,[84] and therefore the First Amendment analysis was unnecessary to the holding of the Court.[85] But this statement is simply and unarguably false. The Court in *Dombrowski* remanded the case to the lower court for a factual determination of the plaintiffs' bad faith allegations but in another part of the opinion enjoined any prosecution of the plaintiffs under those parts of the state law that were held facially invalid. The *Dombrowski* Court held the following:

> The precise terms and scope of the injunctive relief to which appellants are entitled and the identity of the appellees to be enjoined cannot, of course, be determined until after the District Court conducts the hearing on remand [on the bad faith allegations]. The record suffices, however, to permit this Court to hold that, without the benefit of limiting construction, the statutory provisions on which the indictments are founded are void on their face; [and] until an acceptable limiting construction is obtained, the provisions cannot be applied to the activities of SCEF, whatever they may be.[86]

Justice Black in *Younger* misstated the holding, facts, and procedural posture of the *Dombrowski* decision perhaps to avoid having to overrule it expressly. The question arises: So what? The Court could have reached the same result in many different ways including explicitly reversing *Dombrowski*. One answer is that when the Court justifies a decision by fabricating a description of a prior case directly on point, the Court makes a mockery of the notion of stare decisis. It is one thing to narrow a prior decision or extend it or limit it to some rational degree, *but it is quite another to flatly misstate the holding of the prior case.* While many may ignore this failing because it happens so frequently, this apathy to the Court's continuous irresponsibility is exactly the problem. The Court acts outside its appropriate role when it dishonestly summarizes past decisions because judges should not engage in that kind of misleading behavior. It is

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83. *Id.* at 50 (emphasis added).

84. *Id.* at 48–50.

85. *Id.* at 50.

86. Dombrowski v. Pfister, 380 U.S. 479, 497 (1965).

inconsistent with the idea that prior law matters. It is not how judges should behave. It is, quite simply, irresponsible judicial behavior.

An interesting aspect of *Younger* is that there has been little criticism of Justice Black's faulty analysis over the years nor accusations of judicial activism because, as a matter of result, the Court actually deferred to another political institution—the state court judicial system. The definitions employed by Professors Marshall, Young, and Ringhold would not count *Younger* as an activist case because it did not reverse state or federal legislation or explicitly its own precedent. The only scholars who might label *Younger* activist are those who disagree with the Court's decision.[87] But other eminent scholars view *Younger* abstention as correct.[88] That difficult debate has no clear answer but regardless of who is right or wrong, we can all agree that Justice Black and the Justices who joined his opinion acted improperly by mischaracterizing the holding of *Dombrowski*. On this point, we can reach consensus without disputed baselines and contestable value judgments.

During the 1990's, the Court decided two important issues of public policy that demonstrate the futility of the current debate over judicial activism but illustrate how a change in that debate may be helpful. These two issues are (1) the appropriate level of review governing the federal government's ability to employ racial preferences pursuant to its power under Section 5 of the Fourteenth Amendment, and (2) whether Congress may commandeer state legislatures and executives to implement federal law.[89] Both questions raise important federalism questions as to the constitutional powers that Congress may exercise.

The Court first suggested that the federal government may not be limited in its use of affirmative action in the same way as the states in *Fullilove v. Klutznick*,[90] which rejected a facial challenge to a minority set aside requirement in a federal spending program. Although the various opinions did not agree on what level of review applied to racial preferences created by Congress, it was clear that at least six Justices did not apply strict

87. *See* Martin Redish, *Abstention, Separation of Powers, and the Judicial Function*, 94 YALE L.J. 71, 86 (1984) (arguing that Court's abstention doctrines violate the separation of powers).

88. *See* Barry Freidman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 559 (1988) (arguing that "[y]ounger abstention generally is appropriate in any case in which the federal defendant already has begun a state proceeding at the time the federal action is commenced, or begins such a proceeding shortly after the federal action is filed.").

89. *See* Adarand Constructors, Inc., v. Pena, 515 U.S. 200 (1995); New York v. United States, 505 U.S. 144 (1995); Printz v. United States, 521 U.S. 898 (1887).

90. Fullilove v. Klutznick, 448 U.S. 448, 449–51 (1980).

scrutiny to the challenged program. Chief Justice Burger's plurality opinion emphasized "appropriate deference to Congress" and rejected the idea that Congress has to act in a "color blind" fashion when exercising its powers under Section 5 of the Fourteenth Amendment.[91]

Almost ten years and a number of Court personnel changes later, the Court revisited the question of minority set asides but this time with regard to a program enacted by the City of Richmond, Virginia.[92] The City's affirmative action plan had been patterned after the program that was upheld in *Fullilove*.[93] In an opinion written by Justice O'Connor, the Court distinguished *Fullilove* on the grounds that the scope of congressional power under Section 5 of the Fourteenth Amendment to redress racial problems is greater than the power exercised by the states and its subdivisions. The Court said the following:

> That Congress may identify and redress the effects of society-wide discrimination does not mean that, a fortiori, the States . . . are free to decide that such remedies are appropriate. Section I of the Fourteenth Amendment is an explicit constraint on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 State legislatures . . . . We believe such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action . . . .[94]

After distinguishing *Fullilove* on the basis that state power to remedy racial injustices is more limited than Congress', the Court applied strict scrutiny to Richmond's set aside program and held it unconstitutional under the Fourteenth Amendment.[95]

Given Justice O'Connor's treatment of the respective powers of the states and Congress, it was perhaps not surprising that a year later a majority of the Court in *Metro Broadcasting v. FCC*,[96] flatly and unequivocally held that intermediate—not strict scrutiny—would be applied by the Court to racial preferences adopted by Congress and administrative agencies acting pursuant to Congressional authority. In reviewing the validity of two minority preference policies adopted by the FCC, the Court

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91. *Id.* at 482.
92. Richmond v. J.A. Croson Co., 488 U.S. 469, 476–77 (1989).
93. *See id.* at 469.
94. *Id.* at 490–91.
95. *Id.* at 490, 494, 511.
96. 497 U.S. 547, 564 (1990).

said that "benign race-conscious measures mandated by Congress . . . are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives."[97] The five Justices, specifically noted that "much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress . . . are subject to a different standard than such classifications prescribed by state and local governments."[98] At the time that *Metro Broadcasting* was decided, the only Supreme Court cases that discussed the issue of different levels of review for congressional and state racial preferences were *Fullilove* and *Croson*, and a majority of the Court quite reasonably interpreted those cases to require intermediate scrutiny for congressionally mandated affirmative action programs.

