

# Challenges to the Rule of Law: Or, *Quod Licet Jovi Non Licet Bovi*

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I chose for the title of my talk the somewhat mysterious: *Quod Licet Jovi Non Licet Bovi*. I did this for several reasons. The first was sheer publicity value. I thought it might sound more exotic than the usual sort of speech title, as for example, “Democracy and Tradition: Compare and Contrast,” or “Class Actions: Disaster or Catastrophe.”

The more serious reason, however, is that the phrase, which translates as “what is permitted to Jove (or Jupiter, the king of the gods) is not permitted to cows,” has always seemed to me to symbolize the opposite of what I consider to be the rule of law. And the rule of law is what I perceive and consider judging to be about—at least it is why I went into judging rather than into some of the previous endeavors that Roger’s introduction of me laid out at some length. The rule of law means that, to the extent that fallible judges are capable of adhering to it, the expectation is that when you go before a court, the outcome depends on the merits of your case, not your political status, relation to the court, or other personal characteristics. It does not mean that the law is a mechanical enterprise—it cannot be. But it should mean that the judge will apply the same standards to the merits of your case, as to those of any other case, whatever the color of your skin or the content of your character.

I’m going to examine three areas in which I think the courts have confronted or are confronting issues that call into question whether that concept of the rule of law is being applied and ask whether the courts are applying one rule for the cows and refusing to apply that rule when the godly or the goodly are involved. And for balance, the three areas will include one in which I believe that courts have generally done well despite occasional lapses and challenges. That is the area of speech rights. For the second area, racial preferences,

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I believe that courts have done quite poorly. And in the third area, election law cases where the issues are coming increasingly into play, I don't know what the ultimate result will be, but I will examine both dangers and prospects.

At the outset, however, I need to make the obligatory, but I believe important, disclaimer that I am not opining on the outcome of any pending or impending issues that may come before me. I am primarily trying to discuss cases that have been decided and what I see as the consistencies or inconsistencies of some of the doctrine laid out in those cases.

## I.

Beginning then with the issue of speech rights, courts have generally been willing to bite the bullet and give even the most unpopular speech the same protection as the popular. From the 1930s to the 1960s it was primarily the rights of communists, leftists, and protesters that were protected in cases like *Cohen v. California*,<sup>1</sup> the famous "Fuck-the-Draft" jacket case, *New York Times v. Sullivan*,<sup>2</sup> and *Stromberg v. California*,<sup>3</sup> involving communist campers. Yet even in the old cases, fascists, white supremacists, and Klan members were sometimes protected, as in the *Terminiello*<sup>4</sup> case involving anti-Semites in Chicago and *Brandenburg v. Ohio*<sup>5</sup> involving Klan members. Those cases gradually, but generally, established a tradition of broad and evenhanded protection of speech. The recent cases of *R.A.V. v. City of St. Paul*<sup>6</sup> and *Virginia v. Black*,<sup>7</sup> involving various efforts to suppress cross-burning, have mostly continued that tradition.

In recent years, most of the celebrated cases have involved two areas, both relating to education. One is clothing or symbols in elementary and secondary schools growing out of the *Tinker*<sup>8</sup> decision. The other is efforts in schools, especially colleges, to enforce

<sup>1</sup>403 U.S. 15 (1971).

<sup>2</sup>376 U.S. 254 (1964).

<sup>3</sup>283 U.S. 359 (1931).

<sup>4</sup>*Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

<sup>5</sup>395 U.S. 444 (1969).

<sup>6</sup>505 U.S. 377 (1992).

<sup>7</sup>538 U.S. 343 (2004).

<sup>8</sup>*Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

strictures against what is labeled “hate speech”. Both of these areas began with doctrines or rubrics that threatened, nay, even invited, discriminatory application, but I believe that for the most part, courts have resisted that temptation.

*Tinker* involved a girl who, at the instigation of her parents, it turned out, wore a black armband to school as a protest against the Vietnam War. The Supreme Court upheld her right to do so as long as it was not “colliding with the rights of others”<sup>9</sup> or “materially and substantially interfer[ing] with the requirements of appropriate discipline.”<sup>10</sup> In the past few years there have been numerous cases, all at lower levels, in which student rights have generally been upheld, regardless of whether the message could be considered as of the right or the left. Thus, even the Confederate flag usually has not been treated worse than leftist symbols, at least since the time that racial tensions were especially evident in particular schools. The standard, however, is quite problematic.

