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The Political Battle for the Constitution

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Articles

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I. INTRODUCTION

Battles over the meaning of the Constitution began before the document was written, and they have continued through history at varying levels of intensity and salience. But an important change regarding constitutional battles has gone largely unnoticed. Understanding the new terms of engagement helps us better explain the current behavior of many political actors, including Justices. We also believe that it may have significant implications for the future.

Over the past two generations, the Democratic Party and Republican Party have come to fundamentally different conceptions of the United States Constitution, and are visions that differ from the Constitution as interpreted by the Supreme Court. Previously, albeit only periodically, one political party has had serious disagreements with the Court, causing that party to articulate a separate constitutional vision.[1] What is new is that now both parties have done so. Without much recognition, we have reached a point where, in addition to the Constitution espoused by the Supreme Court, we have two quite different constitutions in waiting and in action, one attached to each political party.

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1. D. GRIER STEPHENSON, CAMPAIGNS & THE COURT (1999).

Furthermore, unlike previous one-party episodes, this time the phenomenon has not evaporated after a few years. Documenting and understanding this phenomenon fully requires serious attention to both law and politics.

That the political parties have developed opposing visions of the Constitution which in turn differ from the Supreme Court's demonstrates that there can be useful constitutional interpretation distinct from that of the Court.[2] The debates of the first Congresses showed as much.[3] More importantly, the rise and persistence of these opposing visions has important implications for constitutional politics now and in the future. The fact that each party's vision is quite opposed to the other's throws light on the apocalyptic statements by each party over the past five of six presidential elections[4] concerning the inherent danger of any Supreme Court appointee coming from the other party. The exception was the election of 2004. Neither party's convention nor campaign reflected the constitutional differences we shall describe. The reason was articulated in early September by New York Times reporter Roger Cohen when he wrote that "this vote has a theme: the war."[5] Quite understandably, war[6] and national security trumped everything else. That said, it did not take long after the election for the appointment of judges to return front and center. Talk did turn to "nuclear options" but it

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2. *See* BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION (1999); Keith E. Whittington, *Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning,* 33 POLITY 365 (2001)

3. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801 (1997).

4. "The composition of the Supreme Court is a hot issue in the presidential campaign, with both parties warning of evil days if the other side gets to name the next several Justices." Eugene Volokh, *Where the Justices Are Unpredictable,* N.Y. TIMES, Oct. 30, 2000, at A27. The predictions began with Walter Mondale's statement that if the Court "is replaced by Mr. Reagan, it could well be that our great cause of justice will be doomed for the lifetime of everyone in this room." Linda Greenhouse, *Taking the Supreme Court's Pulse,* N.Y. TIMES, Jan. 28, 1984, at A8. The reason for the focus on the Court during the Reagan-Mondale campaign was that the Justices were just flat-out old, with a majority having been born in the Roosevelt administration—Teddy's. *See* L.A. Powe, Jr., *Go Geezers Go,* 25 LAW & SOCIAL INQUIRY 1227, 1234 n.17 (2000). In the 2000 campaign Al Gore stated that the Court was "at stake: . . . Think about civil rights. Think about women's rights. Think about human rights. Think about antitrust law. Think about Federalism. All of these issue are on the ballot this Nov. 7." Shaila K. Dewan, *The Campaign: The Voters,* N.Y. TIMES, Oct. 30, 2000, at A14. Initially we thought the statement was just campaign rhetoric, but events proved Gore a wise and prescient candidate. The election of the president did, indeed, turn on the Supreme Court and federalism.

5. Roger Cohen, *A Global War: Many Fronts, Little Unity,* N.Y. TIMES, "Week in Review," Sept. 5, 2004, at D1.

6. The war on terror, the Iraqi War, plus, amazingly, the Vietnam War.

was not about war. The issue of the appointment of judges was so contentious that Republicans threatened to use the "nuclear option" and prevent filibusters. Thus far, it has gone unused. In the end, the division helps explain the non-ideological nature of all of the post-Bork nominees except Thomas.[7] Absent profoundly differing constitutional visions, the current battles over circuit court nominations might appear merely as tit-for-tat for what Republicans did to Clinton nominees.

Understanding the split not only helps to explain and predict behavior, but it also raises larger questions.[8] For example, the so-called countermajoritarian difficulty is sometimes dismissed by the claim that the majority position will soon prevail.[9] If, however, the Court develops its own vision of the Constitution that is different from either party, it raises interesting issues about democratic accountability. Perhaps, however, in a political world where the parties have become more polarized, the Court in forging a majority opinion is offering the bipartisanship that the public purportedly wants but is otherwise lacking in Washington. For many reasons then—historical, behavioral, and theoretical—attention to this phenomenon is important.

