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Michael J. Gerhardt

University of North Carolina School of Law, gerhardt@email.unc.edu

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THE RHETORIC OF JUDICIAL CRITIQUE: FROM JUDICIAL RESTRAINT TO THE VIRTUAL BILL OF RIGHTS

Michael J. Gerhardt*

Professor Michael Gerhardt traces the rhetoric employed by national leaders and commentators over the past century to describe popular conceptions of the judicial function. In particular, Professor Gerhardt examines the evolution of the terminology used in popular and political rhetoric, revealing their inconsistent application to political ideologies through time. Professor Gerhardt argues that such shifts in usage correspond with transfers of power between the political authorities controlling the central interests at stake in constitutional adjudication. Professor Gerhardt applies the shortcomings of traditional political rhetoric to the issues surrounding technological advancements, concluding that the proper treatment of technology by the Supreme Court in the twenty-first century will require recognition of the complex consequences posed by these advances.

INTRODUCTION

A look back on the importance of the Bill of Rights in American history provides a glimpse into its future. The circumstances at the turn of the century are illustrative: Recall that the overwhelming focus of political commentary was not on the new president's conception of the Bill of Rights or even his constitutional vision, but rather on the extent to which the bizarre path by which he had achieved office would undermine the legitimacy of his presidency. In their appraisals of the new president, Democrats and liberals spent much more time questioning his competence than his philosophy: They accused of him of being an intellectual lightweight who had been born with a silver spoon in his mouth, had a reckless past,

* Arthur B. Hanson Professor of Constitutional Law, William & Mary Law School. B.A. Yale University, M.Sc. London School of Economics, J.D. University of Chicago. I am grateful to Erwin Chemerinsky, Neal Devins, Dave Douglas, Marty Flaherty, Dave Garrow, Deborah Gerhardt, Bill Marshall, Alan Meese, and Paul Schwartz for helpful comments on portions of this Article; and to Paul Dame, William & Mary Law School Class of 2003, for his excellent research assistance.

I completed this Article well before the terrorist attacks directed against the United States on September 11, 2001. Though national political leaders united not long thereafter to pass legislation expanding federal authority to combat terrorism, it is of course too soon to predict or fully assess the implications of the war on terrorism for the rhetoric of judicial critique. The key questions likely to divide (and perhaps define the differences among) people involve: (1) the proper balance between respecting civil liberties and protecting national security; (2) the relative scope of presidential and congressional authority to combat terrorism; and (3) the relative scopes of federal and state executive and legislative authorities to combat terrorism. To date, the primary locus for debate of these questions has been in political rather than judicial fora.

and had become a presence in national politics primarily because of his family's name, connections, and friends. Pundits worried that, because of his inexperience in national politics, the new president might be prone to be led by the strong right-wing leaders of his party; many, including some of the president's most ardent supporters, wondered whether he truly was as conservative as he claimed to be. Democrats and liberals were especially critical of the Republican-dominated Supreme Court, which they considered, like the new president and the Republican-led Congress, to be captive to corporate interests. They denounced the Court for its arrogance and for being filled with conservative activists bent on usurping congressional authority.

In this familiar picture, the Bill of Rights was far from center stage. Yet the familiarity should caution us, for the picture is not based on recent events. The circumstances I have described were the state of political affairs not in the year 2001, but rather 1901. The president to whom I referred is not George W. Bush, but rather Theodore Roosevelt, who became the youngest person ever to become president as a result of President William McKinley's assassination.¹ The Supreme Court to which I referred was led not by the staunch Republican William Rehnquist, but rather a Democrat, Melville Fuller,² who led a Court dominated by Republicans for over two decades during an era that took its name from one of the most controversial Supreme Court opinions of the times — *Lochner v. New York*.³

If the political circumstances in 1901 and 2001 seem similar, it is partly because we continue to use much of the same rhetoric for critiquing judicial activity and ideology as commentators did over a century ago. It is particularly striking when one considers this usage persists in spite of the changes in agendas of national political leaders, including the Civil Rights Movement and the process of incorporation by which the Supreme Court made the vast majority of the Bill of Rights applicable to the states. The change in the Court's agenda has not coincided with or precipitated a change in terms of popular debate about the role of the Supreme Court in the American political, social, and legal order. The increasing prominence of the Bill of Rights in our legal order has not changed political rhetoric, but rather, been a function of the ideological drift that helps to explain how different conceptions become appropriated by very different political and intellectual movements over time.

The purpose of this Article is to sketch the evolution of the usage and meanings of our public rhetoric about the Supreme Court. The terms that constitute the bulk

¹ For the extraordinary path by which Theodore Roosevelt became McKinley's running mate in 1900 and his successor in 1901, see generally H.W. BRANDS, T.R.: THE LAST ROMANTIC 3-434 (1997).

² See JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910 (1995).

³ 198 U.S. 45 (1905), *overruled by* *Bunting v. Oregon*, 243 U.S. 426 (1917).

of this rhetoric — “conservative,” “liberal,” “judicial activist,” “judicial usurpation,” and “judicial restraint” — have been fixtures in the lexicon of judicial critique throughout the past one hundred years. The usage of these terms has been constant, but the subjects to which they have referred have not. In this Article, I try to clarify these subjects, including the Bill of Rights. My focus is more on the meanings of these terms and concepts in popular and political rhetoric, of which they have been a constant part, and less on the precise intellectual or philosophical movements that these terms have signified or reflected over the past century. Thus, the focus is primarily on the public statements of national leaders (including justices) and commentators. My focus extends to the records of or commentary on judicial confirmation contests, which tend to provide the most highly visible circumstance in which political leaders express and attempt to shape popular conceptions of different judicial approaches to construction of the meaning of the Bill of Rights. The sketch I derive from these sources is primarily descriptive; I draw on primary and secondary materials to trace the path by which these terms have come to apply to different conceptions of the judicial function over time. This focus helps to illuminate the political objectives served by the usage of these terms, perhaps the most important of which has been to characterize judicial activity in politically salient images.

Moreover, studying the evolution of our popular rhetoric helps to illuminate its limitations. In some important ways, it has impeded, rather than facilitated, greater public understanding of judicial activity. It obscures the fact that some notions cast as ideals, such as judicial restraint, do not belong and are not the province of any single perspective on constitutional adjudication, but rather have belonged to or served different politically driven conceptions of the judicial function in different periods.

The rhetoric of judicial critique is not likely to capture easily the complexity or full range of consequences of the great constitutional issue likely to dominate the next century. In the twentieth century, the dominant constitutional issue tended to be the relationship between the State and the national economy. Questions about the relationship between government and technology entered the national debate at the beginning of the twentieth century, because of economic and social disparities resulting from mass industrialization, and near the end of the century in debates over abortion rights. In the twenty-first century, the great constitutional issue is likely to be the relationship more generally between the government and technology. The latter issue is decidedly distinct from questions about the meaning or significance of federalism because advancements in technology are likely to obscure state and federal boundaries. Moreover, these advancements are likely to increase the gap between constitutional doctrine and political reality. I refer to these advancements as helping to shape a “Virtual Bill of Rights,” by which I mean that the Supreme Court is invariably so far behind technological advancements that

it can never keep pace with them. This problem culminates in the likelihood that the Court's decisions, as a practical matter, will make little or no difference to the impact of these advancements on the various individual liberty interests implicated by them. Once the Court gets around to ruling on any of these technical questions, the technology on which it will have ruled already will have expired or morphed. The challenge is to enrich our political rhetoric about the Court to capture the complexity and significance of these circumstances. If we fail to meet this challenge, we can expect our language and thinking about the issues posed by technological progress to be stuck in the past.

I. PROGRESSIVISM TO CONSERVATISM, 1900-1921

It is tempting to treat the terms that are most commonly employed for describing political and judicial activity as if they had meant the same things in different historical periods. The great political historian Richard Hofstadter fell prey to this temptation when he characterized conservatism primarily as directed at preserving the status quo and liberalism largely as the movement toward reform.⁴ Such definitions however, are misleading and inadequate. Defining conservatism as being preoccupied with the preservation or protection of the status quo and liberalism as being largely, if not wholly, about reform does not explain aggressive judicial obstruction of economic regulations in the name of conservatism or extreme judicial deference to progressive economic regulations on behalf of liberalism.

A more useful characterization of the terms "liberal" and "conservative" would be to describe whether judges have supported or struck down programs and policies commonly associated with or reflecting "conservative" or "liberal" politics. Hence, the justices most commonly regarded as "conservative" in the 1930s were the "Four Horsemen" — Justices McReynolds, Butler, Sutherland, and Van Devanter — who were widely regarded as "activists" because they voted to strike down laws reflecting "liberal" values, while the "liberal" justices of the era were Harlan Fiske Stone, Oliver Wendell Holmes, and Louis Brandeis because they deferred to such legislation.⁵ Understanding how the terms conservative and liberal were bandied about in this fashion promotes some understanding of their significance, but this understanding is limited too, because it fails to provide a complete picture of judicial politics throughout the twentieth century. One ultimately needs to examine the political contexts in which these terms have been employed and the political purposes served by their usage to develop a more comprehensive picture.

A useful starting point for developing this picture is the year 1900. In 1900, conservatism was on the verge of a serious confrontation with the forces of

⁴ See RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 13-15 (1955).

⁵ See *infra* notes 97-115 and accompanying text.

progressivism.⁶ In the national government, conservatism was represented most visibly in the form of the Fuller Court, which had provoked some strident public criticism for upholding economic due process claims to strike down business regulations in such cases as *Allgeyer v. Louisiana* and *Lochner v. New York*.⁷

One of the most strident critics of the Court was the Republican President Theodore Roosevelt. Roosevelt had his own novel conception of conservatism. Roosevelt thought of himself as a conservative, though not in conventional terms.⁸ For him, the true conservative had to be progressive in outlook. He believed “[t]he only true conservative is the man who resolutely sets his face to the future.”⁹ He was disturbed by the fact that during the 1890s the Republican Party had abandoned the “radical” posture that he believed was its birthright in national politics.¹⁰ In his view, the “foolish, ill-judged, mock radicalism” of the Democrats, populists, and socialists had pushed the Republican Party to fight for economic justice from a dangerously “conservative” and defensive position.¹¹ As president, Roosevelt openly worried that the Republican Party risked “fossilization,” that is, a disastrous identification with the propertied classes rather than the common people whom Roosevelt saw as his most important constituency.¹² To help the Republican Party meet the demands posed by mass industrialization, national organization of the economy, and the rise of America as a world power, Roosevelt sought to make “an old party progressive again.”¹³ In short, the “progressive position” that Roosevelt sought to stake out for himself and his administration was to be “conservative-radicalism.”¹⁴ This formulation was a variation on a theme Roosevelt traced back to Edmund Burke, whom Roosevelt often liked to quote as acknowledging that

⁶ For some useful overviews on political and constitutional thinking at or around the beginning of the last century, see STEPHEN M. FELDMAN, *AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE* 83-115 (2000); G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 59 VA. L. REV. 999 (1972), reprinted in G. EDWARD WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT*, 99-135 (1978).

⁷ 198 U.S. 45 (1905), *overruled by* *Bunting v. Oregon*, 243 U.S. 426 (1917).

⁸ Progressives in Congress were no less enamored of the Court. They proposed, in vain, to require a two-thirds vote by the justices when striking down statutes, and permitting Congress to overrule the Court’s decisions by a two-thirds majority. DAVID M. O’BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 363 (5th ed. 2000).

⁹ JOHN MORTON BLUM, *THE REPUBLICAN ROOSEVELT* 5 (2d ed. 1972) (citation omitted).

¹⁰ STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE* 235 (2d ed. 1997) (citation omitted).

¹¹ *Id.* (citation omitted).

¹² *Id.* (citation omitted).

¹³ *Id.* at 236 (citation omitted).

¹⁴ Letter to Sydney Brooks (Nov. 20, 1908), in SKOWRONEK, *supra* note 10, at 237.

“[t]here is a state to preserve as well a state to reform.”¹⁵

Roosevelt viewed the advent of economic due process as a threat to his “conservative-radicalism.”¹⁶ As president, Roosevelt frequently denounced the Supreme Court as “conservative and hidebound.”¹⁷ As president, he yearned to appoint “liberal” justices who would support the progressive policies of his administration.¹⁸ He did not hesitate to denounce his appointees, including Oliver Wendell Holmes, when they failed to vote as he hoped.¹⁹

Roosevelt’s “conservative-radicalism,” and particularly his antipathy to judicial activism, eventually placed him at odds with his chosen successor, William Howard Taft. Not long after Taft became president in 1908, Roosevelt concluded that Taft was betraying Roosevelt’s brand of conservatism. By 1910, Roosevelt complained that Taft had “not proved [to be] a good leader, in spite of his having been a good

¹⁵ See, e.g., Edmund Burke, Address Before the Opening of the Jamestown Exposition (Apr. 26, 1907), 6 WORKS 1213-28, in SKOWRONEK, *supra* note 10, at 237.

¹⁶ See, e.g. Theodore Roosevelt, *Criticism of the Courts*, THE OUTLOOK, XVI 149-53 (Sept. 24, 1910), reprinted in HOWARD FURER, 5 THE SUPREME COURT IN AMERICAN LIFE: THE FULLER COURT 1888-1910, at 213 (George J. Lankevich ed., 1986):

All who are acquainted with the effort to remedy industrial abuses know the type of mind (it may be perfectly honest, but is absolutely fossilized), which declines to allow us to work for the betterment of conditions among the wage earners on the ground that we must not interfere with the “liberty” of a girl to work under conditions which jeopardize life and limb, or the “liberty” of a man to work under conditions which ruin his health after a limited number of years The decision was nominally against states’ rights, but was really against popular rights.

Id.

¹⁷ HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 117 (rev. ed. 1999) (citation omitted in original).

¹⁸ On this subject, Roosevelt wrote to Senator Henry Cabot Lodge: “I should hold myself as guilty of an irreparable wrong to the nation if I should put [on the Court] any man who was not absolutely sane and sound on the great national policies for which we stand in public life.” 2 SELECTIONS FROM THE CORRESPONDENCE OF THEODORE ROOSEVELT AND HENRY CABOT LODGE, 1884-1918, at 519 (H.C. Lodge & C.F. Redmond eds., 1925), reprinted in HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 157 (3d ed. 1992). For Roosevelt, those policies included support for labor, anti-trust laws, improved race relations, and increased regulatory power of the national government.

¹⁹ In response to Holmes’s opinions in a series of antitrust cases that went against administration policy, Roosevelt fumed: “I could carve out of a banana a Judge with more backbone than that!” ABRAHAM, *supra* note 18, at 69 (citation omitted).

first lieutenant."²⁰ In 1911, Roosevelt derided Taft as "a flubdub with a streak of second-rate and the common in him, and he has not the slightest idea of what is necessary if this country is to make social and industrial progress."²¹

Roosevelt's concerns about Taft's Supreme Court appointees' rigid adherence to economic due process and to the possible radicalism of Woodrow Wilson's appointees²² fortified his decision to run as a third-party presidential candidate in 1912. In February of that year, Roosevelt declared, "I . . . emphatically protest against any theory that would make of the Constitution a means of thwarting instead of securing the absolute right of the people to rule themselves and provide for their social and industrial well-being, . . . 'whether on the bench, in the legislature or in executive office.'"²³ In June, Roosevelt rallied his supporters for the Republican Convention with the cry, "we stand at Armageddon and we battle for the Lord."²⁴ His platform as a third-party candidate included a controversial plea for the judicial recall of federal judges. This plea triggered a widespread critical reaction, including grumbling from a New York conservative that Roosevelt's attack "had startled all thoughtful men and impressed them with the frightful danger which lies in his political ascendancy[.]"²⁵ as well as from the Republican leadership, in the person of William Howard Taft.²⁶

On the public stage, Roosevelt was hardly alone in condemning judicial activism (in those days often synonymous with economic due process). As early as 1894, Oregon Governor Sylvester Pennoyer launched a blistering attack on the

²⁰ Letter from Theodore Roosevelt to Gifford Pinchot (June 28, 1910), in LEWIS L. GOULD, *REFORM AND REGULATION: AMERICAN POLITICS FROM ROOSEVELT TO WILSON* 135 (2d ed. 1986).

²¹ Letter from Theodore Roosevelt to Theodore Roosevelt, Jr. (Aug. 22, 1911), in GOULD, *supra* note 20, at 149.

²² See *infra* notes 60-63 and accompanying text.

²³ WILLIAM F. SWINDLER, *COURT & CONSTITUTION IN THE 20TH CENTURY: THE OLD LEGALITY 1889-1932*, at 159 (1969) (citation omitted).

²⁴ Theodore Roosevelt, Address on the Eve of the Republican Convention of 1912, N.Y. TIMES, June 18, 1912, in WALTER F. PRATT, JR., *THE SUPREME COURT UNDER EDWARD DOUGLASS WHITE, 1910-1921*, at 2 (1999).

²⁵ GOULD, *supra* note 21, at 139 (citation omitted in original).

²⁶ In response to these attacks, Taft stated: "What distinguishes this country from any other one is the Supreme Court . . . and to turn on that Court . . . and attack it seems to me to lay the axe at the root of the tree of our civilization." N.Y. EVENING POST, Oct. 6, 1911, at 1, in ALPHEUS T. MASON, *WILLIAM HOWARD TAFT: CHIEF JUSTICE* 57 (1964). Taft also portrayed Roosevelt as one of a group of "extremists" who were "not progressives . . . [but] political emotionalists or neurotics." GOULD, *supra* note 20, at 154. In private correspondence, Taft candidly revealed his fundamental concerns about Roosevelt. In July 1912, he wrote that "[Roosevelt] is really the greatest menace to our institutions that we have had in a long time — indeed I don't remember one in our history so dangerous and so powerful because of his hold upon the less intelligent votes and the discontented." HERBERT S. DUFFY, *WILLIAM HOWARD TAFT* 299 (1930).

Fuller Court's protection of property rights. He declared:

We have during this time been living under a government not based upon the Federal Constitution, but under one created by the plausible sophistries of John Marshall. The Supreme Court has not contented itself with its undisputed judicial prerogative of interpreting the laws of Congress which may be ambiguous, but it has *usurped* the legislative prerogative of declaring what the laws shall not be. Our constitutional government has been supplanted by a judicial oligarchy.²⁷

A less vitriolic, but no less severe, critique came from Labor leader Samuel Gompers, who stated in 1913:

It took years to secure relief from the old conspiracy laws which curbed and restricted the workers in protecting and promoting their industrial rights and interests. When at last it seemed that efforts of the toilers were to be rewarded, then the Supreme Court of the United States, by an interpretation which amounted to judicial legislation, applied the Sherman Anti-Trust Law to trade unions in a way which virtually revived the conspiracy laws.²⁸

Similarly, the Socialist Party included the following plank in its 1912 campaign platform: "The abolition of the power usurped by the Supreme Court of the United States to pass upon the constitutionality of the legislation enacted by Congress. National laws to be repealed only by act of Congress or by a referendum vote of the whole people."²⁹

In addition to the harsh criticism of the Court by many political leaders, there was significant critical reaction to judicial activism within the legal academy, magazines, and the judiciary. Harvard Law School Professor James Thayer became an early, influential critic of the judicial activism that economic due process spawned.³⁰ In the same year that Justice David Brewer gave a fiery address at the American Bar Association in defense of judicial opposition to "the red flag of

²⁷ Sylvester Pennoyer, *The Income Tax Decision, and the Power of the Supreme Court to Nullify Acts of Congress*, 29 AM. L. REV. 550, 558 (1895), reprinted in 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 703 (1937) (emphasis added).