It is tempting for judges to let their own attitudes color their view of what a particular symbol or slogan means. The Supreme Court in *Tinker* clearly felt that protesting the Vietnam War with an armband was a benign, even laudable, act. Those seeking to uphold discipline against Confederate flag tee-shirts clearly thought that the message was much less benign, representing hate not heritage, to revert to the slogan of the flag defenders. But courts seem not to have grappled in a general way with how they should interpret symbols. Is there an objective standard for what they mean? Should it be the intent ascribed by the speaker or the meaning taken by the listener or observer? Clearly, during the Vietnam War the *Tinker* armband could have been taken as a personal affront to those in the armed forces and their children, since the wearer in many cases implied their complicity in war crimes and other evils. Or it could have been taken as simple support for pacifism, or anything in between.

In this ambiguity of symbols I experienced a very poignant example concerning the great Broadway hit *Les Miserables*. The heroic crowds in that musical are waving red flags, and those flags are potent symbols. A friend, a refugee from a communist country, said she

<sup>9</sup>*Id.* at 513.

<sup>10</sup>*Id.* (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)).

had a very hard time watching or enjoying the play because for her the red flag was a symbol of oppression that gave her offense. But that offense, even if expressed in a school rather than a theater, should not and generally has not led to judicial suppression. Courts have not resolved the philosophical tension, of course, but they have mostly upheld speech rights evenhandedly, at least in the absence of compelling evidence of physical confrontation or tension at the school.

But that limitation is also problematic as it invokes the specter of the “Heckler’s Veto,” conceptualized by my great old professor, Harry Kalven, and now taken as part of First Amendment law.<sup>11</sup> The heckler’s veto stands for the idea that officials may suppress speech if those hearing it may be sufficiently incensed to try themselves to suppress it. It has been rejected in numerous cases from *Brown v. Louisiana*<sup>12</sup> to *Forsyth County*,<sup>13</sup> involving a license for a Klan march. But the standard of whether a symbol creates disruption leads to some rather strange results. If the audience includes very touchy and angry people, a speech or symbol might be restricted more readily than if the school is inhabited by Quakers or Zen masters, which seems a very odd doctrine. The “fighting words” doctrine, which at least by citation has enjoyed a revival since *R.A.V.*,<sup>14</sup> has the same problem. As a limit on freedom of speech when such speech tends to incite an immediate breach of the peace, the doctrine is anything but clear or easy to apply. Psychological testing asking people what it would take by way of insult or language to make them fight has found, not surprisingly, that there are substantial differences among groups. Women, for example, are less inclined to fight, which might mean that under the doctrine they could be subject to more offensive speech than the more testosterone-poisoned, which makes for an odd doctrine. Yet though these doctrinal dangers remain, courts usually have applied the doctrine evenhandedly.

But my benign view was tested recently in a case from the Ninth Circuit. After pro-gay rights activities in the Poway School District

<sup>11</sup> See Harry Kalven, Jr., *The Negro and the First Amendment*, 140–60 (1965).

<sup>12</sup> 383 U.S. 131 (1966).

<sup>13</sup> *Forsyth County v. The Nat’l Movement*, 505 U.S. 123 (1992).

<sup>14</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

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in California, a student named Harper wore a tee-shirt that could be read at the least as expressing philosophical opposition to homosexuality. In a Ninth Circuit opinion,<sup>15</sup> Judge Reinhardt permitted the school to punish the wearer, drawing a sharp dissent from the panel and from a denial of rehearing *en banc*.<sup>16</sup> That led Judge Reinhardt to some rather remarkable rejoinders that in their starkness express what I would call the Jovi vs. Bovi view. Reinhardt said, "The dissenters still don't get the message [that you can't] strike[ ] at the very core of . . . [someone else's] dignity and self-worth."<sup>17</sup> And Judge Gould, in concurring with the denial of rehearing *en banc*, said, "Hate speech . . . in the form of a tee shirt misusing biblical text [can be punished to] protect [others] from psychological harm,"<sup>18</sup> which I also found quite striking because based on the judge's view about the proper use or misuse of a biblical text.