Focusing on political parties is not something legal academics tend to do.[10] We know parties exist and differ on policy, and we understand them as electoral organizations, but we often ignore them as crucial institutions in governing.[11] When it comes to constitutional analysis, they fall off the radar screen. Legal academics are not alone. Supreme Court opinions that describe how our government works likewise ignore political parties. Justices opine about the balance of power between branches, or

7. A possible caveat is necessary with the fleeting nomination of Douglas Ginsburg, who was certainly conservative. But with his pot-smoking and wife maintaining her maiden name, he did not look like the true believer. The sentence in text was written before the nomination of Samuel Alito.

8. It sheds an interesting light on Mark Tushnet's imaginative proposal in TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

9. *See* Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957). *But see* Jonathan D. Casper, *The Supreme Court and National Policy-Making*, 70 AM. POL. SCI. REV. 50 (1976).

10. Of course there are notable exceptions such as Bruce Ackerman and Larry Kramer. And things are beginning to change. A symposium at Columbia Law School on the role of political parties resulted in an entire issue being devoted to the topic. *See* 100 COLUM. L. REV. (2000).

11. Political scientists often differentiate among aspects of the party. They refer to "party-in-the-electorate," "party-in-government", and "party-as-organization." When political scientists refer to "pigs and "pies" they are usually not referring to nursery rhymes. *See* JOHN ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA (1995).

how the administrative state functions, with hardly a reference to the role of political parties.[12] Interbranch struggles and issues of separation of powers today are often not the same as those described in the *Federalist Papers*, when parties did not exist. [13] What usually matters most today is whether we have divided government, how divided it is, and how it is divided. Ignoring the role of political parties when analyzing a governing arrangement would be unthinkable to any serious modern student of government.

Political scientists view political parties as central to governance.[14] The modern American state—indeed any modern democracy—cannot begin to be understood or explained without a deep understanding of the role played by political parties. Parties are the primary institutions that articulate, aggregate, and integrate interests in democratic polities. Moreover, understanding the positions of parties is the only way to understand the "output" of government. As Morris Fiorina has noted, "the only way collective responsibility has ever existed, and can exist, given our institutions, is through the agency of the political party; in American politics, responsibility requires cohesive parties."[15] Yet political scientists, like legal academics, have not noted the creation of a constitutional vision within each party.[16]

We proceed by describing the evolution of the parties' constitutional positions and then compare them to the position of the Court. We cannot recount every jot, tittle, and perturbation, and we often skip over several years. What matters is that at the

12. Redistricting cases require attention to parties, but even those opinions often seem to belie an understanding of how things actually work.

13. Justices often cite THE FEDERALIST PAPERS or convention debates as their guide. Insightful as Publius was, his description of how things would or should work did not include a role for political parties. Most of the Founders abhorred the idea of political parties; nevertheless, they quickly developed. As such, undue reliance on Federalist Papers and convention debates in light of the subsequent development of political parties is ironically ahistorical. *See* L.A. Powe, Jr. & H.W. Perry, *Political Parties and Separation of Powers* presented at the annual meeting of the American Political Science Association, Washington, D.C., September 1, 2005.

14. According to E.E. Schattschneider, "political parties created democracy, and . . . democracy is unthinkable save in terms of parties." ALDRICH, *supra* note 11, at 3 (quoting Schattschneider).

15. *Id.*

16. They do, however, talk about parties and the Court and the Constitution. *See, e.g.*, KEVIN MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE WAY TO BROWN (2003); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, AM. POL. SCI. REV. 511 (2002)

end of our story, the parties have strikingly differing constitutional visions that have persisted and seem likely to persist.

Parties, of course, are complex institutions. Obviously not each member of each party subscribes to every point that we shall make. But the positions ascribed to each party faithfully track the dominant national presidential wing of each party. We have developed these party visions by systematically examining the presidential platforms of the parties and statements by party leaders in publications such as *Congressional Quarterly* and the *Congressional Almanac*. We have also supplemented this more systematic examination with statements and articles in other major press venues. While the presidential wings are generally more ideologically "extreme," they are not as different from the broader parties as they once were. Political scientists have demonstrated that both parties are becoming more cohesive, more partisan, more polarized, and moving toward the ideological extremes. This is certainly true of the parties in Congress, [17] but there is some debate about whether it is also true of partisan identifiers in the public.[18] We also believe that the positions that we ascribe to the parties will ring true to the reader.

To set the stage for a discussion of political parties, the Constitution, and the Court, and to set the baseline for our story, we begin by retreading familiar ground. We recount two instances in which one party agreed with the Court and the other did not.