²⁸ Letter from Samuel Gompers to President Woodrow Wilson, reprinted in NORMAN BINDLER, 6 *THE SUPREME COURT IN AMERICAN LIFE: THE CONSERVATIVE COURT 1910-1930*, at 67 (George J. Lankevich ed., 1986).

²⁹ Socialist Party Platform (1912), reprinted in NORMAN BINDLER, 6 *THE SUPREME COURT IN AMERICAN LIFE: THE CONSERVATIVE COURT, 1910-1930*, at 91 (George J. Lankevich ed., 1986).

³⁰ ALPHEUS T. MASON, *WILLIAM HOWARD TAFT: CHIEF JUSTICE* 42 (1964).

Socialism, inviting a redistribution of property,"³¹ Thayer urged judicial restraint.³² He warned that judicial review did not imply judicial supremacy. In the face of Justice Brewer's inflammatory call to "strengthen the judiciary,"³³ Thayer pleaded instead for principled judicial restraint. He declared:

[Judicial self-restraint] recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.³⁴

According to Thayer, the judicial function was "merely that of fixing the outside border of reasonable legislative action[.]"³⁵ Power of such modest dimension would leave courts "a great and stately jurisdiction. It will only imperil the whole of it, if it is sought to give them more."³⁶

The article was more than just an academic exercise, for Thayer's thinking on the legitimacy of judicial review would influence a generation of Harvard Law School graduates, including his colleague Holmes, as well as Learned Hand, Louis Brandeis, and Felix Frankfurter.³⁷ Indeed, as a Supreme Court justice, Holmes

³¹ *Id.* (citation omitted in original).

³² See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 156 (1893):

[T]he safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the legislatures, and of the clear limits of judicial power; so that responsibility may be brought sharply home where it belongs.

Id.

³³ David J. Brewer, *The Nation's Safeguard*, 16 PROC. N.Y. ST. B.A. 37, 37-47 (1893), reprinted in MASON, *supra* note 30, at 43.

³⁴ Thayer, *supra* note 32, at 144.

³⁵ *Id.* at 148.

³⁶ *Id.* at 152.

³⁷ See G. Edward White, *Revisiting James Bradley Thayer*, 88 NW. U. L. REV. 48 (1993);

In the early twentieth century, Thayer's essay . . . was 'discovered' by a group of 'progressive' legal scholars and policymakers, personified by Felix Frankfurter, and introduced into the canons of 'approved' constitutional scholarship. Thayer's essay was read as endorsing a deferential posture for judges . . . and applauded as

became the leading advocate for judicial restraint and against judicial activism.³⁸ Holmes's dissent in *Lochner v. New York*³⁹ was, both then and now, generally regarded as a major attack on activism. He echoed this same theme repeatedly in his private correspondence,⁴⁰ as well as in public addresses.⁴¹ A more colorful example of Holmes's commitment to judicial restraint came in an exchange with John W. Davis in 1916 regarding a series of cases dealing with the Sherman Anti-

a prescient exemplar of judicial self-restraint.

Id. at 48-49.

³⁸ See, e.g., G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 352-53 (1982) (describing Holmes's attacks on judicial activism).

³⁹ For example, Holmes wrote:

[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J. dissenting), *overruled by* *Bunting v. Oregon*, 243 U.S. 426 (1917); *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

⁴⁰ In 1910, Holmes wrote to long-time confidant Sir Frederick Pollock: "I am so sceptical [sic] as to our knowledge about the goodness or badness of laws that I have no practical criticism except what the crowd wants. Personally I bet that the crowd if it knew more wouldn't want what it does — but that is immaterial." Letter from Oliver Wendell Holmes to Sir Frederick Pollock (Apr. 23, 1910), in 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR[.] JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, at 163 (Mark DeWolfe Howe ed., 1941). Holmes again expresses this sentiment in a 1914 letter to Felix Frankfurter, writing:

I quite agree that a law should be called good if it reflects the will of the dominant forces of the community even if it will take us to hell. But if one sees that result clearly, one may suspect that the community would change its will if it had the same wisdom.

Letter from Oliver Wendell Holmes to Felix Frankfurter (Mar. 24, 1914), in HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912-1934, at 19 (Robert M. Mennel & Christine L. Compston eds., 1996).

⁴¹ For example, in a speech at Harvard in 1913, Holmes stated: "It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong." Oliver Wendell Holmes, Law and the Court, Address at a Dinner of the Harvard Law School Association (Feb. 15, 1913), reprinted in NORMAN BINDLER, 6 THE SUPREME COURT IN AMERICAN LIFE: THE CONSERVATIVE COURT 1910-1930, at 62-64 (George J. Lankevich ed., 1986).

Trust Act. Holmes said: "Of course I know and every other sensible man knows that the Sherman law is damned nonsense, but if my fellow citizens want to go to hell, I am here to help them — it's my job."⁴² Whether it reflected pragmatism, consequentialism, or some other more esoteric view of the world,⁴³ Holmes's antipathy to judicial activism and calls for judicial restraint became nationally synonymous with a "liberal" outlook.

After his elevation to the Court, Wilson's friend and Supreme Court appointee Louis Brandeis joined Holmes in attacking judicial activism (that interfered with economic reform) and defending judicial restraint. One of the few areas in which they both saw a legitimate role for judicial interference with democratic enactments was the First Amendment, though more often than not, they joined in dissent.⁴⁴ Holmes's and Brandeis's frequent agreement in civil liberties cases, as well as in opposing judicial activism in business regulation cases, helped to cultivate their joint reputations publicly as "liberals."⁴⁵

Learned Hand, too, joined the attack on economic due process. In 1908, in the pages of the *Harvard Law Review*, he wrote:

⁴² GARY J. AICHELE, OLIVER WENDELL HOLMES, JR.: SOLDIER, SCHOLAR, JUDGE 140 (John Milton Cooper, Jr., ed., 1989) (citation omitted).

⁴³ For conflicting views on the philosophic underpinnings of Holmes's judicial outlook, see ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* (2000); LOUIS MENAND, *THE METAPHYSICAL CLUB* (2001).

⁴⁴ See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925) (Holmes and Brandeis, JJ., dissenting) (holding New York statute against "criminal anarchy" not violative of the First Amendment); *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting) (holding the distribution of pamphlets advocating resistance to World War I in violation of the Espionage Act as not being protected by the First Amendment); *Schenck v. United States*, 249 U.S. 47 (1919) (holding the distribution of a circular advocating draft dodging in violation of the Espionage Act as not being protected by the First Amendment).

⁴⁵ A 1927 newspaper article concluded:

Oliver Wendell Holmes and Louis Dembitz Brandeis . . . have achieved a spiritual kinship that marks them off as a separate liberal chamber of the Supreme Court. On the great issues that go down to the fundamental differences in the philosophy of government these two are nearly always together; often they are together against the rest of the court.

Charles G. Ross, *ST. LOUIS POST-DISPATCH*, June 19, 1927, in SAMUEL J. KONEFSKY, *THE LEGACY OF HOLMES AND BRANDEIS* 94 (1956) (citation omitted). The frequent labeling of Holmes as a "liberal" in his time drew the ire of H.L. Mencken, who in 1955 wrote that "[t]he Liberals, . . . who long for tickling with a great and tragic longing, were occasionally lifted to the heights of ecstasy by the learned judge's operations, and in fact soared so high that they were out of earshot of next day's thwack of the club." Hadley Arkes, *Lochner v. New York and the Cast of Our Laws*, in *GREAT CASES IN CONSTITUTIONAL LAW* 94, 116 (Robert P. George ed., 2000) (citation omitted) [hereinafter *GREAT CASES*].

It is not, however, necessary that the consideration by the court of the expediency of a statute should be such as would be given if the whole question were before it as a legislature in the first instance The nearest analogy for the function of the court is the function of a court in review of a verdict on the facts. Only in those cases in which it is obvious beyond peradventure that the statute was the result, either of passion or of ignorance or folly, can the court say that it was not due process of law. In this way the principle may be observed that with the expediency of the statute the court has no concern, but only with the power of the legislature.⁴⁶

Privately, Hand expressed his agreement with Roosevelt's condemnation of judicial obstructionism.⁴⁷ Even more importantly for Hand's future, his attack caught the attention of Taft's Attorney General, George Wickersham, who helped to secure Hand an appointment as a federal district judge.⁴⁸ Later, after becoming chief justice, Taft opposed elevating Hand to the Supreme Court because of his age and his strident opposition to economic due process.⁴⁹

In 1913, historian Charles Warren described the political controversy enveloping the Supreme Court at the time:

During the past two years, there has been much agitation directed against the Supreme Court of the United States, frequent reference to "judicial oligarchy," "usurpation" and the like, and demands for fundamental changes in the judicial system under the Constitution, not only of the States but of the United States.⁵⁰

Warren explained that the years 1887 to 1911 "constituted the period most productive of progressive and liberal — even radical — social and economic legislation in the United States."⁵¹ He noted the Court had struck down laws for violating the Due Process and Equal Protection clauses in only three cases,⁵² though

⁴⁶ Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 499-500 (1908) (internal citations omitted).

⁴⁷ See GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 212-13 (1994) (describing and quoting from exchanges between Hand and Roosevelt on judicial activism and the propriety of judicial recall).

⁴⁸ *Id.* at 129-33.

⁴⁹ *Id.* at 239, 274-75.

⁵⁰ Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 294 (1913), in PRATT, *supra* note 24, at 7.

⁵¹ *Id.*

⁵² Warren suggested those three decisions were *Lochner v. New York*, 198 U.S. 45 (1905), *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902), and *Allgeyer v. Louisiana*,

he conceded that the Supreme Court had struck down laws thirty-four times to protect private property rights during the same period.

Although the decisions in which the Fuller and White Courts took on politically charged issues were relatively small in number, the criticism of the Supreme Court grew increasingly harsh during the first couple decades of the twentieth century. By 1921, at the end of Edward Douglass White's tenure as chief justice, a contemporary observer suggested that the:

[H]istorian of the future will probably say that at the time Mr. White was appointed Chief Justice, the Supreme Court, as well as the entire judiciary in America, was passing through the most distinct crisis in its history. The public had become suddenly distrustful of our courts and resented the absolute power of the judicial veto. Recall of judges as well as recall of judicial decisions was one of the flaming issues of the day. Indeed, antagonism to the power of judges was one of the basic creeds of a nascent political faith.⁵³

Perhaps no one defended the Court more vigorously against this "antagonism" than William Howard Taft. The path by which Taft came to lead the Court and the direction in which he helped to lead it are extremely important for understanding the meanings of both conservatism and liberalism prior to the New Deal.

II. TAFT AND THE TAFT COURT, 1921-30

It is hard to imagine anyone matching the extraordinary public service of William Howard Taft. From 1881 to 1930, he served as a public prosecutor and state court judge in Ohio, Solicitor General of the United States, circuit court judge, Governor General of the Philippines, Secretary of War, President of the United States, Yale Law School professor, President of the American Bar Association, and Chief Justice of the United States Supreme Court.⁵⁴ In all of these positions, he had unique opportunities to articulate and advance his conservative constitutional vision.

Taft developed his judicial philosophy relatively early in life and asserted it consistently throughout his career. In a well-publicized speech before the American Bar Association in 1895, Taft, then a circuit judge, tried to refute charges that the federal courts had "flagrantly usurped jurisdiction, first, to protect corporations and perpetuate their many uses, and second, to oppress and destroy the power of

165 U.S. 578 (1897).

⁵³ Samuel Spring, *Two Chief Justices: Edward Douglass White and William Howard Taft*, 64 THE AM. REV. OF REVS. 163-64 (Aug. 1921), in PRATT, *supra* note 24, at 8.

⁵⁴ See generally MASON, *supra* note 30, *passim*.

organized labor.”⁵⁵ He suggested the federal courts were being “subjected to the most severe criticism without just grounds, merely because of the character of their jurisdiction.”⁵⁶ He explained that “[c]ourts are but conservators; they cannot effect great social and political changes. Corporations there must be if we would progress; accumulation of wealth there will be if private property continues the keystone of our society.”⁵⁷ Thus, he believed legislation to regulate the excesses of private property must be narrow in scope. The excesses of labor were, in his view, more amenable to judicial action because courts had the authority to issue injunctions when labor violated property rights.

In a lecture at Yale in 1906, Taft recalled fondly his opinions upon his own graduation from Yale in 1878:

The tendency in my own case . . . was toward the *laissez faire* doctrine that the least interference by legislation with the operation of natural laws was, in the end, the best for the public; that the only proper object of legislation was to free the pathway of commerce and opportunity from the effect of everything but competition and enlightened selfishness; and that being done, the Government had discharged all of its proper functions.⁵⁸

He reiterated this same philosophy in 1912 in making the case for the Republican Party to pick him, rather than Roosevelt, as its standard-bearer:

I believe I represent a safer and saner view of our government and its constitution than does Theodore Roosevelt, and . . . I mean to continue to labor . . . to uphold them and . . . to stamp out the pernicious theory that the method of reforming the defects in a representative government is to impose more numerous and more burdensome political duties upon the people when their inability properly to discharge their present duties is the cause of every ground of complaint.⁵⁹

⁵⁵ William Howard Taft, *Criticisms of the Federal Judiciary*, Annual Address Delivered Before the American Bar Association (Aug. 28, 1895), in XXIV AM. L. REV. 641-74 (1895), in MASON, *supra* note 30, at 47. The charges were directed at the Court’s hampering enforcement of the Sherman Anti-Trust Act, barring a direct federal income tax, upholding the injunction-contempt power of the federal courts, and legitimizing economic due process.

⁵⁶ *Id.* at 47-48 (citation omitted in original).

⁵⁷ *Id.* at 48 (citation omitted in original).

⁵⁸ William Howard Taft, *Administration of Criminal Law*, Address to the Graduating Class of Yale Law School (June 26, 1905), in WILLIAM HOWARD TAFT, PRESENT DAY PROBLEMS: A COLLECTION OF ADDRESSES DELIVERED ON VARIOUS OCCASIONS 335-55 (1905).

⁵⁹ HERBERT S. DUFFY, WILLIAM HOWARD TAFT 276-77 (1930).

Though defeated in his re-election bid, Taft never wavered in his convictions and never hesitated thereafter to rally his political allies and to take strong public stands whenever necessary in opposition to judicial nominations that would dilute judicial protection of private property.

Perhaps Taft's most widely publicized stand against a nomination he regarded as dangerous to the Constitution was his dramatic opposition to Louis Brandeis's nomination to the Court.⁶⁰ The fact that Brandeis was nominally a Republican made no difference to Taft, whose concerns about prospective judicial nominees were always about their "real politics."⁶¹ Brandeis's "real politics" were anathema to Taft. He wrote to one of his aides that Brandeis's nomination represented "one of the deepest wounds" that he had sustained "as an American and a lover of the Constitution and a believer in progressive conservatism [that] when you consider . . . that men were pressing [him] for the place, [it is ridiculous]."⁶² Taft saw Brandeis as "a muckraker, an emotionalist for his own purposes, a socialist . . . a man who has certain high ideals in his imagination . . . of great tenacity of purpose and, in my judgment, of much power for evil . . ."⁶³ Taft further complained that, in nominating Brandeis, Wilson was "seeking to break down the guaranties [sic] of the Constitution,"⁶⁴ and Taft predicted a "catastrophe . . . will come to this country in having the Supreme Court reorganized by him."⁶⁵

⁶⁰ To his brother, Taft wrote: "I am deeply concerned to have such an insidious devil on the Court . . ." LEWIS J. PAPER, *BRANDEIS* 214 (1983). Taft took the even more extreme step of being signatory to a letter to the Senate Judiciary Committee, dated February 7, 1916, stating: "[T]aking into view the reputation, character and professional career of Mr. Louis D. Brandeis, he is not a fit person to be a member of the Supreme Court of the United States." 2 *THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1972*, at 1226 (Roy M. Mersky & J. Myron Jacobstein eds., 1975).

⁶¹ See generally MASON, *supra* note 30.

⁶² *Id.* at 72 (citation omitted). There is also evidence that Roosevelt was against the nomination of Brandeis as well. In a letter discussing the nomination, Senator Lodge, a well-known Roosevelt confidant, wrote: "I did not know that Mr. Brandeis, who has been in and out of all political parties and of late has been a staunch Democrat, had such a hold on Progressives. I know one Progressive who is pretty thoroughly against him, and that is Theodore Roosevelt." A.L. TODD, *JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS* 88 (1964). It should be noted that Todd later writes: "Despite a careful search, I was unable to find any confirmation of Senator Lodge's statement that . . . Theodore Roosevelt was 'pretty thoroughly against' Brandeis." *Id.* at 257.

⁶³ Letter from William Howard Taft to Gus Karger (Jan. 31, 1916), in MASON, *supra* note 30, at 72.

⁶⁴ Letter from William Howard Taft to Robert Winslow (Oct. 21, 1916), in 2 HENRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 899 (1964).

⁶⁵ *Id.* at 898.

As president and later as President Harding's choice for chief justice, Taft strived to ensure the appointments of justices who would wholeheartedly "maint[ain] the Supreme Court as the bulwark to enforce the guaranty that no man shall be deprived of his property without due process of law."⁶⁶ Harding's three other appointees — George Sutherland, Pierce Butler, and Edward Sanford — were all chosen because they were thought to be rigidly committed to securing the Court in discharging this function.⁶⁷ Consequently, the Taft Court became the most consistently conservative Court in philosophy and outcomes of any Court in the twentieth century until a working majority of five Republican justices coalesced on the Rehnquist Court.⁶⁸

Though relatively brief in its duration, the Taft Court was distinctive for several reasons. First, the Court struck down an unprecedented number of state and federal economic regulations. As Robert McCloskey observed:

In the 1920-29 period the number of negative decisions under the Fourteenth Amendment was almost double the number in the preceding decade. These figures themselves suggest some change in the constitutional climate, and the suggestion is confirmed by examination of individual decisions. True, a great many economic statutes still survived the judicial ordeal; prudent self-restraint was still an important Court theme. But the temper of the times, signalized by conservative Republican electoral triumphs and by the withering of the progressive spirit in public policy, was infectious. The spread of the infection was made somewhat more likely by the coming of men like Taft, Sutherland, and Butler to the bench, for all of them were deeply convinced foes of the welfare state. Now the judges were confident that they spoke for the

⁶⁶ William Howard Taft, *Mr. Wilson and the Campaign*, 10 YALE L. REV. 19-20 (1920), in MASON, *supra* note 30, at 158.