The next time the Court reviewed a federal affirmative action program, *Adarand Constructors, Inc., v. Pena*,[99] the Court changed its mind and held that strict scrutiny applied to all racial preferences, even those enacted by Congress.[100] That result, according to some scholars on the left, amounts to judicial activism in light of the history and purposes of the Fourteenth Amendment.[101] Others, of course, disagree and believe that the Court correctly ruled that any racial preferences enacted by any governmental body should be governed by strict scrutiny.[102] This debate is a difficult one, and reasonable people can disagree over whether the Court was correct. But what reasonable people cannot disagree about is the failure of Justice O'Connor's opinion in *Adarand* to correctly outline the previous history of this issue. She first claimed that the Court's cases prior to *Metro Broadcasting* established the "congruence" principle that the level of review of state and federal racial preferences would be exactly the same—strict scrutiny.[103] That sentence is simply incorrect. No Supreme Court majority had ever reached that result. Then Justice O'Connor said that "the Court

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97. *Id.* at 564–65.

98. *Id.* at 565.

99. 515 U.S. 200 (1995).

100. *Id.* at 235.

101. *See* Jeb Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1141–43, 1176 (2002).

102. *See* William Perry Pendley, *Last Chance for a Color-Blind Constitution?*, TOWNHALL.COM, Sept. 1, 2006, http://townhall.com/columnists/WilliamPerryPendley/2006/09/01/last_chance_for_a_color-blind_constitution; John O'Sullivan, *Preferred Members: Affirmative Action for All, Except White Males*, NATIONAL REVIEW, Sept. 3, 2001, http://findarticles.com/p/articles/mi_m1282/is_17_53/ai_77237131.

103. *Adarand Constructors, Inc.*, 515 U.S. at 223–24.

took a surprising turn" in *Metro Broadcasting*, that *Metro Broadcasting* "departed from prior cases" and finally that *Metro Broadcasting* was "a significant departure from much of what had come before it."[104] She then expressly overruled *Metro Broadcasting*.[105]

There are many plausible arguments as to why *Metro Broadcasting* was incorrectly decided, and there are many reasonable arguments as to why the principles of stare decisis did not require it to be affirmed. However, there are no legitimate arguments that one of the reasons for not applying stare decisis to *Metro Broadcasting* was because it was a departure from previous cases.[106] As one noted commentator has observed, Justice O'Connor's treatment of the state of the law at the time of *Metro Broadcasting* was simply "dishonest."[107] This reasoning is no better than the Court saying that it would not adhere to *Metro Broadcasting* because there were not five Justices who agreed to its reasoning.[108] Had the Court given that mistaken fact as a reason supporting its decision, presumably there would have been much outrage, even among those who supported the result. Saying that *Metro Broadcasting* was a significant departure from prior decisions is just as incorrect as saying that five Justices did not agree to its reasoning.

Justice O'Connor's incorrect statement of the past in *Adarand* is an example of judicial irresponsibility. The idea that the Court is bound to some degree to respect its prior cases is a fundamental aspect of its duty to make sure that the Court treats similarly situated people similarly, absent good reason for a change in the law. When the Court makes a mockery of prior doctrine, as Justice O'Connor did in *Adarand*, it acts outside its appropriate role and implicates core rule of law principles. Although we as a society may always be divided on the question of affirmative action, and

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104. *Id.* at 225–27 nn.104–06.

105. *Id.* at 227.

106. For a few of the many scholars who have made this observation or similar observations, *see, e.g.*, David Kairys, *More Or Less Equal*, 13 TEMP. POL. & CIV. RTS. L. REV. 675, 683 (2004) (discussing *Adarand's* odd and troubling use of stare decisis); Frank S. Ratvich, *Creating Chaos in the Name of Consistency: Affirmative Action and the Odd Legacy of Adarand Contractors, Inc. v. Pena*, 101 DICK. L. REV. 281, 316–317 (1997) (criticizing the Court's analysis of the history of the question of what level of review to apply to federal affirmative action programs); Jay Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 345 (1998) (suggesting that the Court's treatment of *Metro Broadcasting* in *Adarand* was "both inherently unsatisfactory and precedentially dangerous," although the commentator approved of the result in *Adarand*).

107. Neil Devins, *Adarand Constructors, Inc. v. Pena and the Continuing Irrelevance of the Supreme Court's Affirmative Action Decision*, 37 WM. & MARY L. REV. 673, 706 (1996).

108. That was one of the reasons given by Justice Rehnquist for not applying stare decisis to an Eleventh Amendment question in *Seminole Tribe v. Florida*, 517 U.S. 44, 63–64 (1996).

what level of review should be applied to whom, we are not divided on the question of whether the Court should have to wrestle with its precedents in a meaningful and appropriate manner. The Court failed to do this in *Adarand*, which makes Justice O'Connor's opinion a classic example of irresponsible judging, though not for the reasons that most commentators suggest—that the Court applied an improper legal standard to an act of Congress or that it reversed its own recent precedent. Rather, the Court failed to appropriately acknowledge or justify its abandonment of prior doctrine with valid legal reasons.

Also during the 1990's, the Court issued a pair of decisions cutting back on Congress' commerce clause powers to require states to implement federal law. In *New York v. United States*,[109] the Court held that Congress does not have the authority to require state legislatures to carry out federal policy. In *Printz v. United States*,[110] the Court held that Congress could not mandate that state executives help implement a federal gun control program. The issue whether Congress could press state executives into federal service, according to Justice Scalia, who wrote the majority opinion in *Printz*, was not answered by the "constitutional text" and, therefore, had to be resolved by looking at "historical understanding and practice . . . the structure of the Constitution, and . . . the jurisprudence of this Court."[111] Justice Scalia, having made historical understandings relevant to the constitutional question, was then forced to wrestle with unambiguous statements from the founders that Congress could, contrary to the Court's ultimate holding, press state governments into federal service. As both Justices Souter and Stevens argued in dissent, Alexander Hamilton in *The Federalist No. 27* made the following statement on this very question: "[The Constitution] by extending the authority of the federal head to the individual citizens of the several States, will enable *the government to employ the ordinary magistracy of each in the execution of its laws.*"[112] Justice Stevens went on to say that "Hamilton's meaning was unambiguous; the Federal Government was to have the power to demand that local officials implement national policy programs."[113] Justice Stevens also bolstered his historical argument by providing examples of early federal

109. 505 U.S. 144, 149 (1992).

110. 521 U.S. 898 (1997).

111. *Id.* at 905.

112. *Id.* at 945, 971 (Stevens, J., dissenting) (Souter, J., dissenting) (emphasis added) (quoting THE FEDERALIST NO. 27, at 174 (Alexander Hamilton) (J. Cooke ed., 1961)).

