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The Jurisprudence of the Rehnquist Court

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Abstract

Popular discourse about the Supreme Court often seeks to characterize its direction in political terms. Yet the Rehnquist Court, while it has undoubtedly turned rightward, has never turned as starkly rightward as predicted in such accounts,1 even though Presidents Reagan and Bush between them filled five seats on the current Court.

KEYWORDS: jurisprudence, structure, shortfall

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I. INTRODUCTION

Popular discourse about the Supreme Court often seeks to characterize its direction in political terms. Yet the Rehnquist Court, while it has undoubtedly turned rightward, has never turned as starkly rightward as predicted in such accounts,[1] even though Presidents Reagan and Bush between them filled five seats on the current Court.[2] To be sure, President Clinton—with two appointments of his own in the last five years—has had the chance to counterbalance the Reagan-Bush nominations.[3] But both before and after Clinton's appointments, it was evident that Justices who were expected to be "conservative" sometimes voted for "liberal" or "moderate" results.

Why might this be so? One explanation might be that court-packing is simply harder than it looks, and a president's ability to predict the judicial orientation of his nominees is inherently prone to error.[4] President Eisenhower is famously said to have labeled as "mistakes" his appointments

1. *Compare* David G. Savage, Turning Right: The Making of the Rehnquist Court (1992) *with* James F. Simon, The Center Holds (1995).

2. President Reagan nominated, and the Senate confirmed, Justices Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy, in addition to elevating Justice William Rehnquist to the Chief Justiceship. President Bush nominated, and the Senate confirmed, Justices David Souter and Clarence Thomas.

3. President Clinton nominated, and the Senate confirmed, Justices Ruth Bader Ginsburg and Stephen Breyer.

4. See, e.g., Christoper E. Smith & Thomas R. Hensley, Unfulfilled Aspirations: The Court-Packing Efforts of Presidents Reagan and Bush, 57 ALB. L. REV. 1111, 1130 (1994).

of Chief Justice Earl Warren and Justice William J. Brennan, Jr.[5] Likewise, President Nixon's appointment of Justice Harry A. Blackmun hardly produced, as expected, a conservative "Minnesota Twin" to Chief Justice Warren Burger. And those who predicted that Justice David Souter's appointment would be a "home run" for conservative causes later lamented that it had been something less than a bunt.

But three other explanations seem more powerful than presidential miscalculation alone. This essay seeks to explore those explanations. First, the institutional structure of the Court may constrain or systematically moderate ideological tendencies. Second, a Justice's jurisprudential commitments may limit his or her expression of ideological orientation. Finally, the very concept of conservative judicial ideology is quite complex, and thus an apparently "liberal" result sometimes represents simply the dominance of one strand of conservatism over others. These institutional, jurisprudential, and ideological factors might help explain the surprising moderation of Justices predicted to be conservative.

II. THE PHENOMENON OF IDEOLOGICAL SHORTFALL

Without doubt, the Rehnquist Court has taken positions consistent with conservative politics in a variety of constitutional areas since 1980. The Court has narrowed pregnant women's rights against state regulation of abortion[6] and rejected the claim that consensual homosexual sex is protected by the same conception of liberty that had earlier protected access to abortion and contraception.[7] The Court has likewise declined to extend such liberty rights to physician-assisted suicide.[8] The Court has been increasingly willing to invalidate race-based affirmative action programs,[9] even when implemented by the federal government.[10] In an analogous line of cases, the Court has struck down several state attempts to create majority-minority

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5. Asked whether he had made any mistakes as President, Eisenhower said: "'Yes, two, and they are both sitting on the Supreme Court.'" HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 266 (3d ed. 1992).

6. *See* Planned Parenthood v. Casey, 505 U.S. 833, 869 (1992); Webster v. Reprod. Health Servs., 492 U.S. 490, 521 (1989).

7. *See* Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

8. *See* Washington v. Glucksberg, 117 S. Ct. 2258, 2275 (1997) (upholding state ban on assisted suicide against a substantive due process challenge).

9. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989) (invalidating under strict scrutiny a race-based preference in a municipal procurement program).

10. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (evaluating federal affirmative action program under strict scrutiny and remanding constitutionality of the program under appropriate standard).

electoral districts.[11] The Court has made it more difficult for challengers to prove that a school district is continuing to violate the requirements of *Brown v. Board of Education.*[12] For the first time in sixty years, the Court has sought to restrain federal power in relation to the power of the states by striking down a congressional assertion of power under the Commerce Clause.[13] Similarly, the Court has struck down congressional efforts to "commandeer" state legislative or executive action.[14] Perhaps nowhere has the Court's conservative trend been more apparent than in the area of criminal justice.[15] Hence, it is difficult to dispute that Presidents Reagan and Bush had considerable success in moving the Court to the political right.

The Court, however, has also issued a number of decisions disappointing conservative advocates. For instance, the Court did not, as many had predicted, overrule *Roe v. Wade.*[16] Nor did it eliminate

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11. *See* Miller v. Johnson, 515 U.S. 900, 927 (1995) (striking down congressional redistricting where evidence showed that race was overriding purpose); Shaw v. Reno, 509 U.S. 630, 658 (1993) (striking down congressional redistricting where bizarre shape of the prescribed districts created an inference that race motivated the action).

12. 347 U.S. 483, 495 (1954). *See* Missouri v. Jenkins, 495 U.S. 33, 51 (1990) (holding that district court abused discretion in ordering an interdistrict remedy for an intradistrict violation of the principles of *Brown*).