⁶⁷ Chief Justice Taft actively pursued the role of presidential advisor on judicial selection. He explained to President Harding and his attorney general that "I presume I have a legitimate right to possess the President of such information as I think useful, if he desires to receive it." Letter from William Howard Taft to C.D. Hilles (Nov. 4, 1923), in MASON, *supra* note 31, at 160. For his part, President Harding was insecure in his ability to nominate justices and wrote to Taft: "I am very glad to have you convey to me the information which comes to you. I am anxious, of course, to make a thoroughly high-grade and satisfactory nomination." Letter from Warren G. Harding to William Howard Taft (Nov. 2, 1922), in MASON, *supra* note 30, at 161. Furthermore, Attorney General Daugherty wrote to Taft, assuring him that Harding "would not approve anybody who was not approved by [the chief justice]." Letter from H.W. Taft to William Howard Taft (Oct. 26, 1922), in MASON, *supra* note 30, at 173.

⁶⁸ See *infra* notes 252-66 and accompanying text.

nation when they defended *laissez faire*.⁶⁹

The second distinctive feature of the Taft Court's approach to due process and equal protection claims was that it generally had a unified, if not coherent, constitutional vision. The chief spokespersons and architects in expressing this vision were Chief Justice Taft and Justice Sutherland. One of the few instances in which the two divided was in *Adkins v. Children's Hospital*.⁷⁰ Much more often than not, a majority of the Taft Court consistently took a formal approach to due process and equal protection questions grounded in a judicially cognizable, virtually absolute fundamental right of property.⁷¹

Third, the Taft Court's protection of due process rights extended, for the first time in the Court's history, outside of the economic sphere. In *Meyer v. Nebraska*,⁷² most of the justices joined together to recognize a fundamental right to bar state or local government from eliminating German in public schools or private schools altogether. Two years later the Taft Court, in *Pierce v. Society of the Sisters*,⁷³ enjoined enforcement of a statute that would have made parents criminally liable for sending their children to private schools.

The common link among *Meyer*, *Pierce*, and the economic due process cases was the Taft Court's distrust of popular majorities. As early as 1913, Taft wrote

⁶⁹ ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 106 (Daniel J. Boorstin ed., 2d ed. 1994).

⁷⁰ 261 U.S. 525 (1923), *overruled in part by* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Compare the opinion of Justice Sutherland for the Court, which included extensive quotes from *Lochner* and concluded that "[s]ubsequent cases in this court have been distinguished from that decision, but the principles therein stated have never been disapproved," *id.* at 550, with the dissent filed by Chief Justice Taft in which he stated:

It is impossible for me to reconcile the Bunting Case [*Bunting v. Oregon*, 243 U.S. 426 (1917) (approving maximum hours legislation for factory workers)] and the *Lochner* Case, and I have always supposed that the *Lochner* Case was thus overruled *sub silentio*. Yet the opinion of the court herein in support of its conclusion quotes from the opinion in the *Lochner* Case as one which has been sometimes distinguished but never overruled. Certainly there was no attempt to distinguish it in the Bunting Case.

Id. at 564 (Taft, C.J., dissenting).

⁷¹ *See, e.g.*, *Gong Lum v. Rice*, 275 U.S. 78 (1927) (holding a school district's decision to send a student of Chinese descent to a colored school was not violative of the Equal Protection Clause); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924) (holding a Nebraska law fixing the weights of loaves of bread arbitrary and unconstitutional); *Truax v. Corrigan*, 257 U.S. 312 (1921) (holding an Arizona law prohibiting employers from getting injunctions against striking employees violative of the Equal Protection Clause).

⁷² 262 U.S. 390 (1923).

⁷³ 268 U.S. 510 (1925).

that radical reformers counted on “the willingness of an inflamed majority to possess themselves of advantages over a minority, or the individual.”⁷⁴ In 1914, Taft explained:

Those of us who insist upon the preservation of constitutional limitations upon the action of a majority . . . are convinced that we are the best friends of popular government . . . [C]onstitutions are the self-imposed restraints of a whole people upon a majority of them to secure sober action and a respect for the rights of the minority.⁷⁵

The fourth and distinctive feature of the Taft Court was its dissenters. On the Taft Court, the dissenters were largely united in opposing economic due process; however, it was not clear where they would draw the line precisely on the point beyond which a legislature could not go in drafting social or economic legislation.⁷⁶

The sharp jurisprudential differences among the justices of the Taft Court reflected increasing hostilities within the Court. The Chief Justice especially distrusted dissent. When Brandeis dissented in *Myers v. United States*,⁷⁷ for example, Taft listed him among that “class of people that have no loyalty to the [C]ourt and sacrifice almost everything to the gratification of their own publicity and wish to stir up dissatisfaction with the decision of the [C]ourt, if they don’t happen to agree with it.”⁷⁸ Though initially supportive of President Coolidge’s appointment of Harlan Fiske Stone to the Court in 1925, Taft grew to distrust Stone, based on Stone’s frequent alignments with Holmes and Brandeis. Taft equally distrusted Herbert Hoover. Shortly before his retirement from the Court in 1930, Taft expressed his concerns that “if a number of us died, Hoover would put in some rather extreme destroyers of the Constitution.”⁷⁹

The discontent of the dissenters hardly was confined to the pages of the Supreme Court Reports. The Taft Court had more than its fair share of public critics. For instance, in 1921, *The New Republic* published an unsigned editorial

⁷⁴ WILLIAM HOWARD TAFT, *POPULAR GOVERNMENT: ITS ESSENCE, ITS PERMANENCE, AND ITS PERILS* 233 (1913), in MASON, *supra* note 30, at 57.

⁷⁵ WILLIAM HOWARD TAFT, *THE ANTI-TRUST ACT AND THE SUPREME COURT* (1914), in MASON, *supra* note 30, at 60.

⁷⁶ For example, Stone split with Brandeis and Holmes and joined the “conservative” majority in the major First Amendment cases of the day: *Whitney v. California*, 274 U.S. 357 (1927), overruled in part by *Brandenburg v. Ohio*, 395 U.S. 444 (1969); and *Gitlow v. New York*, 268 U.S. 652 (1925).

⁷⁷ 272 U.S. 52 (1926) (holding a congressional act requiring the consent of the Senate to remove various classes of postmasters violative of Article II of the Constitution).

⁷⁸ Letter from William Howard Taft to Horace Taft (Oct. 27, 1926), in HENRY F. PRINGLE, *2 THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 1025 (1939) (citation omitted).

⁷⁹ MASON, *supra* note 30, at 70.

that lamented “the present temporary triumph of reaction.”⁸⁰ The author — none other than Felix Frankfurter — continued:

Labor is cowed, liberalism is confused, and the country’s thinking generally is done in the storm cellar But . . . [c]ases involving the social control allowed the states under the [F]ourteenth [A]mendment, or the exercise of federal power for police purposes . . . will soon again call forth a clash of differing conceptions of policy and of the proper scope of the Court’s ultimate veto power⁸¹

Similarly, in 1922, a despairing Woodrow Wilson pleaded with Justice John H. Clark not to retire, citing the menace of Taft’s conservative activism. He wrote:

Like thousands of other liberals throughout the country, I have been counting on the influence of you and Justice Brandeis to restrain the Court in some measure from the extreme reactionary course which it seems inclined to follow The most obvious and immediate danger to which we are exposed is that the courts will more and more outrage the people’s sense of justice and cause a revulsion against judicial authority which may seriously disturb the equilibrium of our institutions, and I can see nothing which can save us from this danger if the Supreme Court is to repudiate liberal courses of thought and action.⁸²

In 1924, a North Dakota judge expressed what many liberals of the times had been thinking when he suggested: “It is our judges who formulate our public policies and our basic law We are governed by our judges and not by our legislatures.”⁸³

In 1930, Frankfurter no longer remained anonymous in criticizing the Court, though his criticisms had become more intense. He wrote:

Since 1920, the Court has invalidated more legislation than in [the] fifty years preceding. Views that were antiquated twenty-five years ago have been resurrected in decisions nullifying minimum wage laws for women in industry, a standard-weight bread law to protect buyers from short weights and honest bakers from unfair competition, a law fixing the resale of the price of theater tickets by scalpers, laws controlling the exploitation of the unemployed by employment agencies and many tax

⁸⁰ *Mr. Chief Justice Taft*, THE NEW REPUBLIC, July 27, 1921, at 230.

⁸¹ *Id.*

⁸² MASON, *supra* note 30, at 165 (citation omitted in original).

⁸³ ANDREW A. BRUCE, THE AMERICAN JUDGE 6, 8 (1924).

laws.⁸⁴

For Frankfurter, this was a disastrous turn of events, particularly because the sheer number of laws struck down did not fully tell the tale of the Taft Court. He explained:

[I]n the first place, all laws are not of the same importance. Secondly, a single decision may decide the fate of a great body of legislation Moreover, the discouragement of legislative efforts through a particular adverse decision and the general weakening of the sense of legislative responsibility are destructive influences not measurable by statistics.⁸⁵

Despite the derision, Chief Justice Taft staunchly defended the Court's conservative activism throughout his tenure. In 1922, he explained: "It is better to endure wrongs than to effect disastrous changes in which the proposed remedy may be worse than the evil."⁸⁶ By the end of his tenure, as his health was failing, he confessed to his son that "[t]he truth is that Hoover is a Progressive, just as Stone is, and just as Brandeis is and just as Holmes is."⁸⁷ Though Taft never lived to see it, his worst fears were about to be realized.

III. THE HUGHES COURT, 1930-41

The Hughes Court was a transitional court. It stands roughly in the middle — not just chronologically, but also in terms of judicial philosophy and outcomes — between the Taft Court's persistent, formalistic defense of property rights and the Stone and Vinson Courts' absolute deference to economic regulations. The series of cases in which this transition unfolded is as well documented and analyzed as any in American constitutional history.

The transition was made possible by a number of forces, one of the most underrated having been the pressure applied to President Hoover to forego appointing conservative ideologues like Taft or Sutherland to the Court. The clearest illustration of the success of this pressure is the fact that Hoover was the first president in the twentieth century to have had a Supreme Court nominee rejected by the Senate. Though Hoover's nominee John Parker, a Fourth Circuit

⁸⁴ Felix Frankfurter, *The United States Supreme Court Molding the Constitution*, CURRENT HISTORY, May 1930, at 239.

⁸⁵ *Id.*

⁸⁶ WILLIAM HOWARD TAFT, LIBERTY UNDER LAW 21 (1921).

⁸⁷ Letter from W.H. Taft to Horace Taft (Dec. 1, 1929), in PRINGLE, *supra* note 78, at 967.

judge, was generally well-regarded by the legal community, liberal interest groups organized a campaign against him. They helped to forge fatal opposition against the nomination by a coalition of Democrats and progressive Republicans.⁸⁸ At the time, Parker's defeat was "generally interpreted as a blow at conservatism;"⁸⁹ he was, as Harlan Fiske Stone observed, a "victim of the circumstances [of his nomination]"⁹⁰ The circumstances in question were the growing political discontent with aggressive judicial protection of private property rights at the expense of economic reform.

Even when the Senate accepted Hoover's Supreme Court nominees, it exacted a price. After Parker's rejection, President Hoover nominated Owen Roberts largely because he knew senators from both parties would agree on Roberts, who had served with distinction as a special prosecutor investigating some of the scandals of the Harding Administration. Later, in 1932, when Hoover's power (even within his own party) was at its lowest, Senate leaders warned Hoover that the only acceptable nomination he could make to replace the retiring Justice Holmes was Benjamin Cardozo.⁹¹ Hoover resisted because Cardozo's well-publicized opposition to the Taft Court's activism and critiques of economic due process clearly marked him as a "liberal."⁹² Hoover relented and appointed Cardozo to the Court.

Hoover's nomination of Charles Evans Hughes as chief justice ran into nearly as much flak as his similarly-timed nomination of John Parker as an associate justice. Because of the strong support of both of New York's senators, Hughes's nomination avoided serious trouble. Yet, its success was not due to the absence of strong-willed opposition. After initially signaling he would support the Hughes nomination, Senator George Norris, a prominent progressive Republican, led the opposition to Hughes. He explained that, *inter alia*, "[we] have reached a time in our history when the power and influence of monopoly and organized wealth are reaching into every governmental activity Perhaps . . . it is not far amiss to say that no man in public life so exemplifies the influence of powerful combinations in the political and financial world as does Mr. Hughes."⁹³ Robert La Follette, another prominent progressive Republican, warned that in expressing opinions on Hughes's nominations, senators "are filling the jury box which ultimately will decide the

⁸⁸ In 1930, the Republican-controlled Senate rejected Fourth Circuit Judge John Parker's nomination as an associate justice by a vote of 41-39.

⁸⁹ ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 300 (1956) [hereinafter, MASON, HARLAN FISKE STONE].

⁹⁰ Letter from Harlan Fiske Stone to His Sons, Apr. 18, Apr. 30, 1930, in MASON, HARLAN FISKE STONE, *supra* note 89, at 300 (internal quotations omitted).

⁹¹ See MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 173-74 (2000).

⁹² See ANDREW L. KAUFMAN, CARDOZO 465-67 (1998).

⁹³ 72 CONG. REC. 3373 (1930), in MASON, HARLAN FISKE STONE, *supra* note 89, at 297.

issue between organized greed and the rights of the masses of this country. If that be the situation, the Court is responsible for it.”⁹⁴ Echoing the views of many senators, Senator Carter Glass reviewed some of Hughes’s opinions from his tenure as an associate justice to illustrate how “the Supreme Court in recent years has gone far afield from its original function and has constituted itself a court in economics and in the determination of social questions rather than the interpretation of statutes passed with reference to the Constitution itself.”⁹⁵ According to Mason, Hughes’s opponents pointed out that the Court had become “a great political body, appointed very often through political influence, passing on political questions, fixing policies for the people, legislating when they should leave that to Congress.”⁹⁶ Senator Norris stated the problem directly: The Court had become “another legislative body [consisting] of nine men; and they are more powerful than all the other [legislative bodies] put together.”⁹⁷ Hughes, like Parker, was opposed less for anything he had done wrong, but rather because his appointment would reinforce, in Senator Clarence Dill’s estimation:

[A] judicial system of law that is fast bringing economic slavery in this country If the system of judicial law that is being written in defiance of state legislation and of congressional legislation is continued, . . . there is no human power in America that can keep the Supreme Court from becoming a political issue, nationwide, in the not far-distant future.⁹⁸

Though the Senate ultimately confirmed Hughes 52-26, with eighteen senators abstaining, many senators believed their opposition had effectively signaled to President Hoover and the new chief justice both the extent of the senators’ power and displeasure with the direction of the Court.

By the time Franklin D. Roosevelt entered office, the hard-core opposition of the Court to economic reform had already begun to wither. By 1941, he had made four appointments, and there were no Republican appointees, with the sole exception of Harlan Fiske Stone, left on the Court. All of the nine justices, including Stone, shared a deep-seated hostility to economic due process and commitment to preserving the New Deal against constitutional attack. Some of the New Deal liberals whom Roosevelt appointed to the Court, particularly William O. Douglas, were legal realists who were dedicated as judges to exposing the politics behind the formalisms of the Taft Court, to being enlightened by the social sciences,

⁹⁴ N.Y. TIMES, Feb. 14, 1930, *in* MASON, *supra* note 90, at 298.

⁹⁵ 72 CONG. REC. 3553 (1930), *in* MASON, HARLAN FISKE STONE, *supra* note 89, at 298.

⁹⁶ MASON, *supra* note 90, at 299.

⁹⁷ 72 CONG. REC. 3449, 3516, 3566 (1930), *in* MASON, HARLAN FISKE STONE, *supra* note 89, at 299.

⁹⁸ 72 CONG. REC. 3642 (1930), *in* MASON, HARLAN FISKE STONE, *supra* note 89, at 299.

to being more candid about their reasoning, and “to go[ing] with the unconscious flow of practice-based intuition.”⁹⁹

The Court’s increasing acceptance of social legislation has dominated narratives on the Court during the period from 1930 to 1941.¹⁰⁰ The preoccupation with explaining both the significance and causes for this acceptance has sometimes come at the expense of recognizing the significance of at least two other developments that, together with the ultimate acceptance of the constitutional foundations for the New Deal, provided the fodder for public commentary on the Court during this period. The first of these was a series of decisions broadly interpreting the scope of various Bill of Rights claims that foreshadowed the Court’s future agenda.¹⁰¹ This series of decisions became important because, in time, it helped to drive a wedge to divide the New Deal liberals, who increasingly disagreed over the appropriate level of judicial deference regarding non-economic interests.

As this series of decisions unfolded, public discourse reflected the political divide over the Court. For example, *The New York Times* hailed the Court’s decision in *Powell v. Alabama*¹⁰² as a healing decision in that it “ought to abate the rancor of extreme radicals while confirming the faith of the American people in the soundness of their institutions and especially the integrity of the courts.”¹⁰³ The far left disagreed, however, as the Communist Party position was that: “A careful reading of the official decision shows that the Supreme Court has taken great care to instruct the Alabama authorities how ‘properly’ to carry through such lynch schemes and bolster their discredited ‘judicial’ institutions.”¹⁰⁴

⁹⁹ Thomas Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 501 (1996) (reviewing NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1996)). Grey provides a wonderful overview of the development of American legal thought in the twentieth century. For a more detailed and equally excellent overview, see LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1991).

¹⁰⁰ Even before the *Parrish* case in 1937, it became clear that the *laissez faire* majority of the 1920s had become a minority. More often than not, Hughes and Roberts tended to be in the majority on questions regarding the constitutionality of social legislation. As Barry Cushman notes, “it is . . . safe to say that by 1937 the prohibition against minimum wage legislation was pretty close to all that was left of economic substantive due process.” Barry Cushman, *Lost Fidelities*, 41 WM. & MARY L. REV. 95, 104 (1999).

¹⁰¹ See, e.g., *De Jonge v. Oregon*, 299 U.S. 353 (1937) (holding freedom of assembly to be incorporated by the Fourteenth Amendment); *Powell v. Alabama*, 287 U.S. 45 (1932) (holding that due process requires states to supply indigent defendants with counsel); *Near v. Minnesota*, 283 U.S. 697 (1931) (holding freedom of the press to be incorporated by the Fourteenth Amendment).

¹⁰² 287 U.S. 45 (1932).

¹⁰³ N.Y. TIMES, Nov. 8, 1932, at 8, in DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 163 (1969).

¹⁰⁴ N.Y. DAILY WORKER, Nov. 8, 1932, at 8, in DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 163 (1969).