113. *Id.* at 945–46 (Stevens, J., dissenting).

laws requiring state judges to implement federal law, not by acting as judges, but by performing various administrative tasks.[114]

Justice Scalia, having stated that history was relevant, had to respond to this evidence. As to Hamilton's statements, his response was the following:

> There are several obstacles to such an interpretation [that *The Federalist No. 27* meant that the federal government could conscript state executives]. First, the consequences in question . . are said in the quoted passage to flow automatically from the officers' oath to observe "the laws. . . ." Thus, if the passage means that state officers must take an active role in the implementation of federal law, it means that they must do so without the necessity for a congressional directive . . . . But no one has ever thought, and no one asserts in the present litigation, that that is the law. The second problem with Justice Souter's reading is that it makes state legislatures subject to federal direction . . . . We have held, however, that state legislatures are not subject to federal direction.[115]

Justice Scalia's reasons for rejecting the plain and unequivocal meaning of *The Federalist No. 27* are not just unpersuasive arguments; they do not rise to the level of a meaningful response. The first reason Scalia provides is difficult to comprehend. Apparently he is suggesting that, to the extent that *The Federalist No. 27* stands for the proposition that state agents would have to implement federal law even when not asked, "no one has ever thought" that to be the case.[116] But the reason "no one . . . ever thought" that is because no one would ever interpret the language that way. Justice Scalia is tearing down an imaginary straw man of his own creation. The dissent's argument was that when the federal government acts pursuant to its enumerated powers, it is allowed to "employ the ordinary magistracy of each [state] in the execution of its laws"[117] if it wants to, not that state officers have to carry out federal policy automatically. Scalia's first response is not a response at all.

Justice Scalia's second response to *The Federalist No. 27* is that, if it says what Justices Stevens and Souter argue it means, then it would be inconsistent with the Court's holding in *New York v. United States*,[118] which held that Congress could not commandeer state legislatures. *New York* was

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114. *Id.* at 949–51.

115. *Id.* at 912 (majority opinion) (citing New York v. United States, 505 U.S. 144 (1992)).

116. *Id.*

117. *Id.* at 945, 971 (Souter, J., dissenting) (Stevens, J., dissenting) (quoting THE FEDERALIST NO. 27, at 174 (Alexander Hamilton) (J. Cooke ed., 1961)).

118. *Id.* at 912.

decided in 1992 and did not discuss *The Federalist No. 27* or any other relevant history on this question. The point is that it was Justice Scalia who put history into play in *Printz*, and there is no reasonable argument that history supported his side, which is perhaps why Justice Stevens said in dissent that "[n]o fair reading of these [historical] materials can justify . . . [the majority's] interpretation."[119]

I am not arguing that *Printz* was decided incorrectly, though I think that it was. But Justice Scalia's historical arguments go well beyond poor reasoning. They amount to the giving of reasons that are, in fact, *illegitimate*. It is past time that, when evaluating Justices, we stop ignoring the presentation of arguments that reflect bad faith, dishonesty, or gross carelessness. Most of the arguments in *Printz* are capable of reasonable disagreement, but what history reflects on the important question of congressional commandeering of state officers is simply not one of them.

Justice Black in *Younger* flatly mischaracterized the holding of the most current case directly on point; Justice O'Connor in *Adarand* distorted beyond recognition the history of a key affirmative action issue; and Justice Scalia in *Printz* ignored unambiguous historical facts undermining the result he wanted to reach. Each case represents a clear example of the Supreme Court acting irresponsibly, not because of the results reached, but because of the obvious failings of the explanations offered for those results.

Another example of the Court's failure to meet minimal standards of judicial responsibility is *Rogers v. Tennessee*,[120] a case directly implicating rule of law principles.[121] The defendant in *Rogers* stabbed his victim with a knife causing death to occur fifteen months later. He was convicted of second-degree murder despite the common law rule then applicable in Tennessee that a defendant could not be convicted of murder if the death he caused occurred more than a year and a day after the crime. The state supreme court held that this rule no longer made sense, that it should be abolished and that its abolition should be applied retroactively to this defendant.

The Ex Post Facto Clause of the Constitution prohibits legislatures from punishing people for crimes that were not a crime at the time of the defendant's conduct.[122] The text of the clause, however, applies to legislatures, not courts. Nevertheless, in *Bouie v. City of Columbia*,[123] the

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119. *Id.* at 947 (Stevens, J., dissenting).

120. 532 U.S. 451 (2001).

121. For a similar discussion of this case, *see* Eric J. Segall, *Justice O'Connor and the Rule of Law*, 17 U. FLA. J.L. & PUB. POL'Y 107, 131–33 (2006).

122. *See* U.S. CONST. art. I, § 10 ("No state shall . . . pass . . . [any] ex post facto law.").

123. 378 U.S. 347 (1964).

Supreme Court held that ex post facto principles apply to courts through the Due Process Clause of the Fourteenth Amendment because "[i]f a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a state supreme court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."[124] The issue in *Rogers* was whether the holding of *Bouie* prohibited the retroactive repeal of the "year and a day" rule by the Tennessee Supreme Court.

Despite the clear ruling of *Bouie*, the Court in *Rogers* held that the Due Process Clause did not specifically incorporate ex post facto limitations. The Court said that *Bouie* was based on core due process concepts such as fair notice and foreseeability and that the Court's discussion of the Ex Post Facto Clause was dicta.[125] Extending the Ex Post Facto Clause to the courts, according to the Court, would show too little regard for the differences between legislatures and courts.[126]

In light of this interpretation of *Bouie*, the question in *Rogers* was not whether the Tennessee Supreme Court violated ex post facto limitations by retroactively abolishing the year and a day rule but whether the defendant had fair warning that the rule might be changed. The Court concluded that he did because the rule had become an "outdated relic of the common law," the rule had been abolished in most other jurisdictions, and at the time of the crime the rule had only "a tenuous foothold" in the criminal law of Tennessee.[127] Therefore, even though the year and a day rule was still technically part of the Tennessee criminal law at the time of the defendant's offense, he could be convicted of murder despite the fact that his victim died fifteen months after the crime.

The Court's characterization of the *Bouie* Court's discussion of the Ex Post Facto Clause as dicta is simply wrong. That discussion was "essential to the holding of that case," and it was repeated at the end of the opinion before the holding was announced.[128] As Justice Scalia said in his dissent, the *Rogers* majority's determination that the Ex Post Facto discussion in *Bouie* was dicta could be right only if the "concept of dictum . . . includes the very reasoning of the opinion."[129]

The Court's mischaracterization of *Bouie* in *Rogers* violates rule of law and judicial responsibility principles on several levels. The substantive issue in these cases is whether a person can be convicted of a crime that was not

124. *Id.* at 353–54.

125. *See Leading Cases,* 115 HARV. L. REV. 306, 318 (2001).

126. *Id.* at 318–19.

127. *Id.* at 319 (citing Rogers v. Tennessee, 532 U.S. 451, 463–64 (2001).

128. *Id.* at 321–22.