13. *See* United States v. Lopez, 514 U.S. 549, 551 (1995) (invalidating federal law that prohibited gun possession near a school without any requirement that the gun had moved in interstate commerce and without any congressional findings of fact on commerce effects).

14. Printz v. United States, 117 S. Ct. 2365, 2383–84 (1997) (invalidating a provision of the Brady Bill that imposed on state law enforcement officers the obligation to perform background checks on handgun purchasers); New York v. United States, 505 U.S. 144, 149 (1992) (invalidating take-title provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985).

15. *See, e.g.*, United States v. Watts, 117 S. Ct. 633, 636 (1997) (per curiam) (upholding sentence enhancements for conduct of which the defendant was acquitted); Whren v. United States, 116 S. Ct. 1769, 1777 (1996) (upholding pretextual traffic stops supported by a reasonable articulable suspicion); Keeney v. Tamayo-Reyes, 504 U.S. 1, 11–12 (1992) (narrowing habeas corpus review); Payne v. Tennessee, 501 U.S. 808, 827 (1991) (upholding use of victim impact statements in death penalty sentencing hearings); Illinois v. Perkins, 496 U.S. 292, 300 (1990) (holding that *Miranda* does not apply when one posing as a prison inmate induces a defendant to confess); United States v. Salerno, 481 U.S. 739, 755 (1987) (upholding the pretrial detention of defendants found likely to be dangerous); McCleskey v. Kemp, 481 U.S. 279, 313 (1987) (upholding state death penalty against equal protection challenge based on social science research indicating racially disparate impact).

16. 410 U.S. 113 (1973). *See* Planned Parenthood v. Casey, 505 U.S. 833, 854–69 (1992) (reaffirming the central holding of *Roe* that the state may not criminalize abortion prior to the viability of the fetus).

Establishment Clause restrictions on school prayer.[17] The Court declined to allow the states or Congress to criminalize flag burning.[18] And, notwithstanding other harbingers of an antifederalist revival, the Court forbade state voters from imposing term limits on their federal legislators—albeit narrowly and over a bitter dissent.[19] Some recent decisions extending the Equal Protection Clause drew a cacophony of conservative opposition—for example, a decision barring the exclusion of women from an all-male public academy[20] and a decision barring a state from precluding all claims of discrimination based on homosexual orientation.[21] The Court granted free access to state appeals courts for indigent parents attempting to retain rights of relationship to their children, thus reviving a long-dormant strand of fundamental rights analysis in equal protection law.[22] Finally, the Rehnquist Court has consistently interpreted the Free Speech Clause to forbid government prescriptions of orthodoxy, protecting groups as divergent as leftist flag burners[23] and white supremacist cross burners.[24]

Even in decisions reaching conservative results, the Court has articulated doctrines that stop short of their apparent logical conclusion. For example, in the affirmative action cases, the Court has stopped short of establishing outright color blindness as a constitutional norm, intimating that race-based affirmative action might be upheld on somewhat weaker justifications than would be required of policies discriminating against racial minorities.[25] In cases imposing federalism-based limits on congressional

17. *See* Lee v. Weisman, 505 U.S. 577, 599 (1992) (holding impermissible the official recitation of a non-denominational prayer at a middle school graduation ceremony).

18. *See* United States v. Eichman, 496 U.S. 310, 318–19 (1990) (involving a congressional statute); Texas v. Johnson, 491 U.S. 397, 420 (1989) (involving a state statute).

19. *See* United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 782–83 (1995) (holding that state-imposed term limits violated the Qualifications Clauses and infringed the interests of the national citizenry).

20. United States v. Virginia, 116 S. Ct. 2264, 2286–87 (1996) (striking down Virginia Military Institute's exclusion of women for lack of an "exceedingly persuasive" reason).

21. Romer v. Evans, 116 S. Ct. 1620, 1629 (1996) (striking down a state constitutional amendment that denied to homosexuals the opportunity to enact or enforce local and state antidiscrimination measures).

22. *See* M.L.B. v. S.L.J., 117 S. Ct. 555, 559 (1996).

23. *See* United States v. Eichman, 496 U.S. 310, 318–19 (1990); Texas v. Johnson, 491 U.S. 397, 420 (1989).

24. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (unanimously striking down law barring the placement of symbols likely to arouse racial anger or alarm).

25. While subjecting race-based preferences to strict scrutiny, the Court sought to "dispel the notion that strict scrutiny [in this context] is 'strict in theory, but fatal in fact.'" Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (quoting Fullilove v. Klutznick, 448 U.S. 448, 507 (1980)). Under such strict but not fatal scrutiny, governments might permissibly adopt race preferences that are narrowly tailored to redress specifically identified

power, the Court has barred congressional acts requiring states to enact or enforce specified policies but allowed similar results to be accomplished by imposing regulatory conditions on federal funding that states find irresistible as a practical matter.[26] And, in free speech challenges, the Court has sometimes split the difference between the speech claim and the government. For example, the Court has struck down a hate speech law while upholding a hate crime penalty enhancement statute,[27] upheld some but not all regulations of anti-abortion protestors,[28] and permitted public airport terminals to ban the solicitation of funds but not the sale or distribution of literature.[29] Such decisions give greater latitude to speakers than might have been expected given the Court's starting assumptions—for example, that regulations

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past discrimination — even if that discrimination was not committed intentionally by the state, or the scope of the redress is not limited to the individual victims of adjudicable discrimination. For example, a city or state might use race-conscious procurement policies where it had merely been a "'passive participant' in a system of racial exclusion practiced by elements of the local construction industry," rather than a deliberate practitioner of racial exclusion itself. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (O'Connor, J., joined by Rehnquist, C.J. and White, J.). And, "[i]n the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion," *id.* at 509, whether or not such preferences were limited to making particular victims of adjudicable discrimination whole. Indeed, Justice Scalia concurred separately in both *Croson* and *Adarand* to emphasize his disagreement with the Court to the extent it authorized race-conscious measures extending beyond remediation for identified victims of discrimination—the only sort of remediation he would regard as consistent with a constitutional norm of color blindness. *Id.* at 526 (Scalia, J., concurring in the judgment). *See also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and in the judgment).