The tee-shirt that the student wore, after school-approved activities opposing his views, said on the front, "BE ASHAMED OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED." And on the back it said "homosexuality is shameful."<sup>19</sup> The Ninth Circuit panel interpreted those words as being a direct attack on "the dignity and self-worth of individual students," though without any indication that it would have taken a similarly latitudinarian view of the message in *Tinker* with respect to, for example, the children of members of the armed forces or persons in junior ROTC. That case brings starkly to the fore the question of whether a court can make its own personal interpretation of the meaning of symbols, and it leads to a very strong possibility of the Jovi-Bovi distinction.

In contrast, the Second Circuit, shortly thereafter, forbade school officials from punishing a student who wore a tee-shirt described in its opinion as follows: "The front of the shirt, at the top, has large print that reads 'George W. Bush,' below it is the text, 'Chicken-Hawk-In-Chief,' [followed by] a large picture of the President's face, wearing a helmet, superimposed on the body of a chicken" surrounded by oil rigs, dollars signs, three lines of cocaine and a razor

<sup>15</sup>Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006).

<sup>16</sup>*Id.* at 1052.

<sup>17</sup>*Id.* at 1053.

<sup>18</sup>*Id.* at 1053–54.

<sup>19</sup>*Id.* at 1171.

blade, and a martini glass with an olive. And under it is the line “World Domination tour.” That was found insufficiently offensive.<sup>20</sup>

The plaintiff in the California case petitioned the U.S. Supreme Court for certiorari, which might have led one to think that a resolution was forthcoming. The Supreme Court found the case to be moot, however, which kept the Court from opining on the merits.<sup>21</sup> The Court did grant certiorari, however, and in doing so vacated the Ninth Circuit’s opinion.<sup>22</sup> It could instead have simply denied certiorari, leaving the Ninth Circuit’s decision in force. That the Court chose to grant cert and vacate the underlying judgment is at least some indication that they frowned on it.<sup>23</sup>

Another interesting, potentially problematic, case is in front of the Sixth Circuit. It involves a high school rule prohibiting students from wearing clothing that bears the Confederate flag.<sup>24</sup> The district court denied a motion from a student for a preliminary injunction enjoining the school from implementing this rule.<sup>25</sup> A Sixth Circuit panel (I was not on the case) affirmed the district court’s decision, finding that the district court was not clearly wrong in determining that in a school with a recent history of racial tensions a Confederate flag might cause disruption—even absent any indication that Confederate flags had ever caused past disruptions at the school. A petition for rehearing *en banc* is currently pending.

Similarly, college hate speech cases have almost uniformly gone against the schools attempting to enforce speech codes. They are still on the books at many schools and can have a chilling effect on students who do not wish to risk the controversy, expense, and obloquy of challenging them, but they rarely survive despite reams of academic writing attempting to support them.<sup>26</sup> Two quick examples: in our

<sup>20</sup> *Guiles v. Marineau*, 461 F.3d 320, 330–31 (2d Cir. 2006).

<sup>21</sup> *Harper v. Poway Unified Sch. Dist.*, 127 S. Ct. 1484 (2007).

<sup>22</sup> *Id.*

<sup>23</sup> See Tony Mauro, *Court Vacates 9th Circuit Ruling Against Anti-Gay T-Shirt*, First Amendment Center, March 5, 2007, at <http://www.firstamendmentcenter.org/analysis.aspx?id=18251>.

<sup>24</sup> *D.B. v. Lafon*, 217 F. App’x 518 (6th Cir. 2007).

<sup>25</sup> *D.B. v. Lafon*, 452 F. Supp. 2d 813 (E.D. Tenn. 2006).

<sup>26</sup> See, e.g., Mari J. Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering the Victim’s Story*, 87 Mich. L. Rev. 2320 (1989); Thomas C. Grey, *How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience*, 29 U.C. Davis L. Rev. 891 (1996); Charles R. Lawrence III, “If He Hollers Let Him Go: Regulating Racist Speech on Campus,” in *Words That Wound: Critical Race*

