

# The Court's Embarrassingly Bad Decisions

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## 1.

Five conservative justices now dominate our Supreme Court—Chief Justice John Roberts and Justices Anthony Kennedy, Antonin Scalia, Clarence Thomas, and Samuel Alito. They continue to revise our historical constitution and two new cases show that the arguments they offer continue to be embarrassingly bad. One concerns contributions to religious schools; the other, public financing of elections. I will describe those cases and defend that criticism, but it might be well to notice, first, why the justices have had to resort to arguments of such poor quality.



Doug Mills/The New York Times/Redux

*Justices Antonin Scalia, Clarence Thomas, and Ruth Bader Ginsburg leaving the Supreme Court after a ceremony honoring the late Chief Justice William Rehnquist, Washington, D.C., September 2005*

We cannot accuse these justices of ignoring the plain meaning of the Constitution. The popular assumption that justices can decide constitutional cases by just consulting the text of that document and the intentions of its eighteenth- and nineteenth-century authors, without relying on their own sense of justice, is simplistic and wrong. Many of the most important constitutional clauses—the First Amendment’s promise of “the freedom of speech,” for instance, its guarantee of “free exercise” of religion, and its prohibition of any religious “establishment”—are drafted in abstract language; justices must interpret those clauses by trying to find principles of political morality that explain and justify the text and the past history of its application. They will inevitably disagree about which principles best satisfy that test, and they will inevitably be influenced, in making that judgment, by their own sense of what a good constitution would provide.

But that does not mean that the justices are free to interpret the abstract clauses of the Constitution to match their own political convictions, whatever these are. It is essential to the rule of law that they accept the constraints as well as the responsibilities of the jurisprudence of principle. They must rely only on principles that they honestly think provide a persuasive

justification for our actual constitutional traditions. They must set out the principles on which they rely in their opinions transparently; and they must apply those principles consistently across all the cases that come before them. They must not invent arbitrary exceptions when these principles yield results they find uncongenial. Unless justices accept those constraints, they are only unelected politicians.

A justice may believe, as a matter of personal conviction, that a decent, morally responsible government will help to finance and otherwise support religious education, training, and practice. He may also believe that the policies of the Republican Party are best suited to the prosperity and happiness of our country, and that Republican presidents, advised by Republican senators, are most likely to appoint future Supreme Court justices who will serve the nation well. These are not outrageous opinions: they are held by many millions of honorable people. But of course it is not possible to suppose that they are a suitable guide to interpreting or applying the Constitution. On any responsible interpretation, that document separates church and state and is neutral in partisan politics. So if a justice is disposed to advance those goals through his decisions, he must invent arguments that disguise rather than exhibit his actual motivating convictions. These are likely to be artificial and therefore bad arguments.

Is that a fair account of the agenda of the five conservative justices? In the last few years they have overruled a long series of recent and important precedent decisions and they have reversed several long-standing constitutional traditions. They have flatly prohibited even obviously sensible race-conscious social and educational policies, bolstered government's support for religion, and progressively narrowed the scope of abortion rights. They have changed the American electoral system to make the election of Republican candidates more likely, for example by guaranteeing corporations a constitutional right to spend as much as they wish denouncing candidates they dislike. As I have argued in *The New York Review*, these various decisions cannot be justified by any set of principles that offer even a respectable account of our past constitutional history.<sup>1</sup> Now look at some of the arguments they offer.

## 2.

Consider the Court's decision, handed down on April 4, in *Arizona Christian School Tuition Organization v. Winn et al.* Arizona allows taxpayers to claim, as a full credit against their state income taxes, money they contribute to school tuition organizations (STOs) that provide scholarship funds to private schools of their choosing. Schools that use a religious test for admissions or scholarships are eligible and much of the money contributed to these organizations has gone to such schools. A group of Arizona taxpayers challenged this tax credit: they said that it violates the First Amendment, which forbids states from "establishing" religion. The Ninth Circuit Court of Appeals agreed but the Supreme Court, by a vote of 5–4, reversed its decision. The Court did not decide that the Arizona scheme is constitutional; it decided rather that private citizens have no right—no "standing"—to challenge its constitutionality.

The separation of these two issues—whether an act of government is unconstitutional and whether some person or group has legal standing to challenge it—may sound hairsplitting, but it is an integral part of our constitutional practice. The Constitution provides that the federal courts, including the Supreme Court, have jurisdiction to decide only genuine “cases or controversies” and the Court has interpreted this requirement to mean that only people who have actually been harmed in some way by an act of government are permitted to challenge its constitutionality. That general principle makes good sense. Litigants who have something special at stake are likely to do a better job presenting a constitutional argument than those whose interest is only academic, and the opposite practice—allowing anyone who thinks a statute unconstitutional to bring a lawsuit—might swamp the courts with litigation.