26. For example, in New York v. United States, 505 U.S. 144, 171–77 (1992), the Court invalidated a requirement that a state take title to undisposed radioactive waste while at the same time upholding conditional funding provisions.

27. *Compare* R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (unanimously striking down law barring the placement of symbols likely to arouse racial anger or alarm) *with* Wisconsin v. Mitchell, 508 U.S. 476, 487–90 (1993) (upholding aggravated penalty for racially motivated assault).

28. *See* Schenck v. Pro-Choice Network, 117 S. Ct. 855, 866–68 (1997) (striking down provisions of an injunction requiring protestors to stay a certain distance from clinic entrants but upholding provisions requiring protestors to stay a certain distance from clinic entrances); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 776 (1994) (striking down provisions of an injunction barring signs near a clinic and establishing buffer zones at back and side of building, but upholding provisions barring noise near a clinic and establishing a buffer zone at the front perimeter and entrance).

29. *See* International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 685 (1992); Lee v. International Soc'y for Krishna Consciousness, Inc., 505 U.S. 830, 831 (1992) (per curiam).

designed to protect access to abortion clinics are content neutral and that airports are not latter-day public forums.[30]

In short, the Rehnquist Court has not simply followed but in some cases has defied and in other cases stopped short of the outcomes that might have been predicted by the election returns. These results typically depended on votes of at least one of the five Reagan-Bush nominees, necessarily so in the seven years since Justice Thomas' appointment, and in some cases received the support of several. The following sections explore the role of institutional factors, jurisprudential considerations, and ideological complexity in helping to explain such votes.

III. INSTITUTIONAL STRUCTURE

Two features of the Court's institutional situation in relation to the other branches suggest reasons why conservative Justices might vote moderate or liberal. The first and most distinctive institutional feature of the Supreme Court is its relative insulation from political pressures.[31] Politics may play an inevitable role in the nomination and confirmation process, but constitutional guarantees of lifetime tenure and protection from salary cuts[32] afford the Justices considerable opportunity to change their minds. Thus, a Justice's opinions, over time, may cease to bear much resemblance to his or her political profile at the time of nomination and appointment.

Assuming that Justices sometimes diverge from their predicted political profile while in office, is there any structural reason to suppose that the shift will be in a "liberal" rather than a "conservative" direction? To be sure, there are counterexamples. President Kennedy's only appointee, Justice Byron White, arguably grew more conservative during his long tenure on the bench,[33] except for his nearly parliamentary willingness to defer to the

30. Whether the pro-speaker position in such cases is properly denominated "liberal" is a controversial question. In cases involving racist speech and abortion clinic protests it might be argued that the free speech libertarian position has migrated from the left to the right of the political spectrum. *See* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383–85, 393–94 (1995) (characterizing the shifting political valences of recent free speech controversies as an instance of "'ideological drift'").

31. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (1962) (famously noting the counter-majoritarian difficulty that flows from the very insulation of the Supreme Court from political pressure, coupled with the power of judicial review).

32. U.S. CONST. art. III, § 1.

33. For example, Justice White concurred in the judgment in *Griswold v. Connecticut*, 381 U.S. 479, 502–03 (1965), invalidating a prohibition of contraceptive use on substantive due process grounds, but found no similar Constitutional warrant for protecting access to

(usually Democratic) Congress.[34] But, it is at least plausible to suppose that insulation from political majorities typically creates a structural incentive to articulate and protect the interests of political minorities, if only through repeat exposure to such claims and a desire to distinguish the work of the judiciary from that of the political branches. This tendency will often, though not always, appear politically "liberal."[35]

A second and independent institutional explanation arises from the Justices' concern to protect the Supreme Court's credibility. The Supreme Court cannot tax,[36] nor does it possess armed forces to back up its decisions.[37] Lacking power of sword or purse, the Court depends on the power of its legitimacy.[38] At first glance, the legitimacy problem seems more likely to generate conservative decisions than liberal ones. After all, the Court's legitimacy would appear most threatened when the Court protects the interests of a small minority over the intense opposition of the majority.[39]

However, the Court's need to preserve its legitimacy might motivate unexpectedly liberal decisions in some situations because its reputation depends on the perception that its legal pronouncements transcend ordinary politics. Conservative Justices might favor results that appear liberal in the short run in order to diffuse any suspicion that they are caving in to political pressure from their conservative sponsors and their allies. One way of doing this is to abide by stare decisis and entrench earlier liberal decisions even if they would not be reached again as an initial matter.

The pivotal joint opinion of Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter in *Planned Parenthood v. Casey*,[40] for example,

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abortion, *see* Roe v. Wade, 410 U.S. 113, 221 (1973) (White, J., dissenting), or consensual adult sexual conduct, *see* Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (per curiam) (White J.).

34. For example, Justice White voted to invalidate minority business preferences in procurement by state and local governments, *see* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989), but voted to uphold a preference for minority-owned broadcast licensees that was promulgated by the FCC at the direction of Congress, *see* Metro Broad., Inc. v. FCC, 497 U.S. 547, 563–66 (1990).