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own circuit, district judge Avern Cohn struck down a university speech code in an opinion<sup>27</sup> that was apparently sufficiently resounding that the University of Michigan did not even attempt to appeal it to our circuit. Interestingly, Judge Cohn began his opinion, perhaps with sly intent, by quoting Lee Bollinger,<sup>28</sup> the same Lee Bollinger who as law dean and then president of the University of Michigan endorsed and implemented the code and would later be the defendant in *Grutter v. Bollinger*, the Supreme Court decision that upheld law school diversity admissions.<sup>29</sup> He quoted from Bollinger's own writings: "[J]udges, being human, will not only make mistakes but will sometimes succumb to the pressures exerted by the government to allow restraints [on speech] that ought not to be allowed. To guard against these possibilities we must give judges as little room to maneuver as possible and, again, extend the boundary of the realm of protected speech into the hinterlands of speech to minimize the potential harm from judicial miscalculation and misdeeds."<sup>30</sup> There, at least, Professor Bollinger wrote more truly than did Dean and President Bollinger.

More recently, in a similar speech code case, Georgia Tech agreed to a settlement in which the offending portions of the code, which were being used to support discipline against students only of a particular stripe, were excised and only provisions that dealt with direct physical threat were left in.<sup>31</sup> That has been the general trend. Thus, I would summarize this area of the law by saying that, despite a clear and strong effort on the part of many academics and groups to apply legal doctrine in a way that would sanctify the opinions of one side but not those of the other, the evenhanded application of speech rights seems mostly secure. But we will need to see the ultimate outcome of the doctrines raised in that *Harper v. Poway* case in the Ninth Circuit.

Theory, Assaultive Speech, and the First Amendment 53–58 (Mari Matsuda et al. eds., 1993).

<sup>27</sup>Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989).

<sup>28</sup>*Id.* at 853.

<sup>29</sup>*Grutter v. Bollinger*, 539 U.S. 306 (2003). See Roger Pilon, Principle and Policy in Public University Admissions: *Grutter v. Bollinger* and *Gratz v. Bollinger*, 2002–2003 *Cato Sup. Ct. Rev.* 43 (2003).

<sup>30</sup>Lee Bollinger, *The Tolerant Society* 78 (1986).

<sup>31</sup>See *Sklar v. Clough*, 2007 U.S. Dist. LEXIS 49248 (N.D. Ga., July 6, 2007).

## II.

The second area, the one where courts have not done so well in my view, is the area of racial preferences. It is true, of course, that governments often prefer some individuals, groups, or interests to others. To a great extent that is what modern governments do, even if it is not what the Founders primarily said was the proper role of government. At the same time, the Founders were quite aware of the practical dangers of such tendencies and sought to protect against them by structural features. *Federalist 51*, after all, was about how to control the general drive to get government to act in support of one's narrow interests. One aspect of this drive is called patronage. When your side wins political or legislative power, you get the spoils. While perhaps regrettable as a matter of political philosophy, if the role and reach of patronage are defined and enforced by law I don't think that it is necessarily antithetical to the rule of law. Over most of our history, it was thought that government employment was a legitimate area for patronage. Certainly since the presidency of Andrew Jackson it was accepted, and although later it might be limited by civil service legislation, it was not unconstitutional. Then came the *Branti*<sup>32</sup> case in 1980 that said that a person could not be fired for political affiliation or to open up a slot for the politically favored group. At first this ruling seemed limited—after all, being fired is a lot worse than simply not being hired.<sup>33</sup> But ultimately, in the case of *Rutan v. Republican Party of Illinois*,<sup>34</sup> the Court said that all government employment, except for narrowly defined areas, was off limits to patronage. At the time, in a case essentially overruled by *Rutan*, I wrote that minorities might well come to rue this decision as it might limit the opportunities for patronage that had been reaped by groups before them.<sup>35</sup> That prediction came to pass in a later case, *Middleton v. City of Flint*,<sup>36</sup> when we struck down racial preferences in some city employment, which were instituted after a new mayor

<sup>32</sup>*Branti v. Finkel*, 445 U.S. 507 (1980).

<sup>33</sup>See *Messer v. Curci*, 881 F.2d 219, 222–23 (6th Cir. 1989) (en banc); *Messer v. Curci*, 806 F.2d 667, 1986 U.S. App. Lexis 34146, at \*10–11 (6th Cir. 1988) (Boggs, J., dissenting).

<sup>34</sup>497 U.S. 62 (1990).

<sup>35</sup>See *supra*, note 33.

<sup>36</sup>92 F.3d 396 (6th Cir. 1996).