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17. On "party votes" (a majority of one party opposed a majority of the opposing party), "party cohesion" (percentage of members of a party voting with a majority of their own party) was 82.0% for Democrats and 86.5% for Republicans in the House during Clinton's first term. SAMUEL J. ELDERSVELD & HANES WALTON, JR., POLITICAL PARTIES IN AMERICAN SOCIETY 329 (2d ed. 2000). It continued between 80–90%. Party scores in the Senate have been similar. Another score of party unity is Presidential support scores. During the Clinton administration, support of Clinton by Democrats was quite high as was opposition by Republicans. *See* THE PARTIES RESPOND: CHANGES IN AMERICAN PARITES AND CAMPAIGNS 472 (L. SANDY MAISEL 3d ed. 1998). The trend has continued and become more dramatic during the Bush Administration. For the 108th Congress, House Republicans had a party unity score of 93.6 and House Democrats a score of 90.8. Senate Republicans matched their House counterparts with a party unity score of 93.6. Senate Democrats had a score of 89. Sean M. Theriault *Party Polarization in the U.S. Congress: Member Replacement and Member Adaptation*, PARTY POLITICS (forthcoming); *see also* JON BOND AND RICHARD FLEISHER, POLARIZED POLITICS: CONGRESS AND THE PRESIDENT IN A PARTISAN ERA (2000).

18. MORRIS FIORINA, CULTURE WAR? THE MYTH OF POLARIZED AMERICA (2005).

II. PRELUDE: SLAVERY AND THE DEPRESSION—ACKERMAN'S CONSTITUTIONAL MOMENTS

The rise of the modern mass political party is generally seen as beginning with Andrew Jackson and the efforts of Martin Van Buren in seeking the formation of a national Democratic Party. Our story, however, can begin after the emergence of two national, competitive parties, the Whigs and the Democrats. Of course, the crucial issue driving the parties and the polity was slavery.

Although the Constitution seemingly left slavery to the states, the Mexican War and territorial acquisition moved slavery to the top of the national agenda. The debate over slavery split both national parties on sectional lines, doomed the Whigs, and paved the way for an antislavery candidate to take the presidency in 1860 with just 40 percent of the popular vote and no southern support whatsoever.[19]

With slavery in the territories ripping both parties apart, it is no wonder that politicians in the 1850s labored so hard to depoliticize the issue by framing it as one of "law" for the Supreme Court.[20] Unlike the Democrats and Whigs, who understood that slavery in the territories was too hot to handle, the Supreme Court accepted the invitation to "finally" settle the issue with *Dred Scott*.[21] Obviously, that didn't work. The Whigs were no longer viable, and the newly formed Republican Party believed that slavery was a blot on the nation that should be placed on its way to an eventual extinction. Given the very limited powers of the national government to deal with slavery, the only way that essential ending was likely to occur was by a policy of containment—the very solution that *Dred Scott* barred.

The Republicans could not live in a world where *Dred Scott* was law because a constitutional amendment to ban slavery in the territories (or to give Congress that power) was a mathematical and political impossibility.[22] Halting the spread of slavery

19. "The territorial question sectionalized American politics and resulted in the election of a sectional president." MICHAEL A. MORRISON, SLAVERY AND THE AMERICAN WEST 256 (1997).

20. "From the statues of 1850 and 1854, it was evident that Congress would welcome a chance to rid itself of the vexing territorial issue. In fact, Congress had done all it could to foster a judicial resolution of the problem." DAVID M. POTTER, THE IMPENDING CRISIS 271 (1976).

21. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

22. With over one-third of the states being slave states, gaining the three-quarters Article V demands was unthinkable. It might have been easier to gain the three-quarters for the Crittendon Amendments protecting slavery where it existed, compensating own-

was a moral, not a partisan, position. That goal had created the party in the wake of the Whigs' demise, and it was the only common ground the purely northern Republicans shared. So they developed instead an alternative constitution, one in which Congress had the power to legislate on slavery in the territories.