This debate was often overshadowed, however, by the residual vitriol of the conflict over economic substantive due process. A good example of the enmity marking this conflict was the extraordinary dissent of Justice McReynolds in *The Gold Clause Cases*.¹⁰⁵ Because the dissent was too scathing to be included in the official record, McReynolds published it in *The Wall Street Journal*. In his (characteristically) surly view:

It is impossible to estimate the result of what has been done this day. The Constitution as many of us have understood it, the Constitution that has meant so much, has gone. The guarantees which men and women heretofore have supposed protected them against arbitrary action have been swept away. The powers of Congress have been enlarged to such an extent that no man can foresee their limitations. We stand today stripped of the fundamental guarantees we heretofore supposed stood between us and arbitrary action We protest Shame and humiliation are upon us.¹⁰⁶

President Roosevelt strongly expressed the opposing point of view in his Court-packing speech. He stated:

[S]ince the rise of the modern movement for social and economic progress through legislation, the Court has more and more often and more and more boldly asserted a power to veto laws passed by the Congress and State Legislatures The Court has been acting not as a judicial body, but as a policy-making body We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself.¹⁰⁷

Though Chief Justice Hughes's opposition to the Court-packing plan pleased many conservatives, his seemingly inconsistent jurisprudence persistently confounded conservatives and liberals alike. In a retrospective published near the time of his retirement, *The New Republic* commented that "[o]n questions involving social policy, it was always more difficult to predict where Hughes would stand

¹⁰⁵ The Gold Clause Cases were *Perry v. United States*, 294 U.S. 330 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); *Norman v. Baltimore and Ohio Railroad Co.*, 294 U.S. 240 (1935).

¹⁰⁶ WALL ST. J., Feb. 23, 1935, reprinted in ROBERT MAYER, 7 THE SUPREME COURT IN AMERICAN LIFE: THE COURT AND THE AMERICAN CRISES 1930-1952, at 127, 128-31 (1987).

¹⁰⁷ *Radio Broadcast* (Mar. 9, 1937), reprinted in DAVID M. O'BRIEN, 2 CONSTITUTIONAL LAW AND POLITICS 65-66 (4th ed. 2000).

than where other members of the Court would be found."¹⁰⁸ Even members of the Court noted the wandering path of the Court. In 1936, Justice Stone wrote to then-Professor Felix Frankfurter:

I think there has never been a time in the history of the Court when there has been so little intelligible, recognizable pattern in its judicial performance as in the last few years The worst of it is that the one [Hughes] you find most difficult to understand is the one chiefly responsible.¹⁰⁹

Chief Justice Hughes dismissed such criticism on the ground that the jurisprudential labels on which it rested were misleading and ultimately inapplicable to him:

A young student wrote me the other day to ask whether I regarded myself as "liberal" or "conservative." I answered that these labels do not interest me. I know of no accepted criterion. . . . Such characterizations are not infrequently used to foster prejudices and they serve as a very poor substitute for intelligent criticism. A judge who does his work in an objective spirit, as a judge should, will address himself conscientiously to each case, and will not trouble himself about labels.¹¹⁰

By 1940, however, it was widely acknowledged that the debates on the Court regarding the legitimacy of business regulations had been settled and that a "new constitutionalism" had taken hold on the Court. Some commentators condemned this "new constitutionalism" on the ground that in settling the debates "[t]he Court has created doctrine, which stands in the way of its own lapse into legalism."¹¹¹

The second development glossed over in many commentaries on the Hughes Court relates to the status of conservative critics of the New Deal. Legal scholars focus so much on the development of New Deal liberalism that they often overlook what conservative politicians and commentators were arguing in the same period. Accounts of the revolution of 1937 usually gloss over conservatives, as if they were increasingly silent in this period. Yet conservatives could be heard not just on the

¹⁰⁸ THE NEW REPUBLIC, June 9, 1941, in ALPHEUS T. MASON, *THE SUPREME COURT FROM TAFT TO WARREN* 105 (1958) [hereinafter MASON, *THE SUPREME COURT*].

¹⁰⁹ Letter from Harlan Fiske Stone to Felix Frankfurter (Feb. 17, 1936), in MASON, *THE SUPREME COURT*, *supra* note 108, at 106.

¹¹⁰ Address to the Judicial Conference of the Fourth Circuit, 1932, in *THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES* 300 (David J. Danelski & Joseph S. Tulchin eds., 1973).

¹¹¹ Walton Hamilton & George Brock, *The Supreme Court Today*, THE NEW REPUBLIC, Aug. 5, 1940, in WILLIAM F. SWINDLER, *COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE NEW LEGALITY 1932-1968*, at 112 (1970).

Court (for example, in Justice Sutherland's opinions), but also in strident public criticisms of New Deal legislation,¹¹² the apparent switch on the Hughes Court that brought about enduring support for New Deal legislation,¹¹³ Roosevelt's Court appointments,¹¹⁴ and of course Roosevelt's Court-packing plan.¹¹⁵ The obvious problem for conservative leaders on the national stage was in wresting control of both the White House and the Congress from Democrats, but without threatening the dismantlement of relatively popular, even if somewhat ineffective, regulatory measures designed to ameliorate economic hardships produced in part by technological advancements.¹¹⁶ The lack of political success left conservatives disgruntled and in some disarray. For conservatives, the 1930s were "[u]ncongenial years of worker's utopias, New Orders, and marching feet abroad; Blue Eagles, the WPA, and increasing regulation of the economy at home."¹¹⁷

V. THE STONE AND VINSON COURTS, 1941-1953

By the time President Roosevelt elevated Associate Justice Harlan Fiske Stone to the chief justiceship in 1941, the Supreme Court and its agenda were very different from what they had been only a decade before. By 1941, the once-intense controversies over property rights under the Fifth and Fourteenth Amendments and

¹¹² For example, in a pamphlet dated May 31, 1935, the American Liberty League (founded by conservative businessmen) thundered:

The New Deal is nothing more or less than an effort sponsored by inexperienced sentimentalists and demagogues to take away from the thrifty what the thrifty and their ancestors have accumulated, or may accumulate, and give it to others who have not earned it, or whose ancestors haven't earned it for them, and who never would have earned it and never will earn it, and thus indirectly to destroy the incentive for all future accumulation. Such a purpose is in defiance of all the tenets upon which our civilization has been founded.

JOHN MAJOR, *THE NEW DEAL* 80 (1967) (quoting Ralph Shaw, *The New Deal: Its Unsound Theories and Irreconcilable Policies* 13 (1935)). Indeed, opposition to Roosevelt became such a fixation of that traditional bastion of conservatism, the upper class, that HARPER'S magazine noted in May 1936 that "fanatical hatred of the President . . . today obsesses thousands of men and women among the upper class." *They Hate Roosevelt*, HARPER'S, May 1936, at 634, in MAJOR, *supra*, at 100. The author noted also that, "the phenomenon . . . goes well beyond objection to policies or programs." *Id.*

¹¹³ *Id.* at 176.

¹¹⁴ See, e.g., WILLIAM LEUCHTENBURG, *THE SUPREME COURT REBORN 185-87* (1995) (discussing conservatives' reactions, inter alia, to Black's nomination in 1937).

¹¹⁵ See *id.* at 85, 107, 135, 139, 158.

¹¹⁶ See DAVID KENNEDY, *FREEDOM FROM FEAR* 278-86 (1999).

¹¹⁷ GEORGE H. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945*, at 1 (1996).

over the scope of enumerated federal powers had been fully settled.¹¹⁸ Instead, the Court devoted significant attention to a number of troublesome constitutional issues brought about by the Second World War.¹¹⁹ Moreover, it fragmented over the question of heightened scrutiny of measures affecting “specific” constitutional prohibitions, political processes, and insular minorities that the chief justice had initially raised as an associate justice in his fourth footnote in *United States v. Carolene Products Co.*¹²⁰ While to a substantial extent Stone’s view had already prevailed,¹²¹ the battle was not to be fully won until Felix Frankfurter retired from the Court in 1962.¹²² In the meantime, as David Currie has observed, “[a]s leading spokesmen for the competing views [on judicial restraint], Justices Black and Frankfurter, like Field and Miller three-quarters of a century before, squared off in 1946 for another decade and a half of intense controversy over the most fundamental questions of judicial authority.”¹²³

Neither Stone’s replacement as chief justice in 1946 (Fred Vinson), nor any of Truman’s other three appointees — Sherman Minton, Tom Clark, and Harold Burton — played major roles in this debate. Unlike every other post-World War II president, Truman chose Supreme Court nominees based on his personal experiences with them and not on specific criteria designed to elicit information about their likely judicial philosophies.¹²⁴ He appointed justices who were sympathetic to and supportive of the New Deal, but this was largely because he was choosing from a pool of politicians with whom he felt personally and ideologically comfortable. The pool obviously consisted of people who had largely gained their

¹¹⁸ See, e.g., *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 669 (1941) (striking down bans on so-called “yellow-dog” contracts); *Olsen v. Nebraska*, 313 U.S. 236 (1941) (refusing to invalidate state statute on economic due process grounds); *United States v. Darby*, 312 U.S. 100 (1941) (upholding federal minimum wage for production workers and explicitly overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918)); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (defining federal power to regulate commerce).

¹¹⁹ See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding exclusion of Japanese Americans from coastal zones and, in effect, their internment); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding curfews on Japanese Americans); *Ex parte Quirin*, 317 U.S. 1 (1942) (upholding jurisdiction of a special military tribunal over German saboteurs).

¹²⁰ 304 U.S. 144 (1938).

¹²¹ See, e.g., *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Betts v. Brady*, 316 U.S. 455 (1942); *Bridges v. California*, 314 U.S. 252 (1941).

¹²² See *infra* notes 156-57 and accompanying text.

¹²³ DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986*, at 333 (1990) (internal citations omitted); see, e.g., *Adamson v. California*, 332 U.S. 46 (1947). The history structure of this clash is extensively chronicled in JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* (1989). See also *infra* notes 125-55 and accompanying text.

¹²⁴ See SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT TO REAGAN 68-78* (1997).

political experience and proven their loyalty to Truman in political contests over the New Deal and its legacy.¹²⁵ Consequently, Truman's appointees did not share any unified philosophy regarding the cutting constitutional issues of the day. They were widely regarded as "liberals" not so much because of a common judicial philosophy, but because of their shared political experiences prior to their appointments to the Court, including of course their support for Roosevelt's New Deal regime.

Truman's appointments did not ease tensions within the Court, even though by 1946 the Court consisted entirely of Democratic appointees. Fully aware of this discord during his chief justiceship, Stone wrote in 1945:

My more conservative brethren in the old days enacted their own economic prejudice into law. What they did placed in jeopardy a great and useful institution of government. The pendulum has now swung to the other extreme, and history is repeating itself. The Court is now in as much danger of becoming a legislative and Constitution-making body, enacting into law its own predilections, as it was then. The only difference is that now the interpretations of statutes whether "over-conservative" or "over-liberal" can be corrected by Congress.¹²⁶

For the most part, Truman's appointees joined the more restrained of their senior colleagues to slow down the expansion of civil liberties after the departures of Stone and Roberts at the end of the Second World War and the premature deaths of Murphy and Rutledge.¹²⁷ Nevertheless, in this period the Court sanctioned the first

¹²⁵ *Id.*

¹²⁶ Letter from C.J. Stone to Irving Brant (Aug. 25, 1945), in MASON, HARLAN FISKE STONE, *supra* note 89, at 779. Stone often confided in Brant, who was a prominent liberal commentator in the New Deal and post-New Deal eras. Brant shared many of these communications with Stone's eminent biographer, Alpheus T. Mason. According to Mason:

Brant insist[ed] that [Stone] wished, above all, to be known as a 'liberal,' and his prerogative in assigning opinions, in speaking for the Court himself whenever he was with the majority, or passing the task along to [an] associate[], made this quite easy. In a perceptive article Brant tells how this self-portrait was executed. (See Irving Brant, "How Liberal Is Justice Hughes," *The New Republic*, July 21 and July 28, 1937.)

MASON, HARLAN FISKE STONE, *supra* note 89, at 459-60 (footnote at bottom of page).

¹²⁷ Robert McCloskey notes: "Arithmetic reckonings alone illustrate the contrast. The proportion of decisions favorable to the individual never in any term of the Stone Court dropped below 50 percent; there was only one term of the Vinson Court (1947) in which the percentage of favorable decisions rose *above* fifty." ROBERT G. MCCLOSKEY, *THE MODERN SUPREME COURT* 57 (1972) (emphasis in original).

great wave of expansions in civil rights outside of the realm of economic due process,¹²⁸ and it advanced the process of incorporation.¹²⁹

Public criticism of the Court in the mid-1940s focused on the increasing discord among the justices, the Court's disdain for following or respecting precedent, and the Court's penchant for making, rather than merely interpreting, the law. For instance, an editorial in *The New York Times* charged that the "majority of the new appointees came to the Court . . . apparently under the theory that their function was not so much to know and apply the law as it stands, or in case of doubt to interpret it objectively, but to apply a new 'social philosophy' in their decisions."¹³⁰ In reaction to the *Underwriters' case*,¹³¹ *The New York Times* commented in 1944, "[i]ts practical effect is the same as if Congress had just passed a sweeping new piece of legislation. Once more the Supreme Court has acted, in effect, like a third legislative house."¹³² The *Houston Post* was even more critical. "When the United States Supreme Court doffs its black robes Monday," it reported in October 1944, "it will go with less popular admiration and respect than any previous Supreme Court has enjoyed within the memory of living men. In this body of jurists the majesty and dignity and the prestige of the nation's highest tribunal has hit an all-time low."¹³³ The American Bar Association condemned the Stone Court's tendency to ignore precedent, which it called "The New Guesspotism," and warned that the Constitution had again become "a mere thing of wax in the hands of the judiciary."¹³⁴ Harvard Law School Professor Thomas Reed Powell asked: "Who can tell what other landmarks will be similarly obliterated? Where shall confidence be placed?"¹³⁵

¹²⁸ See, e.g., *Terry v. Adams*, 345 U.S. 461 (1953) (outlawing white-only primaries); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (outlawing exclusion of aliens from commercial fishing); *Wieman v. Updegraff*, 344 U.S. 183 (1952) (setting limits on indirect governmental interference with First Amendment rights); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (outlawing judicial enforcement of racial covenants).

¹²⁹ See, e.g., *Wolf v. Colorado*, 338 U.S. 25 (1949) (incorporating right against unreasonable searches and seizures); *In re Oliver*, 333 U.S. 257 (1948) (incorporating the right to a public trial); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (incorporating the separation of church and state).

¹³⁰ MASON, HARLAN FISKE STONE, *supra* note 89, at 625 (citation omitted).

¹³¹ *United States v. Southeastern Underwriters' Ass'n*, 322 U.S. 533 (1944).

¹³² MASON, HARLAN FISKE STONE, *supra* note 89, at 624 (citation omitted in original).

¹³³ *Id.* at 624 (citation omitted in original).

¹³⁴ 30 A.B.A. J. 485 (Sept. 1944), in MASON, HARLAN FISKE STONE, *supra* note 89, at 624; Frank W. Grinnell, 30 A.B.A. J. 507 (Sept. 1944), in MASON, HARLAN FISKE STONE, *supra* note 89, at 624; J.W. Henderson, 30 A.B.A. J. 597 (Nov. 1944), in MASON, HARLAN FISKE STONE, *supra* note 89, at 624; C. Perry Patterson, *Jefferson and Judicial Review*, 30 A.B.A. J. 443 (Aug. 1944), in MASON, HARLAN FISKE STONE, *supra* note 89, at 624.

¹³⁵ Thomas Reed Powell, *Our High Court Analyses*, N.Y. TIMES MAGAZINE, June 18, 1944, in MASON, HARLAN FISKE STONE, *supra* note 89, at 624-25.

The Court, however, did have its defenders. For instance, prominent liberal commentator Walton Hamilton maintained the Court was dealing in good faith with difficult issues. He asked rhetorically why “the Court, an organ of high policy in a society moving rapidly to a ‘new social order,’ [should not] reflect differences widespread among the people?”¹³⁶ He further suggested that:

If often its conduct has not been in accord with our angelic notions, . . . the reason is that the public is let in on the performance. I wonder if any other agency of state . . . could under a like scrutiny exhibit either more brotherly restraint or a more conscientious regard for the general welfare.¹³⁷

Looking back on the Stone Court’s performance during the Second World War, Hamilton declared:

Neither the law nor the Court is to be regimented so long as Stone sits. . . . In less than a decade the Court has been transformed. It has ceased to be a super-legislature; it stands today, more firmly than any other agency of a State, in the great American tradition.¹³⁸

Max Lerner, another prominent academic, agreed: “It is good to have Justices on the Supreme Court who pretend to no Olympian infallibility and who can stick their necks out of their enfolding robes.”¹³⁹ Legal scholar Kenneth Sears was even more praiseworthy of the Stone Court: “Never in the history of the Supreme Court of the United States has the Bill of Rights been more frequently or more ardently supported, and never have the privileges of the poor and the weak and of the minorities of race, color, and religion been more clearly asserted.”¹⁴⁰

Chief Justice Stone was extremely sensitive to the public critiques, and he even agreed with some of them.¹⁴¹ According to Stone’s biographer Alpheus T. Mason, Stone believed this “[l]iberalism’ of the right sort would not lead judges to enact

¹³⁶ Walton Hamilton, *The Supreme Court Today — Part I: Nine Independent Men*, THE NATION, Aug. 12, 1944, in MASON, *supra* note 90, at 625; Walton Hamilton, *Part II: Nine Men, One Law*, THE NATION, Aug. 19, 1944, in MASON, HARLAN FISKE STONE, *supra* note 89, at 625.

¹³⁷ MASON, HARLAN FISKE STONE, *supra* note 89, at 798.

¹³⁸ *Id.*

¹³⁹ *Id.* (citation omitted).

¹⁴⁰ Kenneth C. Sears, *The Supreme Court and the New Deal — An Answer to Texas*, 12 U. CHI. L. REV. 140, 159 (1945), in MASON, HARLAN FISKE STONE, *supra* note 89, at 798.

¹⁴¹ See MASON, HARLAN FISKE STONE, *supra* note 89, at 782-83 (quoting extensively Stone’s approval of a leading scholar’s critical analysis of the Court’s work published in 1945).

their own economic preferences into law."¹⁴² Stone chided liberal critic Irving Brant:

Back of your criticism of the 5 to 4 decisions . . . is your recognition that Congress will not 'correct' them. It will not, because, as I believe, it never intended any other result than that which the Court reached. If that is so the Court has done its sworn duty. Are you seeking the appointment of judges who will do more?¹⁴³

In September 1945, Stone expressed to Thomas Reed Powell his concerns about the likely liberal activism of some of his colleagues:

The time was when I thought you had worked yourself out of a job[,] . . . because the pendulum had swung from the extreme right, where it seemed to be when I came on the Court, much nearer the golden mean. Now that the pendulum seems to be swinging to the other extreme, I feel sure you will have plenty to write about.¹⁴⁴

Less than a year later, Stone's sudden death gave President Truman the opportunity to appoint his friend and political ally Fred Vinson as chief justice.¹⁴⁵ The appointment of Vinson, however, did not lessen either the discord within the Court or its denunciations in political fora. A striking example is to be found in the consistently critical public statements of Senator James Eastland of Mississippi. In 1946, he warned:

[A] number of men who now sit upon the Court do not have the proper legal background, judicial temperament, or the ability to sit upon the world's greatest legal tribunal and to decide fundamental questions upon which the very system of our Government, as we know it, depends. . . . [S]ome students of government have expressed the opinion that these men were appointed because of their economic and social ideologies and their zest for crusading, rather than their judicial knowledge and legal acumen. . . . We find ourselves with a Court, which often is charged with being the

¹⁴² *Id.* at 779.