When has a particular citizen actually been harmed by an allegedly unconstitutional act? Am I, a white taxpayer, harmed if my state uses tax money, including my taxes, to subsidize all-white private schools? The Court long ago held no: even if an act is unconstitutional, the financial harm any ordinary taxpayer suffers, just because his taxes were used to enforce it, is too trivial to count. Black schoolchildren have standing to challenge state-supported white schools because the disadvantage is special to them: they, unlike white taxpayers, have been denied the equal protection the Constitution guarantees. But I cannot make such a challenge, for I have not been harmed. The right-wing justices relied on that principle in the *Arizona Christian* case: since any taxpayer can take a tax credit for any contribution to any STO he chooses, they said, no taxpayer suffers any special disadvantage and so none has standing to sue.

But for many decades the Court has recognized an important exception to this general principle. In 1968, in *Flast v. Cohen*, the Court decided, with only one dissent, that it does not apply in certain cases like *Arizona Christian* that arise under the “establishment” clause holding that Congress “shall make no law respecting an establishment of religion.”<sup>2</sup> This decision—known as the *Flast* exception—makes sense. The other rights set out in the Bill of Rights, including the “free exercise of religion” clause of the First Amendment, are designed to protect people from individualized harm. If government forbids a particular religious practice—the use of peyote in religious ceremonies, for example—some citizens are distinctly disadvantaged and only they should be permitted to challenge the constraint. But the “establishment” clause, uniquely, is different. It is meant to protect all citizens, just *as* citizens, from any form of state religion. In many such cases, including the *Arizona Christian* case, a requirement to show special damage would mean that no one would have standing to challenge even an egregious violation of the establishment clause.

Repealing the *Flast* exception would therefore please social conservatives anxious to increase government support for religion. The five conservative justices took a long step in that direction in the 2007 *Hein* case in which a group of taxpayers sued to challenge President George W. Bush’s expenditures for his “faith-based initiatives.” Two of those justices—Scalia and Thomas—declared that the *Flast* exception should be overruled outright on the ground that the constitutional phrase “cases or controversies” allows no exceptions. The three others chose instead to rely on a distinction that the Court had actually rejected in an earlier case: they said that

*Flast* didn't apply because in *Flast* the plaintiffs were challenging a congressional expenditure while in *Hein* they were challenging discretionary spending by the President. But there is absolutely no difference in principle between expenditures by the two branches of government. If one violates the establishment clause so does the other; if taxpayers have standing to challenge one kind they must have standing to challenge the other. To dismiss a precedent with an argument that bad means actually overruling it while pretending not to.

The five conservatives also refused to apply the *Flast* exception in the new *Arizona Christian* case. Once again Scalia and Thomas said the exception should be candidly overruled. Once again the three others used a silly distinction to avoid doing that: Kennedy, in an opinion joined by the other two, said that the exception did not apply because the government did not *itself* contribute any money to religious schools. It only allowed taxpayers a full credit against their taxes if *they* contributed.

In fact, there is no difference in motive, consequence, or principle between a direct expenditure to a religious school from the state treasury and a full tax credit for those who contribute to a religious school themselves. The STOs that solicited funds told would- be contributors, correctly, that they would be making a gift with other people's money—that is, with the money the state would have to raise from other people to make up for the taxes forgone through the credit.<sup>3</sup>

The three justices needed yet another embarrassing claim to complete their case, however. As Justice Elena Kagan pointed out in her devastating dissent, since the *Flast* decision the Supreme Court had several times accepted, without comment, that ordinary taxpayers have standing to challenge tax advantages that benefit religious organizations. In *Committee for Public Education & Religious Liberty v. Nyquist*,<sup>4</sup> for example, it struck down tax deduction for payments of tuition at religious schools. (Kagan said she had counted fourteen such cases and “I suspect that I missed a few.”) Kennedy replied that since all the parties and the justices had just assumed, in these past cases, that the *Flast* exception applied when tax credits rather than direct expenditures were challenged, the Court had not actually ruled on the issue, so he was free to disregard all those decisions. But the Court had had to accept that the taxpayers had standing in these cases in order to accept jurisdiction, so of course the Court's decisions count as precedents. The fact that all the parties in those cases thought Kennedy's distinction between direct expenditures and tax credits too silly even to mention should have given him pause, not comfort.



Why, then, did the three conservative justices—Kennedy, Roberts, and Alito—not follow Scalia and Thomas in simply overruling *Flast*? They would have avoided having to make as many bad arguments as they did. (They would have needed only one.) Roberts and Alito both promised, in their Senate confirmation hearings, to respect precedent. But they both qualified the promise: they would not need to respect past decisions whose rationale had been “undermined” by later decisions. Perhaps they are now engaged in an undermining process, step by step, so they can later justify overruling *Flast* and other precedents they dislike. Justice Stephen Breyer has called that strategy “death by a thousand cuts.” The strategy might conceivably be at work in the Court’s recent abortion rights decisions as well.