35. If a challenged policy is itself "liberal," then counter-majoritarian decisionmaking will appear "conservative." The Court's recent affirmative action and race-based districting cases provide an illustration. The Court invalidated popularly enacted programs in order to protect individual members of the racial majority. Another example might be the Court's recent federalism decisions, where it has struck down acts of Congress in the name of divided government.

36. U.S. CONST. art. I, § 8, cl. 1.

37. U.S. CONST. art. II, § 2, cl. 1.

38. *See* Jesse H. Choper, Judicial Review and the National Political Process 129–70 (1980) (discussing the legitimacy problem).

39. *See id.* at 132–33.

40. 505 U.S. 833 (1992).

declined to overrule *Roe v. Wade*[41] in part on the ground that the Court ought not overturn settled law in the face of vehement public controversy over abortion, lest it appear to be doing politics rather than law.[42] Likewise, the Court's recent decisions invalidating most affirmative action programs, but holding out the possibility that some such programs might be justified by remedial or distributive concerns expressed in earlier cases, might be read as seeking to avoid a perception that the Court interprets the Constitution in light of the latest public opinion polls. Similarly, in the area of federal-state relations, Justice Kennedy strikingly defied any preconceived label as a rigid antifederalist by casting the decisive vote in a single Term both to invalidate a federal gun-possession statute as exceeding Commerce Clause authority,[43] and to invalidate state-imposed term limits on members of Congress as exceeding state authority.[44]

IV. CONSTITUTIONAL JURISPRUDENCE

A second explanation of why conservative Justices might vote moderate or liberal is that they have a jurisprudential orientation that moderates or constrains any ideological tendencies they might have. Justices' jurisprudential tendencies tend to follow one of two general approaches to fashioning legal directives. One approach employs bright-line rules, while the other utilizes flexible standards.[45] Rules, generally speaking, bind a legal decision-maker in a fairly determinate manner by capturing underlying principles or policies in ways that then operate independently. What gives a rule its force is that judges will follow it in fairly rote fashion even where a particularized application of the background principle might arguably yield a different result. Standards, on the other hand, allow judges to apply the background principle more directly to a fact situation.

To take a simple example; suppose you wished to ensure safe driving on a highway. You might set a rule: "drive no faster than fifty-five miles per

41. 410 U.S. 113 (1973).

42. *Casey*, 505 U.S. at 864–69.

43. United States v. Lopez, 514 U.S. 549, 580 (1995).

44. United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995). Justice Kennedy argued that the Court ought both to stop the states from "invad[ing] the sphere of federal sovereignty," and to hold the federal government "within the boundaries of its own power when it intrudes upon matters reserved to the [s]tates." *Id.* at 841 (Kennedy, J., concurring).

45. See Kathleen M. Sullivan, *The Supreme Court: 1991 Term, Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992), and MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15–63 (1987), for a discussion on rules and standards.

hour." Alternatively, you might set a standard of reasonableness: "drive safely for the highway conditions."

What are the comparative advantages of each approach? Rules constrain the discretion of the decision-maker who applies them[46] and typically require the determination of only very limited issues of fact. For example, under the fifty-five miles per hour rule, a police officer only needs to determine at what speed the car was traveling. The fifty-five miles per hour rule also prevents two police officers from treating identical situations differently, whereas under the "reasonableness" standard, one driver might be ticketed while the other drives away free. Thus, the advantages of rules include certainty, predictability, formal fairness, clear notice to those they govern, and economy in the process of decision-making.[47]

Standards, by contrast, require consideration of more facts. Under the "drive safely for the conditions" standard, for example, a police officer must take into account the time of day, the weather, the volume of traffic, and so forth. Standards thus give more discretion to the decision-maker in deciding particular cases. Though less predictable and more time-consuming to apply than rules, those who favor standards would say that they are more substantively fair and accurate than rules in capturing the relevant policy concern. For example, while the fifty-five miles per hour rule might prohibit a driver from reaching a safe sixty miles per hour on an empty straightaway under sunny skies but permit a driver to travel a treacherous fifty miles per hour on a rain-slicked curve at rush hour, the "drive safely" standard might correct such anomalous outcomes.[48] Advocates of standards also approve their flexibility and capacity to evolve in their application over time with changing mores or circumstances.

Constitutional doctrines, like traffic rules, may be expressed in the form of either rules or standards.[49] Approaches that use categorical, formal, bright-line tests are rule-like. For example, consider holdings that obscenity is unprotected speech,[50] or that the legislature may not wield executive

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46. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULES-BASED DECISION-MAKING IN LAW AND IN LIFE 157–62 (1991) ("A decision-maker not constrained by rules has the power, the authority, the jurisdiction to take everything into account. Conversely, the rules-constrained decision-maker loses at least some of that jurisdiction.").

47. *Id.* at 96–98 (discussing the virtues of "predictability, reliability, and certainty"); Sullivan, *supra* note 45, at 62–66 (discussing substantive arguments favoring rules and standards).

48. *See* Sullivan, *supra* note 45, at 66–69.

49. *See id.* at 69–95.

50. See *Miller v. California*, 413 U.S. 15, 36 (1973), for the rule-like holding that obscene material is not protected by the First Amendment.

power,[51] or vice versa.[52] Almost as rule-like in practice are tests that use strong presumptions to decide cases once a threshold classification has been made. When the Court employs strict scrutiny—such as to review infringements of fundamental rights,[53] content based suppression of speech,[54] or suspect classifications[55]—it is nearly impossible for the government to prove the law constitutional. Conversely, when the Court employs rationality review—for example, to review challenges to socioeconomic legislation[56]—the Court typically defers to the judgments of the other branches so that it is difficult, if not nearly impossible, for the challenger to win. This two-tiered system of scrutiny limits judicial discretion because once the Court has sorted a challenged law into the appropriate tier, it is confined to the resulting decisional rule, as are the lower courts in deciding analogous cases.