¹⁴³ Letter from Harlan Fiske Stone to Irving Brant (Aug. 25, 1945), in MASON, HARLAN FISKE STONE, *supra* note 89, at 779.

¹⁴⁴ Letter from Harlan Fiske Stone to Thomas Reed Powell (Nov. 8, 1945), in MASON, HARLAN FISKE STONE, *supra* note 89, at 780 (citation omitted).

¹⁴⁵ Alpheus T. Mason closed his monumental biography of Stone on the same theme as many of the eulogies written at the time of Stone's death: "Little minds, trying to compress his meaning within the handy labels of 'conservative' or 'liberal,' had been confounded." MASON, HARLAN FISKE STONE, *supra* note 89, at 809.

weakest in the history of the Republic, a Court which now is engaged in changing the fundamental law of the United States and overruling the considered opinions of their great and illustrious predecessors The inferior courts and the people of this country do not know what the law is or what their rights are, because of the confusion created by the present Supreme Court.¹⁴⁶

Public attacks on the Court often included charges of complicity with Communist subversion by the “liberal” justices and were peppered with thinly veiled racism. For example, Representative Rankin of Mississippi angrily suggested as much in his appraisal of the Vinson Court’s decisions of the 1948 term:

[T]here must have been a celebration in Moscow last night; for the Communists won their greatest victory in the Supreme Court of the United States on yesterday, when that once august body proceeded to destroy the value of property owned by tens of thousands of loyal Americans . . . by their anti-covenants decision. . . . That tribunal [also] recently upheld the atheists . . . [and] attempted, by judicial fiat, to redraw the boundary lines of every state Which all adds up to the fact that white Christian Americans seem to have no rights left which the present Supreme Court feels bound to respect.¹⁴⁷

Similarly, Representative Mason of Illinois introduced into the Congressional Record an editorial from the *Chicago Daily Tribune* in July 1949 that lambasted the Vinson Court’s decision in *Christoffel v. United States*.¹⁴⁸ The article stated that “[i]t was pretty evident in the *Christoffel* case that a left wing majority of the Supreme Court decided that it wanted to let *Christoffel* off, and having reached that decision, looked around for some law to make the decision look right.”¹⁴⁹

In 1951, Justice Roberts, then retired from the Court, openly castigated the Vinson Court for:

[S]urrender[ing] the role the Constitution was intended to confer on it. Vox populi vox Dei was not the theory on which the charter was drawn. The sharp divisions of powers intended has become blurred. . . . It seems obvious that doctrines announced as corollaries to express grants of power to the Congress have more and more circumscribed the pristine

¹⁴⁶ 92 CONG. REC. 7,065 (1946) (statement of Sen. Eastland).

¹⁴⁷ 94 CONG. REC. 5,256-57 (1948) (statement of Rep. Rankin).

¹⁴⁸ 338 U.S. 84 (1949).

¹⁴⁹ 95 CONG. REC. at A4693 (1949) (statement of Rep. Mason) (quoting Editorial, *The Supreme Court Outsmarts Itself*, CHI. DAILY TRIB., July 18, 1949).

powers of the states, which were intended to be reserved to them by the Constitution.¹⁵⁰

Many liberals were not any more satisfied with the Vinson Court than its conservative critics. Some liberals, both on and off the Court, thought the Court was becoming too activist in its pursuit of liberal ideals.¹⁵¹ Justice Frankfurter, in particular, found himself in an awkward position as the Court's chief advocate of judicial restraint. Praised by liberals for his staunch defense of judicial restraint in the 1930s and early 1940s, he was upset to find that, in the late 1940s and early 1950s, they denounced him:

Now, when he advocated judicial restraint, he was attacked by those very liberals [who had once praised him.] In his earlier years, pillars of the legal community like Henry Stimson, Emory Buckner, and Charles Burlingham praised him. Now, they were either dead or silent. . . . [I]n the Truman years, there was little White House contact. Frankfurter had never believed he was "the single most influential man" in Washington but sometimes he had enjoyed the notoriety. Now there was no more notoriety; he was only one of nine, and one under increasing criticism from those once his friends.¹⁵²

In 1951, Judge Learned Hand expressed his own dwindling confidence in the Vinson Court's ability to stay on the course that Chief Justice Stone had tried to steer: "[Stone] steered a course at times very difficult and he had the right — absolutely right — measure of a Court's limitation on constitutional questions, which appears to be in danger of being lost again."¹⁵³

Others thought the Court was not going far enough. Looking back on the Vinson Court, Yale Law School Professor Fred Rodell harshly criticized its loyalty jurisprudence.¹⁵⁴ In his opinion,

¹⁵⁰ OWEN J. ROBERTS, *THE COURT AND THE CONSTITUTION* 95 (1951).

¹⁵¹ A striking example of this phenomenon is Justice Frankfurter's characterization of Justice Hugo Black as "essentially lawless" in a letter to Learned Hand regarding denial of certiorari in *United States v. Remington*, 191 F.2d 246 (2d Cir. 1951), *cert. denied*, 347 U.S. 913 (1954), a case that had prompted an impassioned dissent from Hand while on the Second Circuit. Letter from Felix Frankfurter to Learned Hand (Mar. 3, 1954); GUNTHER, *supra* note 47, at 623.

¹⁵² LEONARD BAKER, *BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY* 456 (1984).

¹⁵³ Letter from Learned Hand to Alpheus T. Mason (Aug. 22, 1951), in MASON, HARLAN FISKE STONE, *supra* note 89, at 777 (citation omitted).

¹⁵⁴ The loyalty cases arose in the 1950s in response to legislation passed to combat the perceived influence of subversives (read Communists) in many facets of American life. *See*,

[T]he tragedy . . . is that the Supreme Court's majority, with the most magnificent opportunity ever granted so small a group to show the world the profound difference between the humanity of a democracy and the brutality of a dictatorship, so miserably failed; that the Court — except in the Negro cases — while purporting to fight a foreign tyranny, actually aped it.¹⁵⁵

Similarly, Arthur Schlesinger, Jr. called for greater liberal judicial activism. In 1947, he wrote that “[c]onservative majorities in past Courts have always legislated in the interests of the business community”¹⁵⁶ So, Schlesinger wondered, “Why should a liberal majority tie its hands by a policy of self-denial?”¹⁵⁷ The Court's course after Chief Justice Vinson's death five years later in 1952 would provide a dramatic answer to this question.

VI. THE WARREN COURT, 1953-1969

The conventional wisdom in academia is that the Warren Court went through two phases of decision-making.¹⁵⁸ The pivotal event that separates these periods was the retirement of Felix Frankfurter from the Court in 1962. President Kennedy appointed Arthur Goldberg to the seat vacated by Frankfurter, an appointment that transformed an “activist minority” (then consisting of Black, Douglas, Warren, and Brennan)¹⁵⁹ into a majority. Justice Frankfurter had been in the vanguard of the assault on racial injustice (notably *Brown* and its progeny)¹⁶⁰ and religious establishment,¹⁶¹ but he had lost a few important battles for “judicial restraint” in

e.g., *Dennis v. United States*, 341 U.S. 494 (1951) (upholding the Smith Act under which members of the Communist Party had been jailed for conspiring to organize a society to advocate violently overthrowing the U.S. government); *Am. Communications Ass'n v. Douds*, 339 U.S. 382 (1950) (upholding legislation conditioning union access to the NLRB on loyalty oaths); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947) (upholding the Hatch Act provisions limiting permissible political activity of civil service employees).

¹⁵⁵ FRED RODELL, *NINE MEN* 304 (1955).

¹⁵⁶ Arthur Schlesinger, Jr., *The Supreme Court, 1947*, *FORTUNE*, Jan. 1947, at 73.

¹⁵⁷ *Id.*

¹⁵⁸ *See, e.g.*, CURRIE, *supra* note 123, at 375.

¹⁵⁹ *Id.*

¹⁶⁰ *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Gayle v. Browder*, 352 U.S. 903 (1956); *Holmes v. Atlanta*, 350 U.S. 879 (1955); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁶¹ *See, e.g.*, *McGowan v. Maryland*, 366 U.S. 420, 459-559 (1961) (Frankfurter, J., concurring).

other fields.¹⁶² At the time of Frankfurter's retirement, the Warren Court had yet to incorporate most of the Bill of Rights, as it would over its remaining seven years, and through incorporation direct the widespread reformation of state criminal procedures.¹⁶³ After Frankfurter's departure,¹⁶⁴ the Warren Court, building on precedents from the late 1930s and 1940s, expanded to unprecedented degrees the scope of equal protection,¹⁶⁵ free speech,¹⁶⁶ and criminal procedure guarantees.¹⁶⁷

However one characterizes the Warren Court's evolution,¹⁶⁸ the political discontent it generated was intense.¹⁶⁹ The fact that the Court generated such discontent does not mean that it was running counter to prevailing social and

¹⁶² See, e.g., *Baker v. Carr*, 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting).

¹⁶³ For an overview of the development and application of the selective incorporation doctrine, see Jerold Israel, *Selective Incorporation Revisited*, 71 *Geo. L.J.* 253 (1982).

¹⁶⁴ Another account of the Warren Court's activism focuses on its impact on process-based jurisprudence, which posited, *inter alia*, that the rule of law was essential to the preservation of liberal democracy. See Grey, *supra* note 99, at 504-05. The Warren Court's activism divided the:

[p]rocess jurists . . . Most of them followed Felix Frankfurter in rejecting liberal activism as simply the mirror image of the conservative activism of the old Court, equally partisan and no more consistent with the conception of a nonpolitical judiciary dedicated to upholding the rule of law. A minority of Process thinkers took up [Stone's] suggestion . . . that the rule of law in a democracy required active judicial correction of the tendency of the majoritarian political system to undervalue the interests of minorities, dissenters, and the downtrodden. This division presaged a more far-reaching break-up: by the late 1960s, the remarkable sway that the Process Jurisprudence had held over postwar American legal thought was about to come to an end.

Id.

¹⁶⁵ See, e.g., *Harper v. Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

¹⁶⁶ See, e.g., *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1968); *Street v. New York*, 391 U.S. 367 (1968); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁶⁷ See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁶⁸ For a description of the Warren Court in three phases, see LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 122-23, 485-501 (2000).

¹⁶⁹ For sympathetic accounts of the Warren Court, see, e.g., MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* (1998), POWE, *supra* note 169, LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES* (1996), and J. Skelly Wright, *The Role of the Supreme Court in a Democratic Society — Judicial Activism or Restraint?*, 54 *CORNELL L. REV.* 1 (1968). For critical assessments of the Warren Court by prominent conservatives, see RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977), and PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION AND THE WARREN COURT* (1970).

political mores. Instead, it likely means that over the Warren Court's lifespan, the opposition intensified, eventually culminating in the election of Richard M. Nixon to the presidency in 1968 and the launching of an era in which conservatives regained control of the Court.¹⁷⁰

From the beginning, the Warren Court's activism on behalf of the equality and rights of minorities (particularly African Americans) and the poor provoked loud, bitter public protests. Particularly in the South, state political and religious leaders called for Warren's "impeachment" and repeatedly resurrected the doctrine of interposition (made popular initially by John Calhoun in the nullification movement) as a check on its activism.¹⁷¹ Governor George Talmadge of Georgia charged that the Supreme Court had "reduced our Constitution to a mere scrap of paper. It has blatantly ignored all law and precedent and usurped from the Congress and the people the power to amend the Constitution and from the Congress the authority to make the laws of the land."¹⁷²

Southern members of Congress were equally if not more critical. In the immediate wake of the *Brown* decision, Senator James Eastland of Mississippi issued a short statement of resistance that read: "[The South] will not abide by nor obey this legislative decision by a political court. We will take whatever steps are necessary to retain segregation in education."¹⁷³ Even more dramatic was the statement of 101 members (nineteen senators and eighty-two representatives) of the Southern delegation in Congress known as the "Southern Manifesto."¹⁷⁴ The Manifesto declared:

¹⁷⁰ JAMES PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES 1945-1974*, at 677 (1996). Patterson suggested that the "[b]acklash" to the liberal policies of the Great Society and activism of the Warren Court:

grew more ominous as the presidential election of 1968 approached. Many Americans . . . especially resented liberals — permissive, patronizing, hypocritical, and sanctimonious do-gooders who reproved them for their resistance to the claims of minorities and assorted trouble-makers. (A conservative, it was said, was a liberal who had been mugged; a liberal was a conservative who hadn't been mugged — yet.) In an increasingly fragmented and polarized society, these angry people were a political force to be reckoned with.

Id.

¹⁷¹ See, e.g., S.J. Res. 3, Gen. Assem., Reg. Sess. (Va. 1956) (interposing the sovereignty of Virginia against the *Brown* decision); see also SENATE OF VIRGINIA, COMMITTEE FOR COURTS OF JUSTICE, *THE DOCTRINE OF INTERPOSITION: ITS HISTORY AND APPLICATION*, Reg. Sess. (1957) (presenting a detailed study of the doctrine of interposition and its applicability in the school desegregation context).

¹⁷² NADINE COHODAS, *STROM THURMOND AND THE POLITICS OF SOUTHERN CHANGE* 254 (1993) (citation omitted).

¹⁷³ *Id.*

¹⁷⁴ See 102 CONG. REC. 4515 (1956) (statement of Rep. Smith).

We regard the decision of the Supreme Court in the school cases as a clear abuse of judicial power. It climaxes a trend in the Federal judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the States and the people. . . . [T]he Supreme Court of the United States, with no legal basis for such action, undertook to exercise their naked judicial power and substituted their personal political and social ideas for the established law of the land. . . . We decry the Supreme Court's encroachment on rights reserved to the States and to the people, contrary to established law and to the Constitution. We commend the motives of those States which have declared the intention to resist forced integration by any lawful means.¹⁷⁵

In *Brown's* immediate aftermath, the criticism of the Warren Court was hardly limited to the Southern political establishment. Shortly before his untimely death in 1954, Justice Robert Jackson penned a scathing indictment of the Court's activist majority. He charged,

A cult of libertarian judicial activists now assails the Court This cult appears to believe that the Court can find in a 4,000-word eighteenth-century document or its nineteenth-century Amendments, or can plausibly supply, some clear bulwark against all dangers and evils that today beset us internally. This assumes that the Court will be the dominant factor in shaping the constitutional practice of the future and can and will maintain, not only equality with the elective branches, but a large measure of supremacy and control over them. . . . [This] seems to me a doctrine wholly incompatible with faith in democracy, and in so far as it encourages a belief that judges may be left to correct the result of public indifference to issues of liberty in choosing Presidents, Senators, and Representatives, it is a vicious teaching.¹⁷⁶

Similarly, while delivering the Holmes Lectures at Harvard in 1958, Judge Learned Hand rebuked the Warren Court as a "third legislative chamber."¹⁷⁷ He argued:

I cannot frame any definition that will explain when the Court will

¹⁷⁵ *Id.* at 4515-16.

¹⁷⁶ ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 57-58 (1955).

¹⁷⁷ LEARNED HAND, *BILL OF RIGHTS* 42 (1958).

assume the role of a third legislative chamber and when it will limit its authority to keeping Congress and the states within their accredited authority. Nevertheless, I am quite clear that it has not abdicated its former function, as to which I hope that it may be regarded as permissible for me to say that I have never been able to understand on what basis it does or can rest except as a *coup de main*.¹⁷⁸

And, in 1960, Justice Frankfurter, in the course of reminiscing on the Court's path during his career, pointedly singled out Thayer's 1893 article on judicial restraint as "the great guide for judges and therefore, the great guide for understanding by non-judges of what the place of the judiciary is in relation to constitutional questions."¹⁷⁹

These liberal critics were just the tip of the iceberg — the Warren Court had not yet even entered the period during which it is commonly thought its true liberal activism flourished. A wave of bad publicity, including a denunciation by the American Bar Association Committee on Communist Strategy, engulfed the Court in the late 1950s.¹⁸⁰ Walter Murphy observed that at this time there was a "quiet but unmistakable undertone on Capitol Hill, a fear not only among conservatives but among moderates as well as some liberals that the justices had gone too far in protecting individual rights and in so doing had moved into the legislative domain."¹⁸¹

As Lucas Powe recounts, the "summer of 1958 witnessed a battle over judicial power not quite comparable to Roosevelt's Court-packing plan twenty-one years earlier but close enough for Court supporters."¹⁸² During this period, conservatives responded to the Court's overruling of congressional attempts to restrict political dissent with accusations of Communist sympathies;¹⁸³ and James Eastland, by then an implacable foe of the Court, spearheaded one of several attempts to curb its jurisdiction.¹⁸⁴ Indeed, bill after bill was added to the Eighty-Fifth Congress's burgeoning inventory of Court-curbing proposals. The suggested legislation included plans to give the Senate appellate jurisdiction over the Supreme Court, to allow Congress to reverse the Court's interpretation of the Constitution, to require a unanimous decision to invalidate a state law, and even one measure which would

¹⁷⁸ *Id.* at 55.

¹⁷⁹ FELIX FRANKFURTER, REMINISCES 347 (1960).

¹⁸⁰ See POWE, *supra* note 168, at 100.

¹⁸¹ WALTER F. MURPHY, CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS 116 (1962).

¹⁸² See POWE, *supra* note 168, at 127.

¹⁸³ See, e.g., 104 CONG. REC. 2011 (1958) (statement of Rep. Smith) ("[The] Warren Court has now thrown its protective cloak around fellow travelers and Communists. The Court is simply blind to the reality of our time.").

¹⁸⁴ See POWE, *supra* note 168, at 128.

have ordered lower courts to disregard any Supreme Court decision "which conflicts with the legal principle of adhering to prior decisions and which is clearly based upon considerations other than legal."¹⁸⁵ These measures barely failed. As Robert McCloskey observed, "[t]he 1958 counter-attack on the Court, even though it failed, can still be regarded as a firebell in the night; it did come shockingly close to succeeding."¹⁸⁶

The attacks on the Warren Court persisted for more than a decade, though the political climate in which it rendered its decisions became somewhat more hospitable in the mid-1960s.¹⁸⁷ For instance, in 1958, state chief justices formally issued a report that condemned the Warren Court's "activism" for expanding federal powers at the expense of the states.¹⁸⁸ In that same year, there were press reports that many justices lacked competence and that, according to former Jackson law clerk William Rehnquist, the Court's law clerks showed "extreme solicitude for claims of Communists and other criminal defendants [and] expansion of federal power at the expense of state power."¹⁸⁹ In 1962, the Council on State Governments formally declared its support for amendments that would permit state legislatures to amend the Constitution without consideration or discussion in any federal forum, that would make apportionment in the state legislatures immune to federal judicial review, and that would create a special court consisting of the chief justices of all fifty states empowered to overrule Supreme Court decisions involving federal-state relations.¹⁹⁰

In that same year, liberal newspapers heaped praise on the Warren Court's decision striking down school prayer,¹⁹¹ while conservative papers such as *The Wall Street Journal* condemned the decision for "violent wrecking of the Constitution's language" and for being "symptomatic of a broader move in the nation toward the rigid exclusion of all traces of religion in the public schools."¹⁹² Also, in 1962, many national and state political leaders excoriated *Baker v. Carr*,¹⁹³ including Senator Richard Russell who denounced the case as "another major assault on our

¹⁸⁵ MURPHY, *supra* note 181, at 116 (footnote and citation omitted).