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was elected. Such preferences may easily have been upheld prior to *Rutan* if the mayor was simply preferring his political supporters who were, fortuitously, largely of one racial group.

I start with this backdrop because prime educational opportunities and the drive to give favored groups preferential access to those opportunities can very well be regarded as a species of patronage. Indeed, one of the arguments made for racial preference (mislabelled by some as “affirmative action”)<sup>37</sup> is that it is important for certain perks offered by society to be spread around in some rough proportion to different groups. Courts seem today to eschew a clear definition of diversity, but a recent article in the *Harvard Law Review* by Professor Heather Gerken<sup>38</sup> stated plainly, I think, the principle involved: “when scholars usually use the term they mean that something . . . should roughly mirror the composition of the relevant population from which it draws its members; it should ‘look like America,’ . . . particularly in the wake of *Grutter v. Bollinger*.”<sup>39</sup> Of course, since there is only 100 percent of anything, such a principle absolutely, inevitably, and mathematically leads to the limitation of all other groups to their rough proportions, whether those groups are actually defined or are simply the residual of the preferred group.

I want then to examine the tie between proportionality and patronage. In *Grutter* it was noted that one of the most allegedly persuasive amicus briefs was submitted by military people arguing the need for a racially diverse officer corps.<sup>40</sup> Yet that argument seemed to

<sup>37</sup>See *Grutter v. Bollinger*, 288 F.3d 732, 774 (6th Cir. 2002) (en banc) (Boggs, J., dissenting) (“Standing alone, the term ‘affirmative action’ might mean anything from affirmative action to study harder to affirmative action to exclude minorities. However, as used in the context of our society’s struggle against racial discrimination, the term first enters the public print and the national vocabulary in Executive Order 10925, issued by President John F. Kennedy on March 6, 1961, and subsequently incorporated into a wide variety of statutes and regulations. It ordered government contractors to ‘take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.’ It is thus clear that whatever else Michigan’s policy may be, it is not ‘affirmative action.’”).

<sup>38</sup>Heather Gerken, *Second-Order Diversity*, 118 *Harv. L. Rev.* 1099 (2005).

<sup>39</sup>*Id.* at 1102.

<sup>40</sup>See, e.g., Charles Lane, *Stevens Gives Rare Glimpse of High Court’s ‘Conference’; Justice Details His Thoughts on Affirmative Action Case in Michigan*, *Wash. Post*, Oct. 19, 2003, at A3.

me almost wholly implausible. As was noted, officers come largely from either ROTC or the military academies.<sup>41</sup> But it is hardly plausible that if more minorities go to the Harvards and Michigans of the world, they are *more* likely to go into ROTC than if they go to lesser-ranked state colleges, which almost invariably have much more active ROTC programs—indeed, even assuming the higher ranked schools permit ROTC programs.<sup>42</sup> And admission to the military academies is the one area where political patronage is *explicitly* enshrined in statute. Admission for the vast majority of spots requires sponsorship by a member of Congress, as enshrined in 10 U.S.C. § 4342 for West Point, and other statutes for the other academies.<sup>43</sup> And congressional membership is perhaps the most racially balanced high-ranking position in our society. Thus, that very patronage can ensure the desired balance.

Although they could have done so, the courts have not articulated or permitted a patronage system. Instead, in *Grutter* and similar decisions the Supreme Court has said that Jove can indeed be treated differently, so long as we blind ourselves as to the exact degree of preference that is being given to Jove and withheld from the cows. For that was the crucial distinction between *Grutter* and *Gratz*. If the numbers are explicit, as in *Gratz*,<sup>44</sup> preference will be struck down; if they are concealed, as in *Grutter*,<sup>45</sup> preferences will be permitted. It's rather interesting that in *Bakke* and *Grutter*, we had sixteen Supreme Court justices and they voted effectively 14-2 that there is no intellectually supportable difference between mere preferences, explicit preferences, and quotas.<sup>46</sup> Unfortunately for intellectual rigor, those two were the swing votes in each case. The two controlling votes thought that you could split the baby and impose burdens on people because of their race or ethnicity, as long as you weren't too explicit about it.

<sup>41</sup>See *Grutter*, 539 U.S. at 331 (citing Brief of Julius W. Becton, Jr. as Amici Curiae at 27 (Military amicus brief)).