By contrast, constitutional tests that employ balancing, intermediate scrutiny, or functional analysis operate as standards. Consider the Court's express use of intermediate scrutiny to evaluate laws that classify individuals based on gender,[57] as well as facially neutral laws with a disproportionate adverse effect on interstate commerce,[58] and facially neutral laws with a

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51. *See* Bowsher v. Synar, 478 U.S. 714, 736 (1986) (invalidating a statute that delegated executive budget-cutting authority to the Comptroller General, who was subject to removal by joint resolution of Congress).

52. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588–89 (1952) (holding that the President may not encroach upon the legislative power by ordering takings of private steel mills without congressional authority).

53. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 163 (1973) (applying strict scrutiny to abortion regulations).

54. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (invalidating a Minnesota ordinance that prohibited symbols raising anger or alarm on the basis of race, color, creed, religion, or gender).

55. *See, e.g.*, United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting the need for exacting scrutiny to protect discrete and insular minorities).

56. *See, e.g.*, Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984) (rejecting claim that taking private land for immediate resale to private homeowners did not constitute a taking for public use); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 178–79 (1980) (rejecting equal protection challenge to denial of retirement benefits to workers based on dates rather than length of service); Williamson v. Lee Optical Co., 348 U.S. 483, 486–88 (1955) (rejecting substantive due process challenge to law barring opticians from fitting eyeglasses without prescription).

57. *See, e.g.*, United States v. Virginia, 116 S. Ct. 2264, 2274 (1996) (inquiring whether the government can offer an "exceedingly persuasive justification").

58. *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (inquiring whether the burden on interstate commerce is "clearly excessive in relation to the putative local benefits").

substantial adverse impact on speech or expressive conduct.[59] Intermediate scrutiny, like standard-based reasoning generally, asks how strong the government's interest is in relation to the constitutional policy at stake.
Functional analyses of separation of powers challenges provide another example of standard-like reasoning. Whereas formal approaches would condemn any trespass by one branch into another's powers, a functional approach invalidates only those trespasses that go too far.[60] These overtly balancing modes of analysis gives judges considerably greater discretion than the stark extremes of strict or rational review.

The Court deviates from rules to standards, if more informally, whenever it weakens the presumption traditionally embodied in strict scrutiny or rationality review. For example, applying "strict but not fatal" review to race-based affirmative action invites governments employing such measures to try to justify them in court.[61] Conversely, applying aggressive rationality review to invalidate laws found to reflect irrational animus—for example, the prohibition on gay rights claims struck down in *Romer v. Evans*[62]—invites claimants to challenge measures ranging beyond traditionally suspect classifications. Either way, the two-tier approach collapses into de facto balancing.

A preference for constitutional standards over constitutional rules will tend to register as political moderation because, generally speaking, rules are more effective than standards at effecting sharp and lasting changes in constitutional interpretation. Standards allow the Court to decide cases narrowly: for example, this waiting period is not on its face an undue burden,[63] this wholesale preclusion of gay antidiscrimination claims is unjustified,[64] this particular district was drawn with excessive attention to racial demographics.[65] The use of standards tends to moderate sharp swings between ideological poles; standards allow future courts more discretion to distinguish prior cases and decide cases in fact-specific fashion, and thus to afford more solace and spin opportunities to the losers.

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59. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 382–86 (1968) (rejecting a facial and as-applied challenge to a law criminalizing the burning of a draft card and establishing the modern Court's test for analyzing content-neutral laws as inquiring whether the law closely fits a substantial government interest).

60. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 691–93 (1988) (upholding independent counsel statute because it did not "unduly trammel on executive authority," or "unduly interfere with the role of the Executive Branch").

61. *See supra* note 25.

62. 116 S. Ct. 1620, 1628 (1996).

63. *See* Planned Parenthood v. Casey, 505 U.S. 833, 879–901 (1992).

64. *See Romer*, 116 S. Ct. at 1628–29.

65. *See* Miller v. Johnson, 515 U.S. 900, 917 (1995).

Of the five Justices Presidents Reagan and Bush appointed to the Court, only two (Justices Antonin Scalia and Clarence Thomas) turned out to favor rules;[66] the other three (Justices O'Connor, Kennedy, and Souter) have tended to favor standards.[67] The latter group's preference for standards in deciding constitutional cases furnishes one explanation for unexpectedly moderate or liberal decisions.

To take a few examples, consider first the issue of race-based affirmative action. Four Justices, including Justices Scalia and Thomas, would favor a rule that the Constitution should be color blind, and that no race-conscious measures should ever be permissible, whether aimed at subordinating or benefiting racial minorities. On the other hand, four Justices would apparently defer to many race-conscious measures designed to benefit minorities while still striking down race-conscious measures that are designed to disadvantage minorities, believing that they can perceive the difference between a no trespassing sign and a welcome mat. Between these two camps stands Justice O'Connor—the key swing vote on this issue—who would permit some limited race-conscious measures where they are shown to be closely tied to remedying past discrimination, relatively broadly defined.[68] Justice Kennedy's opinion for the Court in *Miller v. Johnson*[69] does something similar in asking whether race is the "predominant" factor in how electoral district boundaries are drawn, rather than in precluding racial considerations altogether.[70] By saying that race-conscious measures are sometimes, if rarely, permissible, such standards and race-based distinguishing plans give governments the latitude to defend some affirmative action plans and lower courts the wiggle room to uphold them.