129. *Id.* at 322. (citing *Rogers*, 532 U.S. at 469).

an offense at the time of his action. The answer under the Ex Post Facto Clause is no, and legislatures, therefore, cannot make criminal laws retroactive. In *Bouie*, the Court held that it would be unfair for state courts to accomplish what state legislatures could not. In *Rogers*, the Court not only failed to faithfully apply rules of precedent, it then went on to hold that courts may retroactively apply criminal laws as long as the defendant had fair notice; a requirement the Court diluted beyond recognition in the *Rogers* case. Ironically, the reason Justice O'Connor gave for this new rule was that courts are more constrained than legislatures and, therefore, retroactive judicial interpretations pose fewer dangers than retroactive legislative changes. But, she said this is a case where the Court flatly misinterpreted a prior case that would have given defendants fair notice that courts are as much bound by the Ex Post Facto Clause as legislatures. Even as to rule of law questions, the Court did not apply proper rule of law principles and acted irresponsibly.

There is a plausible, non-legal explanation as to why the Court departed from the *Bouie* rule in *Rogers*. The defendants in *Bouie* were civil rights protesters who were asked to leave a whites-only counter during the early 1960's. Their convictions were upheld in the state courts even though South Carolina's trespass laws had never before been interpreted to apply to the situation of these protesters.[130] In *Rogers*, the defendant was far less sympathetic as his crime simply involved "an isolated stabbing with no socially redeeming purpose."[131] But the differences in these cases should not make a constitutional difference because the defendant in *Rogers* was just as entitled as the defendants in *Bouie* not to be held accountable for a crime that was not a crime when he engaged in the conduct at question. The Court in *Rogers* should have either overruled *Bouie* expressly or explained why it was different. Instead, it simply mischaracterized the past in a constitutionally meaningful way.

A final example of the kind of judicial failure that we should be concerned about, though I could provide many more, involved a case in which the Court decided not to resolve the merits of the controversy nor to overturn a previous case. The issue in *Allen v. Wright* was whether parents of black school children had standing to file a lawsuit challenging the way the IRS was enforcing its legal obligations to deny tax exempt status to private schools that discriminated on the basis of race.[132] The children's parents argued that the government's subsidizing of these private schools

130. *Id.* at 323.

131. *Id.*

132. 468 U.S. 737, 740 (1984). For a similar summary of the problems with this case, see Segall, *supra* note 121, at 112–14.

made it more difficult for their children to receive a desegregated public school education. Justice O'Connor, writing for the Court, held that the alleged integration injury was sufficient to satisfy the injury prong of the standing test but the plaintiffs could not show that the government caused their injuries because it was purely speculative whether the withdrawal of the tax exemptions would cause the allegedly discriminatory private schools to modify their policies in a way that would drive white children back to the public schools.[133] The problem was that there was a prior Supreme Court case raising the identical issue where the plaintiffs were granted standing. In 1971, in *Coit v. Green*, parents of public school children also claimed that the IRS policy of providing tax exemptions to racially discriminatory private schools made it more difficult for their children to receive a desegregated public school education.[134] This was exactly the same allegation made by the plaintiffs in *Allen*. The Court could have overruled *Coit* but did not. Instead, it tried to distinguish the case partly on the basis that *Coit* involved a summary affirmance, but that was a throw-away line because standing is a matter of subject matter jurisdiction, and the Court cannot summarily affirm any decision unless the plaintiffs have Article III standing. Instead, the majority spent most of its time trying to distinguish *Coit* on the facts, stating:

> [T]he facts in the *Coit* case are sufficiently different from those presented in this lawsuit that the absence of standing here is unaffected by the possible propriety of standing there. In particular, the suit in *Coit* was limited to the public schools of one State. Moreover, the District Court found, based on extensive evidence before it . . . *that large numbers of segregated private schools had been established in the State for the purpose of avoiding a unitary public school system; that the tax exemptions were critically important to the ability of such schools to succeed; and that the connection between the grant of tax exemptions to discriminatory schools and desegregation of the public schools in the particular State was close enough to warrant the conclusion that irreparable injury to the interest in desegregated education was threatened if the tax exemptions continued.*[135]

There are significant problems with this analysis. The Court suggested that the plaintiffs could not sufficiently prove for *standing* purposes a proposition that the granting of tax exemptions to racially discriminatory

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133. *Id.* at 756–58.

134. 404 U.S. 997, 997 (1971), *aff'd*, Green v. Connally, 330 F. Supp. 1150, 1171 (D.C. 1971).

135. *Allen*, 468 U.S. at 764–65 (emphasis added) (citations omitted).

private schools threatened integrated public schools, because, in a previous case, other plaintiffs, after being given the opportunity at trial, proved exactly that proposition. As the dissent in *Allen* pointed out, the majority's discussion of *Coit* "stretches the imagination beyond its breaking point."[136] We are left unable to discern the Court's real rationale, making it impossible to predict how the next standing case will be decided and why two sets of similarly situated plaintiffs were treated differently by the Supreme Court.

It bears emphasizing that the problem with *Allen* is not just that the reasoning is unpersuasive. What is wrong with *Allen* is that a prior indistinguishable case was distinguished in a manner *no different* than saying the prior case was different because the color of the plaintiff's eyes was different in one case than the other. Had that been the basis of the decision, there would have been a huge uproar and no question that the Court acted outside its appropriate role. As Professor Geoffrey Stone has written:

> It is the responsibility of the judge faithfully to apply precedent, to explain his or her reasoning in an honest and forthright manner, to acknowledge the difficulties when they arise, and to explain and to justify any departures from precedent. That is at the very heart of the judicial craft, and it is the very essence of a principled system of law.[137]

The notion that *Coit* was distinguishable from *Allen* because, in *Coit*, the plaintiffs proved at trial what the *Allen* plaintiffs *alleged pretrial* is fanciful and amounts to a bad faith effort to deal with difficult precedent. *Allen* is a classic example of irresponsible judicial behavior.

I could provide many other examples of the Court's disregard of facts and cases inconsistent with the results it wanted to reach, its failures to address an issue, which, by any kind of logic, should have been addressed or its obvious mischaracterizations of prior cases. A notable professor recently described five such examples all occurring in the last two years.[138] This kind of judicial behavior should be given more attention by scholars and politicians. As two academics have only recently observed:

> The primary function of transparency in proceedings at trials and arguments, and of published decisions and opinions explicating judges' rulings, is to manifest their disinterest not only

136. *Id.* at 780 n.9 (Brennan, J., dissenting).

137. Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1536 (2008).

138. *See id.* at 1538–42.

> to the parties whose contentions they judge, but also to their lawyers, who share responsibility for imposing moral judgment on the professionalism of judges . . . . A judge or a Justice, sitting in a court of law, who intentionally and often disregards controlling legal texts . . . should be chastised.[139]

It is well past time that politicians, scholars, and lawyers wrestle with this problem of judicial irresponsibility, and we can begin that process by focusing on the jurisprudence of the most important judge in America—Justice Anthony Kennedy.

III. THE CONSTITUTIONAL JURISPRUDENCE OF JUSTICE ANTHONY KENNEDY

Justice Kennedy has written numerous opinions exemplifying both extremes of judicial responsibility. Some of his opinions are refreshingly transparent and honest, reflecting fidelity to the past, while others reflect many of the problems with the Court's failure to adhere to minimal levels of judicial behavior. This Section discusses both kinds of cases.