<sup>42</sup>See, e.g., Harvard College, Other Programs, ROTC, at [http://www.college.harvard.edu/academics/other\\_programs/rotc/](http://www.college.harvard.edu/academics/other_programs/rotc/) (specifying that Harvard undergraduates can only participate in ROTC by cross-registering for ROTC courses at MIT).

<sup>43</sup>See 10 U.S.C. §§ 6954, 9342.

<sup>44</sup>*Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>45</sup>*Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>46</sup>See *id.* and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

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The faults of that position are generally clear, in my view, and well argued in the dissents.<sup>47</sup> But I want to focus only on the Jovi-Bovi aspect of it. Of course, if you are going to treat Jovi different than Bovi, you have to be able to define which is which. Although the public controversy seems to rest on a reasonably clear idea, at the level of actual definition the question of who should or should not be favored is much less clear, indicating the lack of rule-of-law type standards. As late as 1980, for example, Ohio had a statutory preference for "Orientals," a "group" now often disfavored.<sup>48</sup> A series of Ohio decisions ultimately had eight judges on one side and seven judges on the other as to whether people of Lebanese background were entitled to be called "Orientals."<sup>49</sup> With that much trouble at the nomenclature level, deciding individual cases can be even more problematic.

As a personal aside, I observed this issue when one of my children was spontaneously offered a graduate school scholarship from a consortium that asked, after awarding it, for documentation that my son had "at least one Hispanic grandparent." As he was out of the country at the time, I assembled the necessary information with birth and marriage certificates going back a century. But the whole exercise of proving that he was, in analogy to the Nuremberg laws, a "Mischling, second-class," was a bit off-putting, to say the least.

There is a third consideration, which is the potential subdividing of what are currently considered to be favored and disfavored classes. In rough terms, most governmental and educational institutions today give racial preference to groups called "Hispanic" or "Latino" and those called "black" or "African-American," while imposing burdens on groups defined as "white" or "Asian." But I have noted, at least in private conversations with admissions officers, an increasing tendency to distinguish internally among Hispanics so that those who might be considered as coming from "more favored" areas, such as Cuba or Chile, receive less or no preference, in contradistinction to those from, say, Guatemala or Mexico. Similarly, a

<sup>47</sup>See, e.g., Grutter, 539 U.S. at 364 (Rehnquist, C.J., dissenting).

<sup>48</sup>See O.R.C. § 122.71(E) (1980).

<sup>49</sup>See *Ritchey Produce Co. v. State of Ohio Dep't of Admin. Servs.*, 1997 Ohio App. LEXIS 4590 (Ohio App. 10 Dist., Oct. 7, 1007), rev'd, 707 N.E.2d 871 (1999).

series of articles has indicated displeasure among some black scholars and leaders with the distribution of those who are arriving on campus with the label "black," whether or not preference was accorded in their admission, because too many of them have parents from Africa or the Caribbean or are students whose racial mixture was created in recent years by having a non-black parent as opposed to having non-black ancestors in whatever quantity further up the family tree.<sup>50</sup> Finally, as shown by litigation over Lowell High School in San Francisco, which is Justice Stephen Breyer's alma mater, there have been efforts to distinguish among Asians so that one subgroup, such as Samoans or Filipinos, could obtain preference, or at least not be disadvantaged, whereas other subgroups, such as Vietnamese or Chinese, would continue to bear the racial burden.<sup>51</sup>

Very briefly, Lowell had a scheme whereby, in order to be admitted, you needed sixty-six out of a possible sixty-nine academic points if you were Chinese, fifty-nine if you were white or other Asian, and so on down the line for a variety of groups.<sup>52</sup> As a result of a consent decree the scheme was ultimately abandoned, but that decree has just expired<sup>53</sup> and it is unclear what the school is going to do. It is still very controversial. Under *Gratz* I don't think they could go back to so explicit a system. But under *Grutter* they could perhaps have exactly the same result by simply putting a bit of gauze over it. It is interesting to note, however, that in each of these efforts to create subdivisions, the change in generally accepted categories moves toward favoring groups that on average, sociologically, appear to lean more in the direction of liberal or statist views and against those of the opposite persuasion. That leads back to the question of whether what is really at work in this area is a version of patronage. Do the following thought experiment: If it suddenly happened that the students receiving racial preference in admission were to arrive on campus with ninety percent of them

<sup>50</sup>See Sara Rimer and Karen W. Arenson, *Top Colleges Take More Blacks, but Which Ones?*, N.Y. Times, June 24, 2004, at A1.