To take another example, consider the First Amendment's bar on establishment of religion. As many as four Justices at any given time, led by Justice Scalia, have argued for a narrow rule that only sectarian preferences and outright coercion of faith ought to count as forbidden establishment.[71]

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66. *See* Sullivan, *supra* note 45, at 65–95.

67. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989); Morrison v. Olson, 487 U.S. 654, 733 (Scalia, J., dissenting) (arguing that "[a] government of laws means a government of rules" and that the majority's functional analysis of separation of powers was "ungoverned by rule, and hence ungoverned by law").

68. *See supra* note 25. While agreeing that all racial classifications are subject to strict scrutiny, Justice O'Connor's view is that strict scrutiny here is no longer "fatal in fact" collapses a rule into something like a standard; affirmative action plans are evaluated by how starkly they consider race (is race merely a factor or is it dispositive?) and how closely tied they are to remedying discrimination.

69. 515 U.S. 900 (1995).

70. *Id.* at 917.

71. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 642 (1992) (Scalia, J., dissenting) (joined by Justices Rehnquist, White, and Thomas).

Justice O'Connor, however, has led a slim majority of the Court to maintain a broader and more flexible standard, holding that the Establishment Clause also forbids any government action that a reasonable observer would interpret as government "endorsement" of religion.[72] This standard is highly fact-intensive and susceptible to shifting outcomes. For example, a publicly sponsored Christmas creche might be permissible if surrounded by reindeer and a talking wishing well in a shopping district,[73] but not if standing alone on a courthouse staircase.[74] This standard permits courts to invalidate more public religious expression than they would under Justice Scalia's rule.

As a further example, consider the limits of free speech in public spaces other than the traditional public forum of streets and parks. In a 1992 decision involving Hare Krishna devotees seeking to leaflet and solicit in the New York airport terminals,[75] four Justices, led by Chief Justice William Rehnquist, would have established a bright-line rule: airports are not traditional public forums for speech akin to streets and parks, and the First Amendment therefore permits unlimited regulation of speech there, so long as it is viewpoint-neutral. Justices O'Connor and Kennedy, however, steered the Court to a split result: leafleting must be permitted in the airports though soliciting need not.[76] They did so by embracing, in slightly different terms, a standard that focused on whether the particular speech was reasonably compatible with the functioning of the public space.[77] A compatibility inquiry gives more flexibility to the courts to enforce free speech rights than does a rigid hierarchy of types of public places.[78]

As a final example, compare two approaches the Rehnquist Court has taken to separation of powers issues. In *Morrison v. Olson*,[79] the Court took a highly flexible balancing approach in upholding the independent counsel statute by a vote of 8–1.[80] The majority opinion by Chief Justice Rehnquist reasoned that granting authority to prosecute high-level Executive officers to appointees whom the President does not select and may not remove at will does not trench too far upon the Executive power, even if prosecution is

72. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 681 (1984) (O'Connor, J., concurring).

73. *See id.* at 671.

74. Allegheny v. ACLU, 492 U.S. 573, 579 (1989).

75. International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992); Lee v. International Soc'y for Krishna Consciousness, Inc., 505 U.S. 830 (1992) (per curiam).

76. See id.

77. 505 U.S. at 689 (O'Connor, J., concurring).

78. For an example of similar split results in a free speech challenge, recall Chief Justice Rehnquist's opinions for the majority in the abortion clinic protest cases. *See supra* note 28.

79. 487 U.S. 654 (1988).

81. *Id.* at 658.

inherently executive in nature.[81] A scathing dissent by Justice Scalia objected to this brand of prudentialism in structural matters, arguing that the issue should be the nature and not the degree of the infringement.[82] By contrast, last Term, in *Printz v. United States*,[83] the Court invalidated, by a vote of 5–4, a federal requirement that local law enforcement officers perform background checks on handgun purchasers to ensure their conformity to federal standards. The Court reasoned that structural principles of federalism forbade any conscription of state or local officers in administering federal law, however trivial the burden or desirable the end.[84] Writing this time for the majority, Justice Scalia flatly stated that any "'balancing' analysis is inappropriate," and that "no comparative assessment of the various interests" could overcome the affront to state sovereignty embodied in such a law.[85] Plainly, the *Morrison* standard afforded the government more leeway for structural innovation than the *Printz* rule, and against the political backdrop at the time, appeared unexpectedly politically moderate.[86]

The embrace of standards over rules thus leads conservative Justices to reach results that, in a period when the Court is moving rightward, appear more moderate or liberal than would a rule fashioned from a similar ideological starting point.[87] This observation gives rise to an antecedent question: Why do some Justices favor rules and others favor standards? Why any particular Justice is drawn to either disposition is perhaps ultimately a psychological, biographical, or even aesthetic question. But to the extent the choice is conscious and articulate, it is likely to follow from different conceptions of the judicial role. Like the institutional considerations discussed above in Part II, the choice of rules or standards might be understood as a strategy for maintaining the Court's legitimacy. Each camp might claim that its method facilitates greater judicial modesty than the other.[88]

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81. *Id.* at 679–85.

82. *See id.* at 711–12, 733–34 (Scalia, J., dissenting).

83. 117 S. Ct. 2365 (1997).

84. See generally id. at 2384.

85. *Id.* at 2383.

86. Whether endorsement of independent counsels is understood as politically liberal or conservative at any time period, of course, depends to some extent on the political affiliation of such counsels' targets.