A glaring exercise of judicial irresponsibility by Justice Kennedy is his decision in *Romer v. Evans*,[140] though not for the reasons often given by politicians and scholars. The issue in *Romer* was the constitutionality of Amendment Two to the Colorado Constitution which provided the following:

> NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.[141]

Shortly after Amendment Two was passed, various plaintiffs filed suit in a Denver state court claiming that Amendment Two, on its face, violated

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139. Paul D. Carrington & Roger C. Cramton, *Original Sin and Judicial Independence: Providing Accountability for Justices*, 50 WM. & MARY L. REV. 1105, 1106, 1117 (2009).

140. 517 U.S. 620, 620 (1996).

141. *Id.* at 624 (citing COLO. CONST. art. II, § 30(b) (1992)) (emphasis added).

several Constitutional provisions, including the Fourteenth Amendment's Equal Protection Clause. The plaintiffs included three cities that had enacted anti-discrimination measures based on sexual orientation and individuals who sought governmental policies and laws barring discrimination on the basis of sexual orientation.

The Colorado Supreme Court first held that Amendment Two was subject to strict scrutiny because it burdened the fundamental rights of homosexuals and bisexuals to participate equally in the political process. The court remanded the case for a trial to determine whether Amendment Two was narrowly tailored to serve a compelling governmental interest.[142] Upon remand, the lower court concluded that Amendment Two did not serve a compelling state interest in the least restrictive manner.[143] The court permanently enjoined enforcement of the statute. The Colorado Supreme Court affirmed that decision and restated its previous holding that Amendment Two infringed upon the fundamental right of an identifiable group to participate equally in the political process.[144]

By a 6–3 decision, the Supreme Court affirmed the decision of the Colorado Supreme Court, though on different grounds.[145] Justice Kennedy began his analysis by quoting Justice Harlan's famous statement from his dissenting opinion in *Plessy v. Ferguson* that the United States Constitution "neither knows nor tolerates classes among citizens."[146] He then referred to Amendment Two as an amendment that "prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons . . . ."[147] He noted that various state, city, and local governments in Colorado had adopted specific policies prohibiting discrimination against homosexuals and that all of these provisions were repealed by Amendment Two. Rejecting the State's argument that Amendment Two simply "puts gays and lesbians in the same position as all other persons,"[148] Justice Kennedy found that Amendment Two placed homosexuals in a "solitary class," and that it withdrew from them, "but no others, specific legal protection from the injuries caused by discrimination . . . ."[149]

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142. *Id.*
143. *Id.* at 626.
144. *Id.*
145. *Id.* at 635–36.
146. *Id.* at 623.
147. *Id.* at 624.
148. *Id.* at 625.
149. *Id.* at 627.

The Court also considered whether Amendment Two's reach was broader than the prohibition of specific laws and policies granting homosexuals special treatment under the law. Justice Kennedy said that it was a "fair, if not necessary" reading of Amendment Two that it deprived homosexuals of the protection of general laws that forbade "arbitrary discrimination in governmental and private settings."[150] Colorado had numerous laws prohibiting arbitrary discrimination by government officials and some private businesses, like insurance companies. The issue was whether Amendment Two prohibited homosexuals from seeking the benefit of these laws, which did not specifically grant them any protection above and beyond other citizens. Justice Kennedy noted that, although this interpretation of Amendment Two was possible, the Colorado Supreme Court did not resolve this issue and neither would the Court.[151] As we will see, this statement about the Colorado Supreme Court was important and patently false.

Justice Kennedy began his Fourteenth Amendment equal protection analysis by noting that "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."[152] Justice Kennedy, however, never addressed the issues whether Amendment Two burdened a fundamental right or whether homosexuals were a suspect class. Instead, he held that Amendment Two was not rationally related to a legitimate governmental interest.

Justice Kennedy stated that Amendment Two identified people "by a single trait and then denie[d] them protection across the board."[153] This attempt to disqualify a "class of persons from the right to seek specific protection from the law [was] unprecedented in our jurisprudence."[154] He observed that "[c]entral both to the idea of the rule of law and to our . . . guarantee of equal protection is the principle that the government . . . remain open on impartial terms to all who seek its assistance."[155] A law making it more "difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[156]

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150. *Id.* at 630.
151. *Id.* at 630.
152. *Id.* at 631.
153. *Id.* at 633.
154. *Id.*
155. *Id.*
156. *Id.*

Justice Kennedy stated that Colorado tried to justify Amendment Two on the grounds that the Amendment showed respect for citizens' freedom of association and religion and that it helped conserve resources to fight discrimination against other groups.[157] He flatly rejected these arguments stating that the "breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them."[158] Instead, he found that Amendment Two was passed because of "animosity toward the class of persons affected," and that such a purpose was impermissible under the Fourteenth Amendment.[159] States are simply not allowed to "deem a class of persons a stranger to its laws."[160]

Although many politicians and a few scholars have suggested that the *Romer* Court's invalidation of Amendment Two amounted to far reaching judicial activism, they generally have based their conclusion on the argument that the Court erred in striking down the constitutional amendment.[161] In turn, many other scholars and some politicians have argued that the Court correctly invalidated a state's efforts to harm homosexuals without any legitimate reason.[162] There is no objectively correct resolution of this question. The *Romer* opinion, however, is irresponsible for two reasons, neither having to do with whether the case was "correctly" decided. First, Justice Kennedy flatly mischaracterized the opinion of the Colorado Supreme Court on an important issue in the case. Justice Scalia, in his dissent and the State of Colorado, argued that Amendment Two only deprived homosexuals of special protections under the law, but that they would still be protected by laws of general applicability.[163] This issue was important both because a law that denied homosexuals all rights under Colorado law would be facially unconstitutional and because there are statements in the majority opinion

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157. *Id.* at 635.

158. *Id.*

159. *Id.* at 634.

160. *Id.* at 635.

161. *See, e.g.*, John Lofton, *"Romer v. Evans" Case Roberts Helped Homosexuals With Was So Bad Christian Legal Scholar Called For Impeachment Of Supreme Court Judges Who Wrote Majority Opinion*, THE AMERICAN VIEW, 2005, http://www.theamericanview.com/index.php?id=367 (describing outrage in conservative Christian political circles at *Romer* decision); Thomas L. Jipping, *Anthony Kennedy Must Not be Chief Justice*, HUMAN EVENTS, July 1, 2002 (describing *Romer* as "one of the most activist decisions of this century").

162. *See, e.g.*, Scott Lemieux, *Men Overboard: It's Not Just "Contrarian" For Center-Left Pundits to Claim* Roe *Doesn't Matter. It's Stupid.*, AMERICAN PROSPECT, June 18, 2006, http://www.prospect.org/cs/articles?article=men_overboard_06.