<sup>51</sup>See *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 413 F. Supp. 2d 1051 (N.D. Cal. 2005).

<sup>52</sup>Group Preferences and the Law: Hearing Before the Subcomm. On the Constitution of the H. Comm. On the Judiciary, 104th Cong. (June 1, 1995) (written statement by Lee Cheng, Secretary of the Asian American Legal Foundation).

<sup>53</sup>*Id.*

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clamoring to attend Cato conferences and registering Republican, how long do you think the educational institutions would continue to accord such preferences? I doubt very much that it would continue for very long.

Justice O'Connor suggested in *Grutter* that preferences might last only another twenty-five more years.<sup>54</sup> That would make the span from the first preference programs that were upheld to the end of that period to be almost exactly the same fifty-eight years as the time from the *Plessy* decision, which upheld separate-but-equal, to the *Brown* decision, which ended legally sanctioned school segregation. Maybe preferences will end that way, maybe they will persist longer, despite their inconsistency with equal protection, or they may end sooner. Thus far, however, I think courts have done a very bad job in this area. They permit the government to label some as cows and some as gods and assign benefits based on those labels, the very antithesis of the rule of law.

### III.

The third area, and the one in which I say that the jury is still very much out, is that of election law. Many commentators have remarked on the expanding legalization and constitutionalization of elections.<sup>55</sup> This is not a wholly new phenomenon, nor a wholly unwarranted one. Elections are conducted according to laws and those laws, just as with any others, may ultimately lead to court cases and judicial resolution. There is in fact a very rich body of law concerning ballot counting in close elections, albeit usually for small local offices. Most of it came from the paper ballot days. What is a proper mark? What is a spoiled ballot?<sup>56</sup> Before Florida 2000, this seemed mostly the province of antiquarians and election junkies, but it was there. If the election is close enough, legitimate issues inevitably arrive. Perhaps the most notable example was the 1962 Minnesota governor's race, which was ultimately settled by ninety-one votes after a three-month recount supervised by the supreme

<sup>54</sup>*Grutter*, 539 U.S. at 343.

<sup>55</sup>See, e.g., Richard H. Pildes, *Constitutionalizing Democratic Politics*, in *A Badly Flawed Election* 155 (R. Dworkin ed., 2002).

<sup>56</sup>See *In re Application of Anderson*, 264 Minn. 257 (Minn. 1962); 26 Am. Jur. 2d *Elections* § 336 (2006).

court of the state.<sup>57</sup> Florida 2000, of course, brought this area into blazing prominence. I'm not going to refight that litigation, but only use it to illustrate and make a few points. First, it doesn't mean that every election is going to be litigated. Florida was not just any close election; in percentage terms it was the closest state presidential election in our history, out of more than 2,000 state results. At that level of closeness, controversy was inevitable. But it does mean that suspicion about the role of the courts will arise: the Republicans suspected the Florida Supreme Court, the Democrats suspected the U.S. Supreme Court. Yet at the end of the day, it should be possible to discern some underlying principles in the election area that should be followed.

When the controversy started I was very aware of a recent on point and compelling case that had been decided in the Eleventh Circuit, which included Florida. It was called *Roe v. Alabama*,<sup>58</sup> and unlike *Roe v. Wade*, there really was a Mr. Roe who was the plaintiff. In the race for chief justice of Alabama the initial count favored the Republican candidate by 262 votes. Controversy arose over a large number of absentee ballots from one county. State law required a witness signature on the ballots, which these ballots lacked. But the county wanted to count those ballots and not enforce the requirement. Should those votes count? If they counted, the incumbent chief justice, a Democrat, would remain in office. If not, he would be replaced by the Republican opponent. The federal courts sent the case back to the Alabama courts for a state law decision.<sup>59</sup> The state supreme court, with the chief judge recused, but with his colleagues and campaign contributors sitting, said that state law did allow the counting.<sup>60</sup> The Eleventh Circuit, including a Democratic appointee, Rosemary Barkett, universally considered quite liberal, reversed unanimously, saying that you have to apply the law uniformly, even when the state doesn't want to.<sup>61</sup> To me, that was an appropriate court intervention, and not wildly controversial at the time. I was

<sup>57</sup>See Minnesota gubernatorial election, 1962, at [http://en.wikipedia.org/wiki/Minnesota\\_gubernatorial\\_election%2C\\_1962](http://en.wikipedia.org/wiki/Minnesota_gubernatorial_election%2C_1962).