¹⁸⁶ Robert G. McCloskey, *Reflections on the Warren Court*, 51 VA. L. REV. 1229, 1258 (1965), in POWE, *supra* note 168, at 134.

¹⁸⁷ POWE, *supra* note 168, at 214.

¹⁸⁸ Report of the Committee on Federal-State Relations as Affected by Judicial Decisions 27-29 (1958), in POWE, *supra* note 168, at 139.

¹⁸⁹ *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REPORT, Dec. 13, 1957, at 74, in POWE, *supra* note 168, at 139 (the story on law clerks provoked one senator to call for an investigation of the Court's law clerks).

¹⁹⁰ See MASON, *supra* note 108, at 243.

¹⁹¹ *Engle v. Vitale*, 370 U.S. 421 (1962).

¹⁹² WALL ST. J., June 27, 1962, at 14, in POWE, *supra* note 168, at 187-88. Religious organizations and leaders also split on *Engle*. See POWE, *supra* note 168, at 188.

¹⁹³ *Baker v. Carr*, 369 U.S. 186 (1962).

constitutional system."¹⁹⁴ In 1964, the Republican presidential candidate Barry Goldwater declared that of all three branches, "today's Supreme Court is the least faithful to the constitutional tradition of limited government, and to the principle of legitimacy in the exercise of power."¹⁹⁵ The Republican platform in 1964 called for a constitutional amendment to overturn the application of the Court's one person, one vote rule to both chambers.¹⁹⁶ The *Escobedo* decision,¹⁹⁷ issued in the same year, raised, in historian John Morton Blum's estimation, "the storm against the Court to gale force."¹⁹⁸ Goldwater attacked the Court in the aftermath of *Escobedo* for "contributing to the breakdown of law and order in the cities."¹⁹⁹ Two years later, the Warren Court's *Miranda* decision, according to Yale Kamisar, "galvanized opposition to the Warren Court into a potent political force,"²⁰⁰ including Congress's passage of legislation to curb its effects.²⁰¹

As the decade was winding down, Abe Fortas's controversial nomination as chief justice generated a heated confirmation battle, which featured vitriolic opposition from many Southern senators against the Warren Court's "liberal activism" and even a thirty-minute film featuring stills from movies Fortas had held protected by the First Amendment.²⁰² At the time of Fortas's confirmation hearings, polls showed the vast majority of Americans holding the Supreme Court in low

¹⁹⁴ N.Y. TIMES, Mar. 28, 1962, at 1, in POWE, *supra* note 168, at 203-04.

¹⁹⁵ 22 CONG. Q. 2534 (1964), in POWE, *supra* note 168, at 238.

¹⁹⁶ *See id.* at 252.

¹⁹⁷ 378 U.S. 478 (1964).

¹⁹⁸ JOHN MORTON BLUM, YEARS OF DISCORD 210 (1991).

¹⁹⁹ PAUL L. MURPHY, THE CONSTITUTION IN CRISIS TIMES 381 (1972), in POWE, *supra* note 168, at 391-92.

²⁰⁰ POWE, *supra* note 168, at 399 (quoting Yale Kamisar, *The Warren Court and Criminal Justice*, in THE WARREN COURT 139 (Bernard Schwartz ed., 1996)).

²⁰¹ The legislation passed by Congress was ultimately codified as 18 U.S.C. § 3501, which purported to make any confession "admissible in evidence if it is voluntarily given." 18 U.S.C. § 3501(a). In *Dickerson v. United States*, 530 U.S. 428 (2000), the Supreme Court struck down this statute on separation of powers grounds. In an opinion by Chief Justice Rehnquist, the Court declared that "*Miranda*, being a constitutional decision of this Court, may not in effect be overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves." *Id.* at 432. Chief Justice Rehnquist explained that:

Given § 3501's express designation of voluntariness as the touchstone of admissibility, its omission of any warning requirement, and the instruction for trial courts to consider a non-exclusive list of factors relevant to the circumstances of a confession, we agree with the Court of Appeals that Congress intended by its enactment to overrule *Miranda*.

Id. at 436.

²⁰² *See* POWE, *supra* note 168, at 471-72.

regard.²⁰³

To forestall any further liberal judicial activism, conservatives would have to do more than join in or even lead criticizing the Court; they would have to win the presidency and alter the membership of the Court. Their chance would come in the form of Republican presidential nominee Richard Nixon, who made clear that he was “running against Warren and his Court as much as he was running against his Democratic rival, Senator Hubert Humphrey.”²⁰⁴ Nixon’s victory was due in no small measure to the opposition to the Warren Court. As George Nash noted,

[I]n a curious way, the Supreme Court did come to exert a significant influence on the postwar conservative intellectual movement. . . . By forcing to the surface in the most dramatic cases some of the most profound questions about the nature of American life and the entire political process, by making issues of such supreme gravity public and debatable, the Warren Court helped polarize the Left and Right. And polarization is the first step toward self-definition.²⁰⁵

Once back in power, Republican leaders asserted very different constitutional visions to those that had dominated and moved the Warren Court over the preceding sixteen years. As conservatives sharpened their constitutional philosophy, liberals would increasingly fragment over their attitudes about the Warren Court.

VII. THE BURGER COURT, 1969-1986

When Richard Nixon found himself with four vacancies on the Supreme Court to fill in his first three years as president, there were both hopes and fears of a revolution in American constitutional law. As a candidate and as president, Nixon repeatedly promised to appoint:

“[S]trict constructionists” who would see “their duty as interpreting law and not making law”; who would follow a “properly conservative” course of judging that would, in particular, protect society’s “peace forces” against the “criminal forces”; and who would “see themselves as caretakers of the Constitution and servants of the people, not superlegislators with a free hand to impose their social and political viewpoints upon the American

²⁰³ *Id.* at 473.

²⁰⁴ ROBERT WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 10 (1979) (citation omitted in original).

²⁰⁵ GEORGE H. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945*, at 199 (2d ed. 1996).

People.”²⁰⁶

President Nixon did not elaborate on these “criteria.” In time, Nixon would succeed in appointing four justices, whose common link their opposition to the liberal activism of the Warren Court rather than a commitment to a specific, alternative ideology.

By 1986, seven of the Court’s justices had been appointed by Republican presidents who had campaigned against and were openly critical of the Warren Court’s activism.²⁰⁷ In the last four years of the Burger Court, only two of the nine justices had been appointed by Democratic presidents (though Republican presidents had appointed Democrats William Brennan and Lewis Powell).

Yet these Republican appointees did not produce the expected results. Instead, the big story of the Burger years was the counter-revolution that did not occur. Scholars have given different explanations and characterizations of what transpired during the seventeen-year course of the Burger Court. David Currie suggests,

The most notable decisions of the Burger Court were those that appeared to *extend* the work of the Warren period, not to restrict it. It was the Burger Court, not its predecessor, that first protected abortion and commercial speech and legitimated busing and affirmative action; that first curbed sex discrimination, political patronage, and aid to parochial schools; that even called a temporary end to capital punishment.²⁰⁸

In some instances, the Burger Court did, however, pull back from the implications of some of its initial decisions.²⁰⁹ In addition, almost from the first, the new justices demonstrated a tendency to nibble away one case at a time at the edifice of criminal procedure that the Warren Court had erected,²¹⁰ while a series

²⁰⁶ ABRAHAM, *supra* note 18, at 298-99 (quoting Campaign Speech (Nov. 2, 1968), in 27 CONG. Q., WEEKLY REPORT, May 23, 1969, at 798).

²⁰⁷ See generally ABRAHAM, *supra* note 18, at 251-89.

²⁰⁸ CURRIE, *supra* note 123, at 464 (emphasis added). The cases that correspond with the issues Currie identifies as first addressed by the Burger Court are: *Branti v. Finkel*, 445 U.S. 507 (1980) (political patronage); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (affirmative action); *Elrod v. Burns*, 427 U.S. 347 (1976) (political patronage); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (commercial speech); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Furman v. Georgia*, 408 U.S. 238 (1972) (death penalty); *Reed v. Reed*, 404 U.S. 71 (1971) (sex discrimination); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (parochial schools); and *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (busing).

²⁰⁹ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (refusing to extend the Court’s substantive due process arguments of *Roe* to homosexuality); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (invalidating an affirmative action program).

²¹⁰ Two lines of cases chipped away at the twin pillars of the Warren Court’s criminal procedure edifice. The first, *Mapp v. Ohio*, 367 U.S. 643 (1961) (prohibiting the use of

of decisions upholding the constitutionality of plea bargaining suggested that it hardly mattered what procedures were required in the uncommon event of a trial.²¹¹

Only a partial explanation for the Burger Court's failure to reverse the Warren Court's revolution lies in the fact that it was not until 1975 that the new Republican justices constituted a working majority. Equally important is the fact that at least three of them (Blackmun, Stevens, and Powell) did not perform with quite as much fidelity to judicial restraint as originally expected.²¹² The most dramatic

illegally obtained evidence in criminal trials), was significantly weakened by *United States v. Calandra*, 414 U.S. 338 (1974), *United States v. Janis*, 428 U.S. 433 (1976), *Stone v. Powell*, 428 U.S. 465 (1976), *United States v. Ceccolini*, 435 U.S. 268 (1978), *Rakas v. Illinois*, 439 U.S. 128 (1978), *Rawlings v. Kentucky*, 448 U.S. 98 (1980), *United States v. Havens*, 446 U.S. 620 (1980), *United States v. Leon*, 468 U.S. 897 (1984), and *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). In the second, the *Miranda* decision suffered a similar fate, as it was weakened in *Harris v. New York*, 401 U.S. 222 (1971), *Michigan v. Tucker*, 417 U.S. 433 (1974), *North Carolina v. Butler*, 441 U.S. 369 (1979), *Rhode Island v. Innis*, 446 U.S. 291 (1980), *California v. Beheler*, 463 U.S. 1121 (1983), *New York v. Quarles*, 467 U.S. 649 (1984), and *Oregon v. Elstad*, 470 U.S. 298 (1985).

²¹¹ See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Santobello v. New York*, 404 U.S. 257 (1971); *Brady v. United States*, 397 U.S. 742 (1970).

²¹² None of the three thought of himself, at least at the beginning of his tenure, as a judicial activist. President Nixon introduced Powell to the nation as a "strict constructionist," JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 349 (1994) (citation omitted in original). Though Powell avoided using the same phrase in describing his judicial philosophy, he told the Senate Judiciary Committee in his confirmation hearings, "I believe in the importance of judicial restraint, especially at the Supreme Court level. . . . In deciding each case, the judge must make a conscious and determined effort to put aside his own political and economic views and his own predilections and to the extent possible to put aside whatever subtle influences may exist from his own background and experience." *Id.* at 349 (citation omitted in original). At his confirmation hearings in 1970, Harry Blackmun endorsed an even more restrictive judicial ideology: "I personally feel that the Constitution is a document of specified words and construction. I would do my best not to have my decision affected by my personal ideals and philosophy, but would attempt to construe that document in the light of what I feel is its definite and determined meaning." *Id.* Similarly, in a letter responding to a series of written questions regarding his jurisprudential philosophy, Justice Stevens wrote:

I [would not] feel free to construe the broad phrases of the Constitution on the basis of my own personal philosophy It is never appropriate for a judge interpreting the Constitution . . . to disregard the intent of its authors to the extent that such intent can be fairly ascertained The fact that a Justice of the Supreme Court feels that a particular constitutional provision is not adequate to deal with today's social conditions is not a sufficient basis for placing a construction on that document which is not warranted by its language or by the course of decisions interpreting it.

Letter from John Paul Stevens to Sen. James Eastland (Dec. 8, 1975), *reprinted in*

transformation involved Justice Blackmun.²¹³

Such a transformation would not be lost on the next Republican president, Ronald Reagan, who made as a centerpiece of his agenda the appointment of judges committed to "strict construction of the Constitution rather than a liberal agenda based on a concept of judicial activism."²¹⁴ His administration wasted no time in developing a careful screening process to verify whether prospective nominees had the appropriate ideology for appointment,²¹⁵ culminating in the appointments as federal appellate judges several prominent conservative academics — most notably Robert Bork, Antonin Scalia, Richard Posner, Ralph Winter, Frank Easterbrook, Douglas Ginsburg, and J. Harvie Wilkinson — who helped to demonstrate on the bench and explain in other fora their conceptions of appropriate judicial restraint.²¹⁶ Many of these appointees explained that their commitment to judicial restraint was made possible by hewing closely to original understanding; thus, originalism became closely associated with the most prominent conservative judges of the era.²¹⁷

Nomination of John Paul Stevens to be a Justice of the Supreme Court: Hearing on Nomination of John Paul Stevens of Illinois, to be an Associate Justice of the United States Supreme Court Before The Senate Committee on the Judiciary, 94th Cong., 8 (1975). In his oral testimony before the Senate Judiciary Committee, Justice Stevens also stated: "One should always subordinate his own personal views, whether they be economic, social, political . . . because when you are talking about your own views you are only one of millions of individuals in the country." *Id.* at 44.

²¹³ See DAVID SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST COURT* 233-34 (1992):

After the *Roe* opinion, Blackmun appeared to undergo one of the great transformations in Supreme Court history. In 1970, Nixon had selected him as a midwestern Republican with a law-and-order reputation. . . . By the mid-1970s, however, Blackmun had broken with Burger and aligned himself with the Court's liberals . . . [One possible explanation] is that Nixon and the press had typecast him incorrectly in the first place. . . . Blackmun was never a Nixon Republican and had little allegiance to the conservative dogma.

Id.

²¹⁴ ABRAHAM, *supra* note 18, at 281.

²¹⁵ See generally BERNARD SCHWARTZ, *THE NEW RIGHT AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK* 222-49 (1990).

²¹⁶ See, e.g., Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49 (1981); Antonin Scalia, *Morality, Pragmatism and the Legal Order*, 9 HARV. J.L. & PUB. POL'Y 123 (1986).

²¹⁷ See Earl M. Maltz, *Brown v. Board of Education and "Originalism,"* in GREAT CASES, *supra* note 45, at 136, 141-42:

One common perspective of the Burger Court is that on core constitutional issues the justices who served on the Burger Court divided on the basis of their political ideology. In his excellent book on the chief justiceship of Warren Burger, the distinguished conservative constitutional scholar Earl Maltz takes issue with this viewpoint and argues instead that it “can plausibly be seen as having produced the most liberal jurisprudence in history — even more liberal than that generated by its predecessor.”²¹⁸ In Maltz’s view,

[T]he Burger Court advanced well beyond Warren Court jurisprudence on a variety of issues identified with liberal politics. Further, while cutting back at the margins, the Burger Court refused to overrule the core principles underlying Warren Court jurisprudence dealing with issues such as reapportionment and the Fourth and Fifth Amendments. However, given the makeup of the Court, what is perhaps most surprising is that its activism was almost entirely liberal-oriented; although there were a few notable exceptions, decisions invoking conservative values to strike down liberal initiatives from other branches of government were extremely rare during the Burger era.²¹⁹

In their respective appraisals of the Burger Court, Vince Blasi and Bernard Schwartz concluded, however, that the Burger Court’s jurisprudence lacked any discernible focus — that it should be characterized as “rootless activism”²²⁰ or simply “pragmatic.”²²¹ Maltz agrees, to some extent, with these appraisals. He recognizes that: “[T]he Court was composed of nine independent contractors with widely differing political and jurisprudential agendas. Thus, it should not be surprising that the pattern of decisions emerging from the Court reflected the shifting coalitions among these independent contractors rather than a single, easily

[T]he debate over originalist methodology divided the country along political lines. Many conservatives attacked not only the substantive conclusions of post-*Brown* jurisprudence, but also the legitimacy of judicial activism that was not founded on the original understanding. Liberals . . . increasingly saw an unconstrained Court as a reliable political ally; thus, originalism became anathema in liberal ideology.

Id.

²¹⁸ EARL M. MALTZ, *THE CHIEF JUSTICESHIP OF WARREN BURGER, 1969-1986*, at 1 (2000).

²¹⁹ *Id.* at 1-2.

²²⁰ Vincent Blasi, *The Rootless Activism of the Burger Court*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 198* (Vincent Blasi ed., 1983).

²²¹ BERNARD SCHWARTZ, *THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION* (1990).

described intellectual theme."²²² Refusing to rest on this conclusion, Maltz asserts that,

[T]o concede that the patterns of decision making are not easily described does not imply that the patterns are nonexistent; instead, it simply suggests that the decisions are the product of the patterns of decision making of each of the individual justices, patterns which themselves reflect varying combinations of purely political and distinctively legal considerations.²²³

Yet, as one moves away from the academic commentary on the Burger Court, one quickly discovers the increasingly intensifying social and political divisions generated by the Burger Court's decisions, including abortion rights cases.²²⁴ Though the controversy over the abortion rights cases presented a rare opportunity for the public debate over the direction of the courts to address the implications of technology (in the form of certain medical procedures), *Roe* and its progeny were viewed more as a symptom of the problem with the Court than the problem itself. The problem was the Court's failure to respect federalism, and its solution was, as characterized by President Reagan's Attorney General Edwin Meese, adherence to a "Jurisprudence of Original Intention."²²⁵ With *Roe*, free speech, freedom of religion, and other precedents expanding rather than overruling Warren Court precedents in mind, Meese explained,

[I]t is our belief that constitutional law should be rooted in principles that are derived from the text and original intention of the Constitution . . . [and that s]uch disputes are properly resolved within the several states at the level of civil or legal rights, as a matter of statutory law; not at the national level as a matter of constitutional right.²²⁶

This line of commentary provoked much criticism from liberals on the Court and

²²² MALTZ, *supra* note 218, at 5.

²²³ *Id.* (footnote omitted).

²²⁴ One of the most significant developments, which was beyond the scope of Maltz's study, was the increasing fragmentation of liberals over the most "activist" of the Warren and Burger Court precedents, including but not limited to *Roe*. For an account of the splintering of liberals into, *inter alia*, the feminist, critical legal studies, and Critical Race Theory movements, see Grey, *supra* note 100, at 505-07.

²²⁵ Address to the American Bar Association (July 9, 1985), *reprinted in* MAJOR POLICY STATEMENTS OF THE ATTORNEY GENERAL: EDWIN MEESE III 1985-88, at 7.