163. *Romer*, 517 U.S. at 637–38 (Scalia, J., dissenting).

which suggested that Amendment Two had precisely that effect.[164] Justice Kennedy also did say, however, that Amendment Two was ambiguous on this point, and that the Colorado Supreme Court "did not decide whether the amendment ha[d] this effect . . . ."[165] This last statement is simply wrong, and therefore, the Court's implication throughout the opinion that Amendment Two deprived homosexuals of something more than special protections is also incorrect. As Justice Scalia pointed out in his dissent, on the very question of whether Amendment Two applied to laws of general applicability, the Colorado Supreme Court said the following:

> [I]t is significant to note that Colorado law currently proscribes discrimination against persons who are not suspect classes, including discrimination based on age . . . marital or family status . . . veterans' status . . . and for any legal, off-duty conduct such as smoking tobacco . . . . Of course Amendment 2 is not intended to have any effect on this legislation, but seeks only to prevent the *adoption* of antidiscrimination laws intended to protect gays, lesbians, and bisexuals.[166]

The Supreme Court is bound by the interpretation of state law by state supreme courts.[167] The above paragraph is not ambiguous. Amendment Two, as interpreted by the Colorado Supreme Court, prohibited the enactment of anti-discrimination laws by local Colorado communities favoring homosexuals "and nothing more."[168] Justice Kennedy's statement that the Colorado Supreme Court did not resolve the question of Amendment Two's effect on laws of general applicability was incorrect and irresponsible.

A second and even worse aspect of the *Romer* decision involves an important issue the Court did not discuss at all. At the time *Romer* was decided, *Bowers v. Hardwick*,[169] which had upheld a Georgia law criminalizing sodomy as applied to homosexuals, was still good law. In *Bowers*, the Supreme Court "held that the Constitution does not prohibit what virtually all States had done from the founding of the Republic until

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164. *Id.* at 630 (explaining that Amendment Two may "deprive[] gays and lesbians even of the protection of *general* laws and policies that prohibit arbitrary discrimination in governmental and private settings.") (emphasis added).

165. *Id.*

166. *Id.* at 637 (Scalia, J., dissenting) (emphasis added) (citation omitted) (quoting Evans v. Romer, 882 P.2d 1335, 1346 n.9 (Colo. 1994)).

167. *See* Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) ("This Court . . repeatedly has held that state courts are the ultimate expositors of state law.").

168. *Romer*, 517 U.S. at 638 (Scalia, J., dissenting).

169. 478 U.S. 186 (1986).

very recent years—making homosexual conduct a crime."[170] The parties in *Romer* did not challenge *Bowers*, which made it easy for Justice Scalia to argue in dissent that, if the state can put someone in jail for engaging in certain conduct, then it most certainly may enact "other laws merely disfavoring" that conduct.[171] "After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."[172] Furthermore, Scalia argued that even if Amendment Two applied to homosexuals who did not engage in homosexual conduct, "[i]f it is rational to criminalize the conduct" then it must be "rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct."[173] Justice Scalia concluded his dissent with a lengthy discussion of why the *Bowers* decision allowed the people of Colorado to consider homosexuality immoral and subject to the prohibitions contained in Amendment Two.[174]

Leaving aside the question of whether Justice Scalia's dissent is persuasive, the disturbing fact is that there is not one word in the majority opinion about *Bowers v. Hardwick*. The case is simply never mentioned. In light of the parties' reliance on the case as well as Justice Scalia's dissent, there is no justification for Justice Kennedy's failure to mention it at all, even in a footnote. Perhaps the Court knew it was going to overrule *Bowers* eventually so the irreconcilability of *Bowers* and *Romer* did not trouble the Court. But even if that is true, which we cannot know, the Court's duty was to explain transparently its reasoning and its break with the past. Justice Scalia forcefully argued that if Colorado could constitutionally put homosexuals in prison for engaging in homosexual conduct, then it could certainly deny them the benefit of special protection statutes based on that same conduct. Perhaps there are responses to that argument, perhaps not, but it is undeniable that Justice Kennedy should have at least wrestled with or addressed the argument in some way. His failure to do so is judicial abdication at its worst.[175]

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170. *Romer*, 517 U.S. at 640 (Scalia, J., dissenting).

171. *Id.* at 641 (emphasis omitted).

172. *Id.* (internal citation and quotation omitted).

173. *Id.* at 642.

174. *See id.* at 644.

175. It may be that *Bowers* and *Romer* are distinguishable because the former involved due process and the latter equal protection, though that is doubtful because if Colorado could have constitutionally put people in jail for engaging in homosexual conduct, why could it not simply say people who engage in that conduct may not receive special protections *on the basis of that conduct*. *Romer*, 517 U.S. at 641. After all, Congress has debated adding sexual orientation to the list of protected statuses in Title VII but has never done so, and no one suggests that Congress' decision amounts to an equal protection violation. But none of that is really the point.

After *Romer* was decided, politicians on the right lambasted the result, whereas those on the left applauded the Court's decision.[176] Most of the legal academy, which is predominantly liberal, supported the invalidation of Amendment Two though many strained to find alternative rationales for the decision believing that it lacked a persuasive one.[177] But while everyone argued about how the case should have been decided, and whether or not the result was unwarranted judicial activism or the application of correct equal protection principles, virtually no one criticized the Court for its failure to mention the case most directly on point—*Bowers v. Hardwick*. This failure illustrates the futility of the current debate over judicial activism. Reasonable people can disagree over whether the result in *Romer* was plausible in light of the live nature of *Bowers* at the time, and reasonable people can disagree over what the correct result should have been in *Romer*, even assuming the inevitable reversal of *Bowers*. But reasonable people must admit that the Court has an obligation to *at least* mention the one case most directly relevant and relied upon by the defendant to support its arguments and claimed by the dissent to be dispositive. Justice Kennedy's failure to mention *Bowers* even once is inconsistent with the Court's obligation to wrestle in good faith with the past.

Another clear example of Justice Kennedy's judicial irresponsibility is *Roper v. Simmons*.[178] In *Roper*, the Court had to decide whether the Eighth Amendment's ban on cruel and unusual punishments was violated by the execution of juveniles.[179] Just a few years earlier, the Court held in *Stanford v. Kentucky*,[180] that it was not cruel and unusual punishment for states to execute people under eighteen years of age. The *Roper* Court reversed *Stanford* and held that the Eighth Amendment precludes states from executing juveniles. Reasonable people can disagree over the correctness of that decision, but, as demonstrated below, not over the persuasiveness of a major part of Justice Kennedy's justifications for his conclusion.

The point is that, if there is a way to harmonize *Romer* and *Bowers*, the Court should have done so, or at least tried to do so. If not, the Court should have overturned *Bowers*. What the Court should not have done is ignored it altogether.

176. *See* Lofton, *supra* note 161; Jipping, *supra* note 161; Lemieux, *supra* note 162.

177. *See* Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257 (1996); Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203 (1996).

178. 543 U.S. 551 (2005).

179. *Id.* at 578.

180. 492 U.S. 361, 368 (1989).