87. Of course, the choice of standards over rules might have the opposite political valence in a period when the Court is moving leftward. *See* Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 307–08 (1992).

88. *See* Sullivan, *supra* note 45, at 112–22.

Specifically, those who favor rules, like positivists and codifiers of earlier generations, seek to limit the exercise of discretion in judicial decision-making, and thus favor the reduction of constitutional propositions as much as possible to claims of fact, not value. They suspect that the context-specific application of standards will lead judges inappropriately to impose their own values. Those who favor standards, in contrast, see their role in constitutional interpretation as akin to that of common law judges, requiring reference to the accretion of past history, precedent, and collective wisdom in order to constrain the inevitable exercise of some contemporary discretionary judgment.[89] Justices who favor a common law approach to constitutional interpretation believe that they will be disciplined from imposing their own values by our traditions, social practices, shared understandings, and the process of reasoned elaboration from such starting points. They believe that it is more arrogant to assert the philosophical or interpretive certainty required by announcement of a single inflexible rule.[90]

Those who choose standards over rules might believe that such a choice, in addition to embodying judicial restraint, promotes judicial legitimacy in several other ways. It might, as a type of alternative constitutional dispute resolution, help to defuse sharp ideological conflict by giving something to each side. Relatedly, it might take steps toward a desired constitutional end-state while minimizing the expressive injury to the losers.[91] Finally, it might seem to facilitate democratic debate and resolution of the matters it leaves unresolved, placing conflict over values more squarely in the hands of the people than of judges.[92] Whatever its

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89. Such organicism is evident, for example, in the *Casey* joint opinion sustaining while narrowing *Roe v. Wade*, 410 U.S. 113 (1973), and in Justice Souter's concurring opinion in *Washington v. Glucksberg*, 117 S. Ct. 2258, 2283 (1997) (Souter, J., concurring in the judgment) (analogizing his approach to interpreting the Due Process Clause to the judicial method of the common law).

90. For an example of such a critique, see *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. at 852 (O'Connor, J., concurring) ("When bedrock principles collide, they test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Unified Theory that may turn out to be neither grand nor unified.").

91. For example, the *Casey* decision overruled several post-*Roe* decisions, *see* Planned Parenthood v. Casey, 505 U.S. 833, 881–87 (1992) (upholding waiting period requirements that prior decisions had struck down), even while leaving *Roe*'s Constitutional bar to criminal prohibition intact, with the net effect that abortion must be permitted but could be discouraged. Thus an opinion that reaffirmed the right to abortion at the same time constricted the scope of that right as a practical matter.

92. *See, e.g.*, Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 15 (1996). Sunstein argues that "shallow and narrow" constitutional rulings are more desirable than "deep and broad" rulings on the ground that they remand matters for democratic deliberation. To the extent that standards are the

jurisprudential or institutional motivation, the choice of standards over rules will register on the political spectrum as unexpectedly moderate or liberal during a period of general rightward shift.

V. THE COMPLEXITY OF CONSERVATIVE IDEOLOGY

A third reason why conservative Justices might appear to vote moderate or liberal is that the very concept of constitutional conservatism is quite complex. A judicial conservative might be thought to favor, at least to some degree, any of the following: 1) originalism; 2) textualism; 3) judicial restraint (deference to legislatures); 4) libertarianism (deregulation); 5) states' rights (decentralization); 6) traditionalism; 7) stare decisis; 8) capitalism; and 9) law and order. These different strands of judicial conservatism may sometimes pull in competing directions, both among Justices, and even within a single Justice across an array of cases. And when one strand trumps others, the outcome of the case may appear surprisingly moderate or liberal.

Such tensions are easy to identify in divided decisions by the Rehnquist Court. For example, adherence to the original meaning of the Constitution may trump deference to the government for sake of law and order. Justices Scalia and Thomas, typically the Court's staunchest advocates of originalism, have sometimes voted with criminal defendants and against the government where they thought that the framers must have meant to forbid modern practices, such as videotaped testimony in child sexual abuse cases[93] or unannounced drug raids.[94]

Original meaning may be at odds with traditionalism. For example, Justice Thomas voted to sustain a First Amendment right to distribute anonymous election leaflets, reasoning that the framers themselves had engaged in anonymous debates over the Constitution, signing their writings with a variety of pseudonyms from "Publius" to the "Federal Farmer."[95] Justice Scalia, dissenting, found the originalist record ambiguous and would have deferred instead to the long tradition and current legislative practice in nearly all states of requiring identifying information in election literature.[96]

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device for achieving shallow and narrow rulings; however, it is hardly obvious that ambiguities left open by the decision will be remanded for democratic resolution, as opposed to further litigation.

93. *See* Maryland v. Craig, 497 U.S. 836, 860 (1990) (Scalia, J., dissenting).

94. *See* Wilson v. Arkansas, 514 U.S. 927, 930 (1995).

95. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 359–69 (1995) (Thomas, J., concurring in the judgment).

96. *Id.* at 371 (Scalia, J., dissenting).