²²⁶ Address to the American Enterprise Institute (Aug. 6, 1985), *reprinted in* MAJOR POLICY STATEMENTS OF THE ATTORNEY GENERAL: EDWIN MEESE III 1985-88, at 12; *see also* Edwin Meese III, *The Law of the Constitution*, Commencement Address at Tulane University (Oct. 21, 1986), *reprinted in id.* at 45-51.

in Congress. Leading the charge, Justice William Brennan called Meese's approach "facile historicism" that "in truth is little more than arrogance cloaked as humility."²²⁷ Later the same month, Justice Stevens suggested that the argument for reliance on original intention "is somewhat incomplete [because] it overlooks the importance of subsequent events in the development of our law."²²⁸ Senator Joseph Biden accused Meese of holding "extreme and unacceptable views" and attempting "to rewrite in his own image our most basic law."²²⁹

Moreover, the Burger Court repeatedly found itself the target of jurisdiction-stripping measures proposed in retaliation against the Court's desegregation, freedom of religion, and abortion decisions.²³⁰ In addition, it became routine for members of Congress to propose amendments to overturn *Roe* and other "liberal" precedents of the Burger Court,²³¹ and some members of Congress even proposed to do away with life tenure in response to the Burger Court's activism.²³²

These congressional attempts came to naught. Nor did any of these efforts have any apparent effect on the Court's path. Instead, change in the Court's functioning came, as it has often come in the past, from new appointments to the Court.

VIII. THE REHNQUIST COURT, 1986 – THE PRESENT

Except for one very intense year early during Warren Burger's tenure as chief justice,²³³ there were no fierce Supreme Court confirmation contests, in spite of the

²²⁷ Stuart Taylor, Jr., *Brennan Opposes Legal View Urged By Administration*, N.Y. TIMES, Oct. 13, 1985, at 1. The liberal attacks on the use of original intent were not limited to the Court. *Biden Says Meese is Trying to Reshape U.S. Constitution*, N.Y. TIMES, Nov. 7, 1985, at A20.

²²⁸ Stuart Taylor, Jr., *Justice Stevens, In Rare Criticism, Disputes Meese on Constitution*, N.Y. TIMES, Oct. 26, 1985, at 1.

²²⁹ *Biden Says Meese is Trying to Reshape U.S. Constitution*, N.Y. TIMES, Nov. 7, 1985, at A20. Senator Biden also stated: "The Attorney General's real position is little-disguised social activism of the Right." *Id.*

²³⁰ See, e.g., Student Moratorium Transportation Act of 1972, S. 3388, 92d Cong., 2d Sess.; H.R. 13916, 92d Cong., 2d Sess. (desegregation); Equal Educational Opportunities Act of 1972, S. 3395, 92d Cong., 2d Sess.; H.R. 13915, 92d Cong., 2d Sess. (desegregation); H.R. 326, 97th Cong., 1st Sess. (1981) (school prayer); H.R. 865, 97th Cong., 1st Sess. (1981) (school prayer); H.R. 867, 97th Cong., 1st Sess. (1981) (abortion).

²³¹ See, e.g., H.R. 261, 93d Cong., 1st Sess. (1973); S.J. Res. 119, 93d Cong., 1st Sess. (1973); H.R.J. Res. 426, 93d Cong., 1st Sess. (1973).

²³² See, e.g., H.R.J. Res. 33, 93d Cong., 1st Sess. (1973); H.R.J. Res. 69, 93d Cong., 1st Sess. (1973); H.R.J. Res. 120, 93d Cong., 1st Sess. (1973); H.R.J. Res. 199, 93d Cong., 1st Sess. (1973); H.R.J. Res. 669, 93d Cong., 1st Sess. (1973); H.R.J. Res. 869, 93d Cong., 1st Sess. (1973).

²³³ In November 1969, the Senate rejected President Nixon's nomination of Clement Haynsworth to replace Abe Fortas as an associate justice on the Supreme Court. Less than six months later, the Senate rejected Nixon's next nominee, Harold Carswell, to fill the

sharp criticisms of so many of the Court's decisions, most notoriously *Roe*. Burger's resignation announcement coincided, however, with the dawn of a different era; and the Rehnquist Court itself would not be able to begin formally without the most contentious confirmation proceeding for a chief justice since Hughes's confirmation in 1930.

The opposition to Rehnquist's nomination as chief justice quickly targeted his judicial ideology.²³⁴ His record in individual rights cases as an associate justice was not only well known but, in the views of liberal Senate opponents, "out of the mainstream."²³⁵ Rehnquist largely dodged questions about how he would rule in future cases on the grounds that they impinged on judicial independence. Nevertheless, the Republican-controlled Senate confirmed Rehnquist 65-33. The thirty-three votes cast against his nomination constituted the largest number of votes ever cast against a successful nominee for the chief justiceship.

It was just the beginning of the storm, for later in 1986 the Democrats regained control of the Senate. Hence, they were in the majority when Lewis Powell announced his intention to resign from the Court in 1987. The significance of President Reagan's naming Powell's successor was not lost on anyone, for Powell had been, as *The New York Times* reported at the time of the announcement of his resignation, "the determined moderate [who had cast the] critical fifth votes in key Supreme Court rulings. [Thus, h]is resignation gave President Reagan a historic opportunity to shape the future of the court."²³⁶ President Reagan's choice of Robert Bork to replace Powell promised, however, to be contentious not only because Powell had been the swing vote in so many important cases, but also because Bork had been among the most outspoken critics of the Warren and Burger Courts' decisions expanding the scope of the Bill of Rights' guarantees.²³⁷

vacancy arising from Fortas's resignation from the Court. Neither rejection had a lot to do with the ideology of the nominee. The Democratically-led Senate rejected Haynsworth in part as payback for Fortas being driven off the Court because of his ethical lapses as a sitting Justice. The opposition to Haynsworth claimed he had committed ethical breaches no less serious than those made by Fortas. Subsequently, the Senate rejected Carswell based on serious questions about his competence to serve on the Court. *See generally* DAVID YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 104-12 (1999) (discussing the problems leading to the Senate's rejections of President Nixon's nominations of Clement Haynsworth in 1969 and Harold Carswell in 1970).

²³⁴ Rehnquist also confronted charges that as a law clerk for Justice Jackson in 1953 he had urged Jackson to support the constitutionality of segregated schools and in the 1960s he had harassed minority workers at polling places. O'BRIEN, *supra* note 9, at 71.

²³⁵ ABRAHAM, *supra* note 18, at 292 (citation omitted in original).

²³⁶ *Id.* at 297.

²³⁷ *See, e.g.,* Robert Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986); *Tradition and Morality in Constitutional Law*, The Francis Boyer Lectures on Public Policy (American Enterprise Institute, Dec. 1984); *Neutral*

Bork's confirmation hearings were among the most contentious ever. Like Brandeis, Bork faced charges that he was a "radical."²³⁸ The more Bork tried to portray himself as a moderate who had "great respect for precedent,"²³⁹ the more he opened himself to charges of a "confirmation conversion"²⁴⁰ due to his harshly-worded critiques of the "liberal" precedents of the Warren and Burger Courts and his declarations that "in the field of constitutional law, precedent is not all that important."²⁴¹ The subsequent testimony of over one hundred witnesses on the nomination's merits and on differing approaches to constitutional interpretation represented, in Senator Joseph Biden's judgment, "a referendum on the past progress of the Supreme Court and a referendum on the future."²⁴² In the end, the interest groups and politicians who had become invested in the very precedents Bork had so long attacked forged successful opposition to his nomination. He became the first Supreme Court nominee to be rejected on the basis of ideology since John Parker. While Parker had been rejected largely because of controversy over the scope of the federal government's power to regulate the economy,²⁴³ Bork had been rejected largely because of his hostility to many of the Warren and Burger Courts' most prominent individual rights decisions, especially those expanding First, Fourth, and Fourteenth Amendment guarantees and protecting aspects of privacy in *Griswold v. Connecticut*²⁴⁴ and *Roe*.

Shortly after his rejection, Bork published a scathing attack on the liberal interest groups, intellectuals, and politicians who organized his defeat.²⁴⁵ He defended the originalist philosophy he had advanced as an academic, circuit judge, and Supreme Court nominee. He explained that his confirmation hearings:

merely brought [trends toward censoring or punishing conservative thought] into the open in a way that had never previously occurred but was bound to happen sooner or later as conservative presidents, armed with the nomination power, begin to threaten the liberal hegemony over the courts. [My] book has traced the increasingly political nature of the Supreme Court, which reached its zenith with the Warren Court, and the increasing, by now almost overwhelming, politicization of the law schools, where

Principles and Some First Amendment Problems, 47 IND. L.J. 1 (1971).

²³⁸ O'BRIEN, *supra* note 9, at 74 (citation omitted in original).

²³⁹ *Id.* at 75 (citation omitted in original).

²⁴⁰ *Id.* at 75 (quoting Senator Patrick Leahy) (citation omitted in original).

²⁴¹ *Id.* (citation omitted in original).

²⁴² *Id.* at 76 (quoting Sen. Joseph Biden) (citation omitted in original).

²⁴³ See *supra* note 86 and accompanying text.

²⁴⁴ 381 U.S. 479 (1965).

²⁴⁵ ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

much constitutional scholarship is now only politics.²⁴⁶

Bork castigated liberal academics for helping to orchestrate his defeat. In his view, "I had criticized the Warren Court, and [the ideological attack on my nomination] was the revenge of the Warren Court."²⁴⁷ The book confirmed his opponents' worst fears about his disdain for the individual rights precedents most commonly associated with the liberalism of the Warren and Burger Courts.²⁴⁸

The next extensive battle over a Supreme Court nomination came four years later with President George Bush's nomination of Clarence Thomas to replace Thurgood Marshall. Like Reagan, Bush had campaigned as the nominee of a party that had explicitly called for the overruling of *Roe* and pledged to appoint "a strict constructionist, a judicial restraintist, [someone who was] dedicated to legal and constitutional precedent and history."²⁴⁹ His nomination was complicated by several extenuating circumstances: He had a record of controversial writings and speeches that assailed some of the Warren and Burger Courts' best-known decisions expanding individual rights; the person he was replacing — Thurgood Marshall — was a living liberal legend; and President Bush had raised expectations regarding his credentials by promising that he was the "best person at the right time" to replace the retiring Justice Marshall.²⁵⁰ If that was not enough, a former assistant had accused him of sexual harassment in the midst of his confirmation hearings.²⁵¹ Thomas weathered the storm in part because, on substantive constitutional questions, he gave evasive answers, made no promises of how he would perform as a justice, and on the harassment charges, he put his opposition on the defensive by accusing it of racist motives. His eventual confirmation by the closest vote in favor of any Supreme Court nominee in the twentieth century was not interpreted at the time as a victory for any particular constitutional philosophy or as sending any kind of clear signal on the Senate's preferences regarding the Court's composition or direction.

With its current composition of seven justices appointed by Republican presidents dedicated to the overrulings of many Warren and Burger Court precedents and only two by Democratic President Bill Clinton, the Rehnquist Court

²⁴⁶ *Id.* at 348.

²⁴⁷ *Id.* at 349.

²⁴⁸ In his book, Bork targeted many of the nation's leading liberal constitutional theorists. More than a few responded. *See, e.g.,* Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 *YALE L.J.* 1419 (1990); Ronald M. Dworkin, *Bork's Jurisprudence*, 57 *U. CHI. L. REV.* 657 (1990); *see also* Suzanna Sherry, *Original Sin*, 84 *NW. U. L. REV.* 1215 (1990).

²⁴⁹ ABRAHAM, *supra* note 18, at 305 (paraphrasing Bush's pledges).

²⁵⁰ *Id.* at 310 (citation omitted in original).

²⁵¹ For an overview of the contest over Thomas's nomination, see JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* (1994).

is still a work in progress.²⁵² Over the course of its fifteen years (and counting), the Rehnquist Court has been described as “conservative,”²⁵³ “liberal,”²⁵⁴ “activist,”²⁵⁵ the model of restraint,²⁵⁶ “arrogant,”²⁵⁷ “betraying” the cause of conservatism,²⁵⁸ and “imperialist.”²⁵⁹ Such disparate reactions reflect, *inter alia*, the fact that the Court’s

²⁵² At present, the last vacancy to arise on the Court was seven years ago, the longest period of time in which the Court has gone without a vacancy since the first half of the nineteenth century.

²⁵³ See, e.g., Christopher H. Schroeder, *A Conservative Court? Yes*, 1993 PUB. INT. L. REV. 127 (1993) (“The Rehnquist Court truly is a conservative Court. It is so much of one, in fact, that the disagreements on the Court and about the Court are now entirely debates within conservatism, not between liberalism and conservatism.”).

²⁵⁴ See, e.g., Robert H. Bork, *Again, A Struggle for the Soul of the Court*, N.Y. TIMES, July 8, 1992, at A19 (responding to the Court’s decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and asserting that the Court seems “given more to liberal activism than to adherence to the principles of the Constitution as originally understood”).

²⁵⁵ See, e.g., Edward Walsh, *An Activist Court Mixes Its High-Profile Messages*, WASH. POST, July 2, 2000, at A6 (quoting national legal director of the ACLU Robert Shapiro as stating: “It is still a conservative court that has also become one of the most activist courts in American history.”).

²⁵⁶ See, e.g., Joan Biskupic, *A LOOK AT . . . The Rehnquist Court; They Want to Be Known as Jurists, Not Activists*, WASH. POST, Jan. 9, 2000, at B3 (calling the Rehnquist Court “more restrained and legalistic” than its liberal activist predecessor).

²⁵⁷ See, e.g., Renata Adler, *Irreparable Harm*, THE NEW REPUBLIC, July 30, 2001 (stating that the Court’s “moral, intellectual, and legal authority had already diminished over a long period of poorly reasoned opinions expressed in unseemly and unjudicial — often supercilious and even sneering — words”); Carl T. Rowan, *At Least Duke Isn’t a Closet Bigot Like Some*, HOUS. CHRON., Apr. 3, 1999, at A32 (asserting that “Chief Justice William Rehnquist and Justice Antonin Scalia are ‘arrogant’ in their approaches to race”).

²⁵⁸ Immediately after the Rehnquist Court’s surprising 5-4 re-affirmation of *Roe* in *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992), conservative leaders charged Justices O’Connor, Souter, and especially Kennedy (who had been confirmed for the seat to which Bork had been nominated) with “betraying” the presidents who had appointed them to the Court. See, e.g., Aaron Epstein, *As High Court Shifts, Will Center Hold?*, THE RECORD, Oct. 4, 1992, at A22 (“Leaders in the conservative movement felt betrayed, especially by what they perceived as a turnaround by Kennedy. They had counted Kennedy as being well within the conservative orbit despite the absence of any over-arching ideology.”); Nancy E. Roman, *“Wimp Bloc” Disappoints Right Wing*, THE WASH. TIMES, June 30, 1992, at A1 (quoting Gary Bauer as describing O’Connor, Kennedy, and Souter as “quickly becoming an embarrassment to the presidents who appointed them”).

²⁵⁹ See, e.g., Jeffrey Rosen, *The End of Deference*, THE NEW REPUBLIC Nov. 6, 2000, at 38 (“The Rehnquist Court . . . routinely adopts an imperious tone . . . even when striking down relatively insignificant, symbolic laws, such as the Religious Freedom Restoration Act”); Patti Waldmeir, *Rehnquist Term Muddied by Partisan Slur*, FIN. TIMES, June 29, 2001, at 7 (“The justices even took their imperial approach so far as to dictate the rules of professional golf to the PGA, which was overruled when it tried to insist that disabled golfers should not be given special help to compete in elite tournaments.”).

Republican appointees do not share a monolithic conservative judicial philosophy, but rather increasingly disagree over what principled fidelity to judicial restraint entails.²⁶⁰

Indeed, one prominent, self-described “conservative,” Michael Stokes-Paulsen, has suggested that understanding the Rehnquist Court, at least as of 1993, required an appreciation of the variations of judicial restraint.²⁶¹ In his view, the Republican justices differed in terms of how they prioritized possible (or legitimate) sources of decision, such as text, structure, precedent, and original understanding. In contrast, liberal constitutional scholar Kathleen Sullivan has suggested that the Rehnquist Court’s justices could be understood not only in the terms with which Paulsen has described them, but also their different preferences regarding the formulation of legal principles as either “standards” or “rules.”²⁶² The common theme of Paulsen’s and Sullivan’s analyses is to move away from the characterization of the justices as “conservative.” Though helpful in developing a different perspective on the Court’s Republican appointees, the schemes developed by both Paulsen and Sullivan are incomplete, for neither explains how liberals fit into them — do Democratic

²⁶⁰ See generally MICHAEL J. GERHARDT, ET AL., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 283-328 (2d ed. 2000) (providing overview of contemporary conservative constitutional theory).

²⁶¹ Michael Stokes-Paulsen, *The Many Faces of “Judicial Restraint”*, 1993 PUB. INT. L. REV. 3 (1993).

²⁶² See Kathleen M. Sullivan, *The Jurisprudence of the Rehnquist Court*, 22 NOVA L. REV. 743 (1998) [hereinafter Sullivan, *Rehnquist Court*]; Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992). Dean Sullivan explains that approaches to constitutional interpretation “that use categorical, formal, bright-line tests are rule-like. . . . By contrast, constitutional tests that employ balancing, intermediate scrutiny, or functional analysis operate as standards.” Sullivan, *Rehnquist Court*, *supra* at 751-52. She explains further that:

A preference for constitutional standards over . . . 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. . . . 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.

Id. at 753. According to Dean Sullivan’s criteria, only two justices appointed by Presidents Reagan and Bush — Scalia and Thomas — generally have favored rules, while the other three — O’Connor, Kennedy, and Souter — have favored standards. *Id.* at 754. Dean Sullivan suggests, however, that the preference “of standards over rules . . . 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.” *Id.* at 756.

appointees or liberals prioritize or develop standards or rules differently than their Republican counterparts?

In spite of their academic appeal, the schemes suggested by Paulsen, Sullivan, and others²⁶³ have yet to influence the content of political rhetoric about the Court. The trend among commentators remains characterizing the Court in the same terms as it traditionally has been analyzed. For example, scholars talk in terms of judicial activism and restraint as well as about liberal and conservative ideology.²⁶⁴ Moreover, in a recent Senate Judiciary Committee hearing, Democratic senators and witnesses supported a more exacting Senate inquiry into the ideologies of judicial nominees while Republican senators and witnesses resisted it.²⁶⁵ Many witnesses persisted in describing nominees as either liberals or conservatives.²⁶⁶

In the coming years, we can expect characterizing judicial ideology in the traditional terms of "conservative," "liberal," "activist," or adherence to "judicial restraint," to be of only limited utility. The first reason is ideological drift. In the world of constitutional law, there are few fixtures. Looking back, as well as ahead, in 1941, eminent constitutional scholar Edward Corwin noted that "[c]onstitutional

²⁶³ See, e.g., CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

²⁶⁴ See, e.g., Christopher E. Smith & Thomas R. Hensley, *Assessing the Conservatism of the Rehnquist Court*, 77 *JUDICATURE* 83 (1993); Robert H. Smith, *Uncoupling the "Centrist Bloc": An Empirical Analysis of the Thesis of a Dominant, Moderate Bloc on the United States Supreme Court*, 62 *TENN. L. REV.* 1 (1994) (proposing that there is a "moderate" bloc on the Court).