A key issue in *Roper* was whether there was a national consensus that capital punishment for people under eighteen violates modern standards of decency.[181] At the time that *Stanford* was decided, twenty-two of the thirty-seven death penalty States permitted the death penalty for 16-year-old offenders, and among these thirty-seven States, twenty-five permitted it for 17-year-old offenders.[182] Accordingly, over half of those states that allowed the death penalty did not exempt people sixteen and seventeen years old. The Stanford Court did not consider relevant those states that had altogether abolished the death penalty in the determination of whether there was a national consensus against executing juveniles.[183] In *Roper*, however, Justice Kennedy found a national consensus against executing juveniles mainly because, taking into consideration those states which had abolished the death penalty for everyone, he concluded that thirty out of fifty states prohibited the juvenile death penalty.[184] There are numerous intractable problems with this argument. The issue under consideration was whether there was a national consensus against executing juveniles, and no possible logical leap could justify counting in that calculation states that do not have the death penalty. Justice Kennedy's reasoning would apply equally to the question of whether there was a national consensus against executing people over eighty or executing blondes. In answering those questions, we certainly would not consult states that did not have the death penalty at all, as the Court did in *Stanford*.[185] Justice Kennedy did not purport to explain why the Court was taking a different path in *Roper*, showing little respect for either the past or the true facts of the case.

If we look at only those states with the death penalty at the time of *Roper*, 47% of them disallowed it for people under eighteen. As Justice Scalia quipped in dissent, "words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus."[186] Moreover, even if we count those states that had prohibited the death penalty for everyone, only approximately three-fifths of the states could be said to have prohibited the death penalty for juveniles. The Court's prior death penalty jurisprudence, however, required a far greater statistical

181. *See Roper*, 543 U.S. at 564.

182. *Id.* at 562.

183. *Id.*

184. *Id.* at 564.

185. *See* Posner, *supra* note 6, at 90 (Kennedy's reasoning was "the equivalent of saying that [non-capital punishment] states had decided that octogenarians deserve a special immunity from capital punishment.").

186. *Roper*, 543 U.S. at 609 (Scalia, J., dissenting).

showing than that to demonstrate a national consensus.[187] Justice Kennedy made no attempt to explain away the Court's older capital punishment cases, again showing great disrespect for the past. As Justice Scalia remarked in dissent, Justice Kennedy's reasoning made a "mockery" of the idea that the Court would be constrained by precedent.[188] As Judge Posner has said, if *Roper* is stripped of "its fig leaves," the decision constitutes "a naked political judgment."[189]

The problem with decisions like *Romer*, *Roper*, and all of the opinions discussed in Part II is that they demonstrate that the Supreme Court quite often fails to act like a Court and instead behaves like some other kind of political institution. One significant difference between judges and other political officials is that at common law, and today, judges are supposed to explain their decisions with transparency and justify their results by reference to what has come before. If the Court departs from past law, it should explain that decision. A legislature can change its mind on an important question for no reason other than the people elected think that it is a good idea to do things differently. But, for the judicial system to have integrity, the Justices must act with "intellectual candor."[190]

> It is disingenuous . . . to distinguish a prior decision on the ground that it was handed down on a Tuesday rather than on a Wednesday, or on the ground that the car was blue rather than green. Moreover, because the act of overruling a prior decision is and should be relatively unusual in our legal system, such an act when it occurs should be openly acknowledged, explained, and justified.[191]

The American public, the media, constitutional law scholars, and the political branches have never seriously debated whether the Supreme Court acts with enough integrity to meet shared public ideals of how courts should operate. But there are so many Supreme Court decisions like *Romer*, *Roper*, and all the cases discussed in Part II that fail to wrestle in good faith with

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187. *See* Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 343 n. 211 (2008) ("even if abolitionist states are counted, however, there would still not be the high level of consensus among the states that was typically required before a punishment could be invalidated as contrary to evolving standards of decency."). *See also Roper*, 543 U.S. at 613–19 (Scalia, J., dissenting) (listing cases where the Court required much stronger showing of national consensus than Kennedy relied upon in *Roper*).

188. *Roper*, 543 U.S. at 608.

189. *See* Posner, *supra* note 6, at 90.

190. Stone, *supra* note 137, at 1534.

191. *Id.*

the past, that these questions should now be asked by those who follow the Court.

Justice Kennedy himself has demonstrated that Supreme Court opinions can operate within the structure of good faith engagement with the past even if the result reached is disfavored by many people. Unlike *Romer* and *Roper*, for example, Justice Kennedy's concurring opinions in *U.S. Term Limits Inc., v. Thornton*[192] and *Parents Involved in Community Schools v. Seattle School District No. 1*[193] exemplify well-written, transparent examples of excellent judicial opinion-writing regardless of whether one agrees or disagrees with the results of those cases.

The issue in *Term Limits* was whether Arkansas could limit ballot access to any candidate running for the United State House of Representatives who had already served three terms and to any candidate for the Senate who had served two terms (although they could be a write-in candidate). The Court divided five-to-four on the issue with Justice Kennedy aligning himself with the four moderates and against the four conservatives, and voting against state term limits for Congressmen. Justice Stevens' majority opinion spent over twenty pages discussing the history of state term limits, while the dissenting opinion of Justice Thomas needed over thirty pages to rebut that history.[194] Not surprisingly, the two sides reached exactly opposite conclusions based on the same evidence. Additionally, both the majority and dissenting opinions spent considerable time discussing relevant precedent and agreeing on the most important cases, but disagreeing on whether those cases supported or invalidated state term limits.[195] Both sides also argued over the text and structure of the Constitution, again reaching opposite conclusions based on the same words.[196] Anyone brave enough to carefully slog through the over 140 pages of majority and dissenting arguments about text, history, structure, and precedent most likely would come away with the idea that those traditional sources of constitutional interpretation not only did not answer this difficult but important question, but also find it difficult to truly understand the actual basis of each sides' fundamental conclusions. In other words, neither the majority nor the dissent wrote a transparent judicial opinion.

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192. 514 U.S. 779, 837 (1995) (invalidating term limits for member of Congress).

193. 551 U.S. 701, 798 (2007) (invalidating use of race in placing students in elementary and secondary schools).

194. *Term Limits*, 514 U.S. at 806–27; *Id.* at 846–74 (Thomas, J., dissenting).

195. *See id.* at 795–98, 802–03, 854–55, 875 (Thomas, J., dissenting)

196. *See id.* at 798–802, 846–50 (Thomas, J., dissenting).