<sup>58</sup>68 F.3d 404 (11th Cir. 1995).

<sup>59</sup>See *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995).

<sup>60</sup>See *Roe v. Mobile County Appointment Board*, 676 So. 2d 1206 (Ala. 1995).

<sup>61</sup>See *Roe*, 68 F.3d at 409.

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surprised that the case was not widely adverted to and used during the Florida litigation.

On the other hand, a 2004 Ohio election challenger case illustrates the potential for unequal application of the law.<sup>62</sup> There, lower courts had forbidden Republican challengers, named as defendants, from exercising their rights under a state law providing for challenges to persons said to be unqualified to vote. Democrats were not party to the case and, at least by the anecdotal evidence, were not sitting on pins and needles waiting to see how the appeal would be resolved. As it turned out, a panel of our court, on which I did not sit, ultimately overturned the ruling,<sup>63</sup> permitted both parties equally to have observers and challengers. Justice Stevens refused to stay that decision.<sup>64</sup>

Finally, let me simply mention a few cases that raise claims of election fraud. In the Sixth Circuit we upheld the ability of state election commissions to have what I call a truth-declaring function. We allowed a commission to give an opinion on the factual claims of candidates, but we struck down their ability to impose punishment based on that view or to disqualify the candidate.<sup>65</sup> Obviously, I thought that was the proper decision because I wrote it. At a subsequent symposium, counsel from both sides said that we had split the baby correctly, and they both agreed with the decision. But cases allowing courts to adjudicate whether arguments used in elections are fraudulent are especially problematic. Such decisions would not be made behind the veil of ignorance. And they would come at the time when the temptation to bend the principles in favor of one party or another are the greatest. At the same time I think that court intervention cannot be ruled out or even always discouraged. We cannot allow partisans, for their own purposes, to bend or ignore the laws that have been enacted. And that is the lesson of the Eleventh Circuit case that I mentioned.

It is a tough area. We have yet to see fully what the courts will do, and there are many cases bubbling up. I'll mention three cases the

<sup>62</sup>See *Spencer v. Blackwell*, 347 F. Supp. 2d 528 (S.D. Ohio 2004).

<sup>63</sup>See *Summit County Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547 (6th Cir. 2004).

<sup>64</sup>See *Spencer v. Pugh*, 543 U.S. 1301 (2004).

<sup>65</sup>*Pestrak v. Ohio Elections Comm.*, 926 F.2d 573 (6th Cir. 1991).

Sixth Circuit has seen recently. One involved voting technologies.<sup>66</sup> A second involved an effort to strike a Michigan referendum from the ballot where the district court and a panel of our court on which I did not sit denied an injunction.<sup>67</sup> And a third arose when a candidate went into federal court to seek the polling data of an opponent and to censor the questions being asked on the opponent's polls.<sup>68</sup> These are just examples that are emblematic of the challenges that will face courts in this area in the years ahead.

In summary, then, in all three of these areas, and others too, where the temptation is to favor Jovi and burden Bovi, courts must avoid the temptation of such jurisprudence in order to merit and retain the trust of the people. They must try to adhere to principles and rules laid down as far ahead as possible and must explain themselves in ways that show that they are sensitive to the ever-present dangers of stepping outside the rule of law.

<sup>66</sup>See *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006). En banc rehearing never occurred as the appeal became moot. The panel opinion was vacated. See *Stewart v. Blackwell*, 473 F.3d 692 (6th Cir. 2007), cert. denied, 127 S. Ct. 646 (2007).

<sup>67</sup>See *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (6th Cir. 2006).

<sup>68</sup>See Carl Chancellor, *State Auditor Candidates Reach Deal*, Akron Beacon Journal, Oct. 6, 2006, at B4; Complaint, *Sykes v. Taylor et. al.*, No. 5:06-cv-02145-JG (N.D. Ohio).