### 3.

Now consider the newest electoral reform case, also from Arizona. In their earlier *Citizens United* decision the five justices guaranteed corporations a constitutional right to use their own capital for political advertising. They said that the point of the First Amendment is to provide the electorate with as much political speech as possible. They did not deny that the political process would be fairer if candidates and political organizations were more equal in their campaign resources. But the First Amendment forbids infringing free speech for the sake of equality, they said, and so “leveling the playing field” is no justification for stopping corporations or anyone else from spending as much on political advertising as they wish.

Some commentators said that the *Citizens United* decision would make little practical difference: though it was wrong in principle, they thought, it would not actually do much harm. They were mistaken: the decision’s impact has already proved dramatic.<sup>5</sup>

The new case—*Arizona Free Enterprise Club PAC v. Bennett*—gives the five justices another opportunity to protect the power of wealth in politics. Arizona, like many states, offers public financing to election candidates who agree to limit their spending but permits candidates who refuse public funding to spend as much as they wish. In a 1998 referendum following a series of

political scandals, Arizona voters adopted a “Clean Elections Act” providing that if a privately funded candidate spends more than a stipulated amount, other candidates who have accepted public financing receive additional campaign funds from the state.

Conservative political organizations challenged the Clean Elections Act: they argue that this act, too, violates the free speech clause of the First Amendment. The Court heard oral argument in the case on March 28; it has not yet announced its decision but the remarks of four of the five conservative justices (Thomas almost never speaks during oral argument) leave little doubt that all five will rule the Clean Elections Act unconstitutional.<sup>6</sup> They agreed with the plaintiffs that the act would “chill” the speech of privately funded candidates who would know that if they spent more than the stipulated limit their opponents would receive additional funding. In that way, they suggested, the act infringes the rights of privately funded candidates to speak as freely as they wish.

This is a bizarre argument. The five justices do not challenge the constitutionality of public funding; they hardly could since such funding obviously increases the amount—as well as the diversity—of political speech. But public funding presumably deters many rich candidates from broadcasting dubious claims they would happily broadcast if their opponents had no money to rebut them. Indeed, public funding for potential opponents might well deter some wealthy individuals from running for office and therefore from campaigning at all. The First Amendment can hardly be thought to guarantee rich politicians and organizations that they will not be effectively opposed, even when the possibility of effective opposition might induce them to say less.

Nor would increased subsidies for publicly funded candidates lower the total amount of speech available to the electorate. Political spending has increased in Arizona since the act was passed, and common sense argues that the act would increase rather than decrease the amount of political speech. Organizations like the Free Enterprise Club can raise much more money than publicly funded candidates would have even with the additional funds the act would provide them. The act would indeed diminish the financial advantage of rich candidates and organizations. But it would hardly erase that advantage and it would therefore be unlikely to stop privately funded candidates and groups from raising and spending what they otherwise would. If so, the act would increase overall speech by providing somewhat more money for poorer candidates to spend.

The transcript reveals a different and more ominous argument that some of the conservative justices seemed to have in mind, however—an argument that would make the impact of the Clean Elections Act on anyone’s speech irrelevant. They repeatedly declared that the real intention of the act was egalitarian—that it was actually designed not to reduce corruption but to make the resources available to different candidates somewhat more equal—and that the act was unconstitutional for that reason.<sup>7</sup> Roberts put the point this way: “Well, I checked the Citizens’ Clean Elections Commission website this morning, and it says that this act was passed to, quote, ‘level the playing field’ when it comes to running for office. Why isn’t that clear evidence that it’s unconstitutional?”

It is almost always implausible to attribute a single purpose even to an ordinary statute; different legislators might well have had very different intentions and hopes in voting for it. But the Clean Elections Act was adopted in a referendum directly by the Arizona voters and it is worse than implausible to attribute a single or dominant motive to all the many thousands who voted for it. We have no idea, for instance, how many of them wanted just to curb the well-publicized corruption in the state.

But even if we accept that every Arizonan who voted for the act hoped to reduce the advantage of rich candidates and institutions, that assumption would provide no argument for holding it unconstitutional. Past decisions, including *Citizens United*, held that a legislative desire to reduce the inequality in candidates' spending cannot *rescue* a scheme that is otherwise objectionable on First Amendment grounds. Roberts's declaration in the new case suggests a malign sleight of hand: that an act passed by popular referendum to promote electoral equality will now be *condemned* by that motive even if there is no other constitutional objection to it. The enthusiasm with which at least three of the conservatives toyed with the idea that equality is just in itself a forbidden goal gives further evidence that they are driven by political convictions wholly alien to the Constitution—convictions that a genuine jurisprudence of principle must reject.