Justice Kennedy's concurring opinion, however, was only seven and a half pages long.[197] He began his opinion by stating:

> The majority and dissenting opinions demonstrate the intricacy of the question [of term limits]. In my view, however, it is well settled that the whole people of the United States asserted their political identity and unity of purpose when they created the federal system. The dissent's course of reasoning suggesting otherwise might be construed to disparage the republican character of the National Government, and it seems appropriate to add these few remarks to explain why that course of argumentation runs counter to fundamental principles of federalism.[198]

Over the next seven pages, Justice Kennedy argued why these "fundamental principles" counseled against the validity of state term limits for members of Congress. Although he cited some history and precedent along the way, the reader comes away from Justice Kennedy with the sense that it is his opinion about those "fundamental principles of federalism" that drives his interpretation of history, text, and precedent, and not the other way around. In light of the hopelessly ambiguous nature of those traditional sources of constitutional interpretation, Justice Kennedy exercised excellent judicial responsibility by transparently expressing the real basis for his decision. He began by explaining the importance of federalism as follows:

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. It is appropriate to recall these origins, which instruct us as to the nature of the two different governments created and confirmed by the Constitution.[199]

He then argued that allowing states to interfere with federal elections for members of Congress would deny "the dual character of the Federal Government," and that the people of the United States "have a political identity . . . one independent of, though consistent with, their identity as

197. *See id.* at 838–45 (Kennedy, J., concurring).

198. *Id.* at 838.

199. *Id.* at 838–39.

citizens of the State of their residence."[200] He argued that the "federal character of congressional elections flows from the political reality that our National Government is republican in form and that national citizenship has privileges and immunities protected from state abridgment by the force of the Constitution itself."[201] After providing a few examples from history and case law of the importance of national citizenship, Justice Kennedy explained that the proposition that "federal rights flow to the people of the United States by virtue of national citizenship is beyond dispute."[202] He concluded his opinion that state term limits violate this federal right as follows:

> It is maintained by our dissenting colleagues that the State of Arkansas seeks nothing more than to grant its people surer control over the National Government, a control, it is said, that will be enhanced by the law at issue here. The arguments for term limitations (or ballot restrictions having the same effect) are not lacking in force; but the issue, as all of us must acknowledge, is not the efficacy of those measures but whether they have a legitimate source, given their origin in the enactments of a single State. There can be no doubt, if we are to respect the republican origins of the Nation and preserve its federal character, that there exists a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere. Because the Arkansas enactment intrudes upon this federal domain, it exceeds the boundaries of the Constitution.[203]

Justice Kennedy made it clear in his concurring opinion that he believes that federalism requires two strong and independent governments, each of which must have a separate political identity. State term limits on members of Congress, he argued, interfered with those fundamental federalism principles. These propositions are not self-evident and may not even follow from each other, but they did transparently form the basis of Justice Kennedy's opinion and are not obscured by dubious interpretations of text and history. From a judicial responsibility standpoint, leaving aside the correctness of his conclusions, which cannot be proven right or wrong, Justice Kennedy could not have done any better.

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200. *Id.* at 840.
201. *Id.* at 842.
202. *Id.* at 844.
203. *Id.* at 844–45.

The issue in *Parents Involved in Community Schools v. Seattle School District No. 1*,[204] was whether local school boards could use racial balancing to cure the segregation of elementary and secondary schools caused by residential housing patterns and other factors not directly attributable to state action. In an overly simplistic and misleading plurality opinion, Chief Justice Roberts, writing on behalf of Justices Scalia, Alito, and Thomas, invalidated the desegregation plans, arguing that the racial balancing used by the school boards was foreclosed by prior Court decisions applying strict scrutiny to governmental classifications based on race.[205] Justice Roberts found that neither district had articulated a compelling state interest, because the goal of both programs was simple racial diversity, not broader educational diversity.[206] The plurality argued that this use of race by the school districts was inconsistent with *Brown*, and that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[207]

The result reached by the plurality opinion may be right or it may be wrong, but the opinion's overall theme, that there is no difference between the majority using racial classifications to keep whites and African-Americans apart and the majority using racial classifications to bring the races together, simply does not withstand serious scrutiny. As Justice Kennedy said in his swing-vote concurring opinion:

> The plurality's postulate that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," . . . is not sufficient to decide these cases. Fifty years of experience since *Brown v. Board of Education*, 347 U.S. 483 (1954), should teach us that the problem before us defies so easy a solution. School districts can seek to reach Brown's objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.[208]

Justice Kennedy also made the following statement about the goal of having a color-blind society:

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204. 551 U.S. 701, 710–11 (2007).

205. *See id.* at 722–24.

206. *See id.*

207. *Id.* at 748.

208. *Id.* at 788 (Kennedy, J., concurring) (parallel citation omitted).

> The statement by Justice Harlan that "[o]ur Constitution is color-blind" was most certainly justified in the context of his dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896). The Court's decision in that case was a grievous error it took far too long to overrule. *Plessy*, of course, concerned official classification by race applicable to all persons who sought to use railway carriages. And, as an aspiration, Justice Harlan's axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.[209]

Justice Kennedy went on to make a nuanced argument that school districts should be free to use racial solutions to remedy the difficult problem of racially imbalanced public schools, but he agreed with the majority that classifying students based on race alone without taking into account any other factors was problematic. He concluded the following:

> When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite? To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change. Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process. On the other hand race-conscious measures that do not rely on differential treatment based on individual classifications present these problems to a lesser degree.[210]

Unlike both the plurality and dissenting opinions, Justice Kennedy did not pretend that prior cases and general principles could solve the complex issues relating to school segregation. Instead, he transparently set forth his concerns about the individual characteristics of the specific plans at issue in these cases and suggested that local school boards should at least try to employ more nuanced measures to achieve desegregation than overt racial balancing and quotas. As Professor Neil Siegel has argued, although Justice Kennedy's concurring opinion in *Parents Involved* is not perfect and leaves some important questions unanswered, it is a good example of what Professor Siegel calls good "judicial statesmanship."[211] Although his ultimate conclusions might be debatable, he wrestled honestly with the facts

209. *Id.* (parallel citation omitted).

210. *Id.* at 797.

211. Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008).

and the relevant precedents and based his holding on transparent reasons that can be analyzed and discussed. In light of our country's significant divide over how to best resolve the issue of racial segregation in our public schools, we can neither ask nor expect much more from a Supreme Court Justice.

CONCLUSION

Most of the constitutional questions decided by the Supreme Court of the United States do not have right or wrong answers based on the traditional sources of constitutional interpretation. When the Court is criticized by the popular media, politicians, or even legal academics for engaging in judicial activism, little is accomplished other than the voicing of disagreement over the results the Court has reached. Moreover, in our fixation over whether the Court "got it right," we have lost sight of a more important goal. The Supreme Court has an obligation to act as a court, not just another political institution making political decisions. By that, I mean it should wrestle honestly and transparently with the past, even if that past cannot generate an objectively right answer. Far too often, the Court has failed in this task, and it is time to hold it accountable. Those who study and comment on the Court should be paying more attention to the reasons the Court gives for its decisions and focus less on the results the Court reaches. Only then can we extricate ourselves from the empty name calling associated with the judicial activism debate and move on to an important evaluation of how well the Supreme Court is performing its judicial responsibility.

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