Stare decisis may be at odds with any of the other strands of conservatism. The decisive joint opinion in *Casey*, for example, embraced a strong if limited respect for stare decisis, reaffirming *Roe*'s central holding without regard to whether it was correct as an original matter.[97] The dissenters, in contrast, saw stare decisis as far too weak to overcome the lack of clear textual or originalist authority for invalidating popularly enacted abortion regulation. Similarly, in Establishment Clause challenges to such practices as official school prayer, invocations of original practices such as George Washington praying at his inauguration have failed to overcome precedents limiting government endorsement of religion.[98]

Some opinions would seem to represent a triumph of libertarianism over textual or originalist literalism or judicial restraint. For example, all the Justices except Chief Justice Rehnquist recently proved willing to invalidate, as an unreasonable search and seizure, state-mandated drug testing for political candidates.[99] In others, strict adherence to text and original meaning may yield to some combination of stare decisis, traditionalism, and a robust view of property rights. For example, Justice Scalia, who typically favors textualist and originalist readings, exemplified this when he wrote an opinion for the Court in *Lucas v. South Carolina Coastal Council*,[100] calling for strict review under the Takings Clause of regulations that sharply diminish property values—even though the Takings Clause says nothing about regulation of property whose title is not transferred to the state, and even though the framers did not envision applying the Takings Clause to such regulations.[101]

These examples could be multiplied indefinitely, but suffice to illustrate that any effort to carry out a program of judicial "conservatism" in constitutional interpretation involves a simultaneous equation with multiple variables. Even a single Justice pegged as a conservative may be pulled in different directions. The outcome of a case, therefore, depends not only upon a Justice's default weighing of these variables, but on the relative strength of

97. Stare decisis, or respect for precedent, carries varying degrees of weight among the five Justices appointed by Presidents Reagan and Bush. Justices O'Connor, Kennedy, and Souter give considerable respect to at least the core of prior precedents. Justices Scalia and Thomas are more willing to overturn "unsound" precedents. *See, e.g.*, John Wallace, *Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism and Politics in Casey*, 42 BUFF. L. REV. 187, 205–07 (1994).

98. *See* Lee v. Weisman, 505 U.S. 577 (1992) (*compare* Souter's concurrence at 609–10 *with* Scalia's dissent at 632–36, noting early historical examples of official prayer).

99. Chandler v. Miller, 117 S. Ct. 1295, 1305 (1997).

100. 505 U.S. 1003 (1992).

101. His reference points instead were precedent, *see* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), and traditional cultural "understandings" of the contours of property, *see Lucas*, 505 U.S. at 1027.

each particular ideological pull in the differing circumstances of each case. To complicate matters still further, Justices may agree on a variable but disagree strenuously over its application. For example, consider the dueling originalism that has led the majority and dissent to disagree vigorously as to whether the framers did or did not intend that Congress might employ state officials to administer federal programs,[102] or whether the framers did or did not intend that the Establishment Clause bar only that aid to religion which preferred one sect over others.[103]

Finally, constitutional rights sometimes may undergo what might be called "ideological drift."[104] That is, rights once thought of as having liberal provenance are embraced by conservatives even as liberal attachment to them falters. There is no better recent example than freedom of speech.[105] Free speech rights were traditionally asserted in this century by anarchists, socialists, syndicalists, and communists, and closer to our own time by the pioneers of racial civil rights and opponents of the war in Vietnam. But left-wing support is not always forthcoming when free speech claims are asserted by racist cross-burners, anti-abortion demonstrators, large corporate advertisers, or donors of large sums to political campaigns. In the latter sort of case, liberals often favor government regulation designed to ensure racial dignity, reproductive privacy, or greater equality in the marketplace of ideas, and conservative groups take up the banner of free speech libertarian opposition.

In such circumstances, popular views of the political valence of decisions may lag behind the ideological drift, leading to the perception that conservative Justices have voted "liberal" on free speech, and vice versa. For example, in a recent abortion clinic protest case, the traditionally liberal Justice Stevens voted to uphold all restrictions on the protestors while the historically conservative Justice Scalia would have struck them all

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102. *See* Printz v. United States, 117 S. Ct. 2365 (1997) (*compare* the majority opinion at 2370–75 *with* Stevens' dissent at 2389–94).

103. *See, e.g.*, Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995) (*compare* Thomas' concurring opinion at 855–58 *with* Souter's dissent at 866–76).

104. *See* Balkin, *supra* note 31, at 393–94.

105. For another example, consider the shift from left to right on the political spectrum of the view that the Fourteenth Amendment's guarantee of equal protection is a guarantee of formal equality that bars all official use of race as a classification. Today, many conservatives use a principle once urged in the civil rights movement to reject affirmative action and aggressive interpretations of the Voting Rights Act, while many liberals eschew formal equality claims in favor of a view of the Equal Protection Clause as an antisubordination principle under which benign racial classifications should not be treated the same as invidious ones.

down.[106] Similarly, in a recent campaign finance case, the supposedly conservative Justices Kennedy, Thomas, and Scalia embraced vigorously the free speech rights of political parties while several supposedly liberal Justices expressed willingness to allow wide-ranging government regulation of campaign finance.[107] Because the press has an institutional interest in strong First Amendment protection, such decisions are apt to be reported as "liberal" victories for free speech, even if the credit must go to "conservative" Justices.

VI. CONCLUSION

This essay has suggested three possible explanations—institutional, jurisprudential and ideological—of why a Court moving generally rightward might nonetheless be characterized occasionally by surprising judicial moderation or even a liberal turn. These factors help show why it is so difficult to capture the work of the Court along a single political vector: "sharp right turn," or "the center holds." There is nothing mutually inconsistent among these accounts. Indeed, they may reinforce one another, as when institutional concerns influence jurisprudential orientation. And these accounts help to refute the view, sometimes expressed in popular commentary, that the moderate judicial behavior of the swing Justices on the Rehnquist Court is incoherent or inexplicable.

106. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 777 (1994). The majority in *Madsen*, steering between the poles set by Justices Stevens and Scalia, upheld some of the restrictions but not others.

107. Colorado Republican Fed. Campaign Comm'n v. F.E.C., 116 S. Ct. 2309 (1996).