²⁶⁵ See *Should Ideology Matter?: Judicial Nominations 2001 Hearing Before the Subcommittee on Administrative Oversight and the Courts, Senate Committee on the Judiciary*, 107TH CONG. (2001). Another interesting facet of the testimony given before the committee is that two former White House Counsels — C. Boyden Gray (first Bush Administration) and Lloyd N. Cutler (Carter and Clinton Administrations) — were opposed to any extensive Senate inquiry into ideology. Their agreement across party lines perhaps reflects their shared preference to protect executive prerogatives in the judicial selection process.

²⁶⁶ The sensitivity to the ideology of judicial nominees was the central focus of the hearings. For example, in his opening statement Democratic Senator Charles Schumer stated:

The President, of course, can choose to exercise his nomination power however he sees fit. But if the President sends countless nominees who are of a particular ideological caste, Democrats will likely exercise their constitutionally-given power to deny confirmation so that such nominees do not reorient the direction of the federal judiciary. But if the President does not grossly inject ideological politics into his selection criteria, neither will the Senate.

law has always a central interest to guard.”²⁶⁷ If anything has changed over the years in constitutional law, it has been the “central interest” that those empowered to discharge constitutional functions have been trying to protect. Hence, the same themes — abuse of power, judicial usurpation and restraint, and unprincipled activism — have been sounded throughout the past century: In Thayer’s classic plea of 1893 for judicial self-restraint,²⁶⁸ in President Roosevelt’s impassioned radio “chat” of March 9, 1937, calling for re-organization of the federal judiciary,²⁶⁹ in the unsuccessful crusade in 1957 to curb judicial enforcement of certain provisions of the Bill of Rights;²⁷⁰ in Senator Everet Dirksen’s repeated attempts to undo by constitutional amendment the 1964 “one man, one-vote” ruling on state legislative apportionment;²⁷¹ and underlying the proposed constitutional amendments to outlaw busing, overturn *Roe*, authorize states to outlaw flag-burning, eliminate life tenure for federal judges, and make Supreme Court decisions overturning state and federal laws subject to a congressional veto.²⁷² Judicial restraint is no more the singular province of conservatives than activism is the penchant of only liberals.

Second, the fragmentation of liberalism has produced confusion and uncertainty about what exactly a contemporary “liberal” judge would favor. Liberalism has fractured to such an extent that it is virtually impossible to say that political or judicial liberals would agree on a positive ideology any longer. Whereas Bork recounts the trepidation of some conservatives openly to embrace originalism after his rejection for fear of hurting their chances for prestigious judicial appointments,²⁷³ it is at least as true that many prominent constitutional scholars eschew being called “liberal” and consider it a negative label in constitutional politics.²⁷⁴ Moreover, as Paulsen’s analysis suggests, we can expect further fragmentation of conservatives. Splits likely will arise not only in how conservatives prioritize sources of constitutional authority, but also exacerbate divisions among libertarians, social conservatives, moral skeptics, and those who

²⁶⁷ EDWARD S. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* viii (1941).

²⁶⁸ See *supra* note 30.

²⁶⁹ Fireside Chat (Mar. 9, 1937), in VI *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* (1938-50), at 122-33 (Samuel I. Rosenman ed., 1950).

²⁷⁰ See MURPHY, *supra* note 182, at 154-208.

²⁷¹ See Legislative Apportionment: The Latest Proposal Analyzed, Cong. Rec., 89th Cong., 1st Sess., app. 1-3 (Oct. 5, 1965) (remarks of Sen. Joseph D. Tydings); James C. Millstone, *Dirksen Hires Publicity Firm to Promote His Amendment*, ST. LOUIS POST-DISPATCH, Feb. 5, 1966.

²⁷² See *supra* notes 217-19 and accompanying text; see also ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH* 117 (1996) (advocating a congressional veto over judicial review).

²⁷³ BORK, *supra* note 245, at 347-48.

²⁷⁴ Cf. Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 OHIO ST. L.J. 731 (1997) (criticizing, *inter alia*, the reluctance of liberal scholars to embrace the implications of their liberal ideologies).

favor property rights and natural law.

The terms “conservative,” “liberal,” “judicial restraint,” and “activist” engender further complications when one considers some of the consequences that technological advances pose for the future of the Supreme Court’s agenda, particularly in cases involving Bill of Rights claims. The Court has not yet grappled with the implications of technological advancements across the spectrum of Bill of Rights cases.²⁷⁵ At the very least, technological advances pose an increasing range of questions to which conservatives and liberals have yet to develop any systematic responses. Although some individuals have begun to think through some of these issues,²⁷⁶ they do not represent or speak for any organized perspective or school of thought.

The problem is not just that “conservatives” and “liberals” have yet to develop systematic analyses of the constitutional issues triggered by technological advances. A further complication is that the political and judicial authorities responsible for resolving the questions triggered by technological advances lack the requisite expertise for understanding the technology, much less the problems produced by it. An even bigger problem arises from the fact that by the time lawmakers or judges have addressed the issues raised by the technological advances that have come before them, the technology often has moved on. The end result is a peculiar circumstance in which the law, either in the form of legislation or judicial review, is well behind where technology is. Nor can the law ever gain ground. It is hopelessly forever trying to catch up.

The extent of this problem is dramatically apparent when one considers the range of possible constitutional issues triggered by recent technological advances that legislators and judges are trying to master. The extent of the problem creates the possibility of what I describe as a virtual Bill of Rights. By this, I do not just mean the realm of cyberspace that no doubt challenges state and federal regulators and judges, but a broader conception of the many instances in which legal and

²⁷⁵ One of the first times technological advancements culminated in a controversial line of individual rights claims arose in the economic due process cases, including *Lochner*, which resulted in part from the social and economic disparities produced by mass industrialization. The next publicly divisive line of individual rights decisions triggered by technological developments appears to be *Roe* and its progeny. To be sure, there were cases before *Roe*, such as *Skinner* and *Griswold*, that dealt as well with reproductive technologies; however, these cases hardly generated anything close to the ongoing social and political division provoked by *Roe*.

²⁷⁶ See, e.g., LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999) (pointing out that technological advances present possible First Amendment, intellectual property, and Fourth Amendment difficulties for the Court); Eugene Volokh, *Freedom of Speech in Cyberspace from the Listener’s Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex*, 1996 U. CHI. LEGALF. 377 (1996) (analyzing three types of online recreation, including edited electronic references and parental control).

constitutional protections are unavailable to individual citizens while legislators and judges are gearing up for action. Even when officials propose solutions for certain technological questions, the technology with which they have been dealing — in many instances — has already become advanced in ways that the legislative or judicial solutions have failed to adequately anticipate.

The First Amendment, to begin with, is a realm in which such issues flourish. Consider the relatively small range of problems involved in the following: providing adequate access to and quality of filtering mechanisms on the Internet; the failures thus far in government-mandated regulations of indecency or pornography on the Internet; the challenges of devising adequate regulations or control of unsolicited commercial advertising spread on the Internet; the difficulties of developing special rules with respect to access, advertising, and usage for the members of special communities such as public high schools and universities; and the fact that the Internet has already made prior restraint doctrine passe, because by the time information has been leaked onto the Internet and spread almost instantaneously around the world, it no longer makes sense to seek a judicial remedy to block its publication. That technology now allows people to vote from their home computers raises questions about the conditions that government may place on such activity (in those jurisdictions that allow such absentee voting). Nor is it settled, much less clear, whether there are any First or Second Amendment problems with state or federal restrictions of sales of certain items over the Internet, including guns, tobacco products, and liquor.

The Fourth Amendment's guarantee against unreasonable searches and seizures undoubtedly is triggered by advancements in surveillance technology. Although the Supreme Court recently held that the Fourth Amendment governs police use of sense-enhancing technologies for searches,²⁷⁷ there are questions about the extent to which the Fourth Amendment applies to law enforcement use of hidden surveillance cameras to monitor traffic or activity in large public areas — for example, in Times Square²⁷⁸ — by speedily matching the images of people being monitored against massive data banks. There are also Fourth and Fifth Amendment issues triggered by the relative ease of government access to personal information on traveling (as reflected, for example, in the EZ Passes employed for traveling along some turnpikes), personal habits (as reflected, for example, in sales receipts), and health (from blood or hair samples).²⁷⁹ Moreover, a recent controversy arose

²⁷⁷ *Kyllo v. United States*, 533 U.S. 27 (2001).

²⁷⁸ Many other cities are stepping up the use of surveillance cameras as well. *See, e.g.*, Dana Canedy, *Tampa Scans the Faces in Its Crowds for Criminals*, N.Y. TIMES, July 4, 2001 at A1; Dorothy Erlich, *Big Brother is Watching — On Trains, Streets, in Schools*, SAN. FRAN. CHRON., May 2, 2000 at A21.

²⁷⁹ *See, e.g.*, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (banning non-voluntary drug testing of pregnant women).

when the Ninth Circuit — with conservative federal appellate Judge Alex Kozinski as its chief spokesperson — formally objected to the monitoring of the judges' and their staffs' computer usage by the Administrative Office of the United States Courts in the nation's Capitol.²⁸⁰ Judge Kozinski argued, *inter alia*, that the monitoring constituted unwarranted, if not illegal, invasions of the privacy of the court's judges and other personnel. The Administrative Office backed its policy of monitoring for pornography, streaming videos, and music; and the Judicial Conference of the United States, the administrative body overseeing federal judicial operations, subsequently affirmed the Administrative Office's policy.²⁸¹ Such monitoring is commonplace in workplaces around the nation.

Fifth Amendment issues abound. Among these are the following: questions about when life begins and the limits of governmental authority to experiment on human tissue triggered by such technological advances as cloning; medical research involving embryonic stem cells; the extent to which government may restrict individuals' access to medical expertise (such as on the Internet) to advance their health or their own deaths, however they see fit; and the constraints on governmental restrictions on organ transplants or governmental access to deceased persons' body parts (such as corneas).

In other contexts in which it appears the law is more settled, it nevertheless is possible to press existing doctrine. For example, in *Maryland v. Craig*,²⁸² the Court addressed the legitimacy of a child's testifying by way of closed-circuit television against an adult. At some point, the Court can expect claims to arise about the legitimacy of video testimony in other contexts, including spousal abuse or circumstances in which individuals are unavailable for live testimony.²⁸³ Moreover, the Court no doubt will continue to be subjected to increasing pressure to allow cameras to cover its proceedings, live radio feeds of its oral arguments (as it permitted in *Bush v. Gore*), and even public televising of executions.

With respect to virtually all of these issues, there is no clearly set or uniform "conservative" or "liberal" attitude. Some "conservatives" undoubtedly will favor no regulation or the most minimal public regulation possible in each of the areas mentioned; others might construe the Constitution as empowering majorities to resolve the regulatory questions posed in each of these areas; and still others will

²⁸⁰ See Neil A. Lewis, *Monitoring of Judiciary Computers Is Backed*, N.Y. TIMES, Aug. 14, 2001, at A4.

²⁸¹ See Tony Mauro, *Federal Courts Adopt New Online Policies; Judicial Conference Approves Monitoring of Court Computers and Internet Access to Civil Court Documents*, LEGAL TIMES, Sept. 24, 2001, at 6.

²⁸² 497 U.S. 836 (1990).

²⁸³ See, e.g., *Harrell v. Butterworth*, 251 F.3d 926 (11th Cir. 2001) (allowing testimony via satellite in a case where witness lived in Argentina and was in poor health); *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000) (allowing testimony via two-way video link in organized crime trial).

probably fall somewhere in between these extremes. Liberals are likely to reflect equally divergent perspectives, with some perhaps favoring governmental regulation to promote the general welfare in most or all of these fields, and others supporting judicial review to protect privacy and other individual liberty interests implicated in most or all of these areas. Liberals are likely to divide over whether individual autonomy requires (1) increased access to as much information as possible, or (2) greater protection from the loss of privacy entailed in accessing such information or that is otherwise made possible as a result of advancements in information technology.²⁸⁴ In short, neither “liberals” nor “conservatives” will necessarily have predictable attitudes about how the Constitution applies (or does not apply) in these cases.

Moreover, technological advances have changed governmental operations — both the Bork and Thomas confirmation hearings, for instance, were influenced heavily by technological developments. In Bork’s case, technological advancements made possible the mass political organization and mass coverage of his hearings, whereas in Thomas’s case, the mediatization of the hearings helped to dramatize the charges against him and his responses. By 2001, the twenty-four-hour news cycle and the Internet have created increasing incentives for the media to devote much more of their programs or space to speculation and commentary (“soft news”) than to reporting actual data and events (“hard news”). These “advancements” do not necessarily make it easier for people to become informed, but rather cause the public to depend on others as conduits for the information about public events they think they need. Thus, technological advancements help to shape the very environment in which we learn about them and their possible repercussions for

²⁸⁴ See J.M. Balkin, *What Is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1987-88 (1992):

Do traditional liberal notions of autonomy continue to make sense in an age where control of information processing increasingly means new forms of control over individuals themselves? Or has the liberal ideal of the free market of ideas now turned in on itself and created a new form of totalitarianism, a prison constructed from access to information rather than from steel bars? . . . These issues strike at the heart of liberal political philosophy. Privacy is deeply related to notions of individualism and individual autonomy. . . . What will happen to the fabric of intimate relations in a world in which technological advancement increasingly shrinks the domain of the private self? Will traditional assumptions about personal privacy (and hence autonomy) still make sense, or will they have to be reimagined in wholly different ways? And, if this is so, what will happen to a constitutional jurisprudence based on eighteenth-century notions of privacy and autonomy that assumed a world without our present technological advancements?

constitutional law.

Last but not least, technological advancements pose a fundamental problem for the definition and operations of federalism. The physical geography outside of cyberspace does not correspond to its internal architecture. If there is any correspondence, it depends less on the preferences of state or federal authorities than on the plans of web designers who currently answer to no one except perhaps their customers or corporate sponsors. Hence, in cyberspace, the dividing line between federal and state boundaries is illusory — it is not possible to detect precisely where the scope of federal authority (such as its Commerce Clause power) ends and state sovereignty begins.²⁸⁵ The concept of a community is dictated largely, if not wholly, by the architecture of cyberspace — while it is true, for instance, that America Online is a national operation, interaction among those who use its services could be extremely localized (such as two users in the same household) or purely artificial (such as in a chat room). A university or high school can structure opportunities for interaction or instruction that, depending on the services, are open to the world at large or only to its employees and students. In all of these contexts, neither liberals nor conservatives have devised any consensus on the criteria for defining the relevant community for constitutional or legislative purposes.

Even though the Rehnquist Court has ruled that the Fourteenth Amendment protects only negative liberties and thus does not impose any affirmative obligations on the state,²⁸⁶ many people worry about the dangers that state inaction with respect to technological advancements poses for citizens.²⁸⁷ These potential privacy problems are myriad, including identity theft on the Internet; dissemination of private medical information;²⁸⁸ the use of “cookies” to track individual Internet use;²⁸⁹ the spread of embarrassing rumors or tips across the Internet; the release of videos onto the Internet (such as the women or doctors who frequent Planned Parenthood or abortion facilities); and the burdensome requirement of opting-out

²⁸⁵ Larry Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

²⁸⁶ See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

²⁸⁷ See Edmund Sanders, *Privacy Cases Not Yielding Much Payoff*, L.A. TIMES, May 6, 2001, § 3 (Business), at 1 (asserting that “plaintiffs’ attorneys are resorting to creative legal arguments” and quoting a Washington privacy advocate as stating “‘You have to stitch and quilt existing laws to make it work . . . It’s not clean and it’s not easy.’”).

²⁸⁸ This was the subject of a recent case in the New York state courts, *Anonymous v. CVS Corp.*, 728 N.Y.S. 2d 333 (N.Y. 2001), in which an individual with HIV/AIDS sued CVS after the nation-wide chain bought his/her local drug store and then made his/her prescription information available to every CVS store in the nation.

²⁸⁹ See *In re Intuit Privacy Litigation*, 138 F. Supp. 2d 1272 (C.D. Cal. 2001) (denying motion by defendant to dismiss privacy claims). Cf. *In re DoubleClick Inc. Privacy Litigation*, 2001 U.S. Dist. Lexis 3498 (S.D.N.Y. Mar. 29, 2001) (granting DoubleClick summary judgment and dismissing all claims with prejudice).

of plans by businesses to sell their personal information.²⁹⁰ This list is by no means exhaustive; it expands everyday as technology advances along with the corresponding social and legal challenges its growth engenders. Consequently, as federal and state governments coordinate or tussle over regulatory solutions to these problems, our conceptions of federalism — and the limits of the Bill of Rights — will be stretched in ways yet to be conceived.

CONCLUSION

There is more to the history of the Bill of Rights over the past one hundred years than the path of its interpretation by the Supreme Court. The history of the Bill of Rights over the last century reflects the constancy of popular rhetoric about the Supreme Court, regardless of shifting interpretations of the Bill of Rights. Although the Bill of Rights has moved increasingly into the center of the Supreme Court's agenda, its movement has not corresponded with a change in the terms deployed in popular discourse about the Supreme Court. The terms remain the same, while their referents have changed. Neither judicial activism nor restraint has ever been a fixed "liberal" or "conservative" notion, but rather, depend on the political authorities who control "the central interests" at stake in constitutional adjudication at a given moment in our history. The rhetoric parallels shifts in this control.

The constancy of our rhetoric comes, however, at a price, because the persistence of our rhetoric has limited utility. The constitutional issue that is likely to dominate the Court's agenda over the course of the next century — the proper relationship between the State and technology — is likely to challenge our terminology in increasingly inconceivable ways. Liberals already have fragmented in their attitudes toward the expansive interpretations of the Bill of Rights by the Warren and Burger Courts, but they are sure to divide further when confronted with the consequences that technological advancements pose for personal autonomy or freedom over the next century. Liberals are not sure whether maximizing individual autonomy requires more or less regulation. Similarly, conservatives have no predictable or organized response to these advancements, which complicate traditional notions of free speech, privacy, federalism, property rights, and limited federal power.

As technology advances, the pressures to maintain traditional notions such as judicial restraint and activism are bound to intensify. These notions persist because they are culturally and socially ingrained, generally familiar, and trigger politically salient imagery. Yet they are unlikely to capture the complexity of the

²⁹⁰ See, e.g., Robert O'Harrow, Jr., *Getting a Handle on Privacy's Fine Print; Financial Firms' Policy Notices Aren't Always 'Clear and Conspicuous' as Law Requires*, WASH. POST, June 17, 2001, at H1.

consequences posed by technological advancements. The less effectively our rhetoric captures this complexity, the wider the gap between practical and constitutional reality. The bridging of this gap is the first great test that our fidelity to the Bill of Rights will have in the twenty-first century: The more our technology pulls us into the future, the greater the necessity of resisting the pull of our rhetoric of judicial critique to imprison us in the past.