What to do about *Dred Scott*? The case held that one black man remained a slave, but the rest of the opinion was dicta and any Justice appointed by a Republican president would be sworn to repudiate that dicta. As Abraham Lincoln, hardly the most hawkish Republican, stated immediately before his debates with Stephen Douglas, "somebody has to reverse that decision since it is made, and we mean to reverse it, and we mean to do it peaceably."[23] Would he vote to bar slavery in a new territory? Of course: "all that I am doing is refusing to obey [*Dred Scott*] as a political rule."[24] Each member of a coordinate branch of the government, he observed, is "sworn to uphold the Constitution—that each member had sworn to support the Constitution as he understood it."[25]

Lincoln and Republicans generally understood the Constitution to give Congress the power to ban slavery in the territories as the best option to continue what they held to be the Framers' intent to extinguish slavery over time. When they acquired power in the 1860 election, they passed just such a law.[26] Over the next seven years, they took whatever steps necessary—from war, to barring the South from taking seats in Congress, to military reconstruction, to impeachment of the President, to stripping the Supreme Court of jurisdiction to rule on the constitutionality of military reconstruction, to forcing the South to ratify the Fourteenth Amendment as a condition for readmission to the "indestructible Union of indestructible States"[27]—to implement that vision. While the Democrats throughout retained their vision of the Constitution in accordance with that of the Court, the Reconstruction Amendments and the election of Grant rendered that view (temporarily) moot.

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ers of runaway slaves, and extending the Missouri Compromise line. They, along with the three-fifths clause, were to be forever unamendable.

23. ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832-1858, at 451 (Library of America 1989) (July 10, 1858, at Chicago).

24. *Id.* at 450.

25. *Id.* at 452.

26. 12 Stat. 432 (1862). The Congress elected in November 1860 would be not scheduled to meet until December 1861 and came into special session July 4, 1861 without Southerners.

27. Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868).

Seventy years later, faced with economic collapse, the Democrats created a new constitution for an activist national government. Their constitution, once accepted, has lasted to the present. When Franklin Roosevelt suggested in his first inaugural that he might be required to assume powers normally exercised only in wartime,[28] he must have sensed that constitutional problems would be lurking. By the time of the *Gold Clause Cases*,[29] he could be sure because he was prepared to announce that the government would not comply with the decision[30]—a national discussion rendered unnecessary by the Supreme Court's surprising decision to withhold the claimant's desired remedy.[31] In New Deal circles a vastly more expansive notion of federal powers—even broader than that held by the three liberal Justices—emerged as the Court and the New Deal government waged war over the scope of federal power to cope with the Depression.

The Court-packing plan and Owen Roberts's switch set the stage for the New Deal's victory.[32] New Deal Justices Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, and Wiley Rutledge sealed that victory and guaranteed the ensuing revolution.[33] No longer was the power to regulate the national economy a constitutional issue. The New Deal Constitution and the Supreme Court's interpretation of it merged. The Republicans silently acquiesed.

The aftermath of the Civil War and the New Deal's Court battles are, of course, Bruce Ackerman's prime "constitutional moments" after the founding itself.[34] One need not agree with Ackerman's project to recognize that the Democrats in the 1860s

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28. "But in the event that the Congress shall fail to take one of these two courses, and in the event that the national emergency is still critical, we shall not evade the clear course of duty that will then confront me. We shall ask the Congress for the one remaining instrument to meet the crisis—broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe." JAMES MACGREGOR BURNS, ROOSEVELT: THE LION AND THE FOX 164 (1956).

29. Norman v. Baltimore & Ohio R.R., 294 U.S. 240 (1935); Nortz v. United States, 294 U.S. 317 (1935); Perry v. United States, 294 U.S. 330 (1935).

30. *See* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN 87–88 (1995).

31. Although the Court voted 8–1 that retroactively abandoning the promise to pay in gold violated the Constitution, it held 5–4 that to grant the plaintiffs a remedy would unjustly enrich them to the tune of $1.69 on the dollar.

32. *See* DAVID M. KENNEDY, FREEDOM FROM FEAR 325–37 (1999).

33. *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT (1998).

34. *See generally* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998).

and the Republicans in the 1930s embraced the older constitutional order that had been articulated by the Supreme Court and were repudiated. What we are about to describe is different. It is not one of Ackerman's constitutional moments by any means.[35] Nor does it involve an election (or elections) in which the voters repudiate the Court. And most important, it does not involve a single party differing from the Court. Instead, it is how the Republicans and then the Democrats over the past decades have each developed a rather complete constitutional vision that differs significantly from that of the Court and each other and have maintained that vision over time despite contrary decisions by the Court.

III. ONE CONSTITUTION: THREE VIEWS

Invariably, when both parties and the Court split on constitutional interpretation, the Court has found itself between the parties. Beginning with the mature Warren Court, there have been four issues on which this three-way split exists (or existed for at least thirty years): the rights of those accused of crime, the ability of government to make race-based decisions, abortion, and the relationship between government and religion, especially prayer in schools.[36] Strikingly, none of the four issues had received significant national attention before the Court's key decisions. Indeed, with respect to prayer and abortion, the issues had never been debated in Congress as matters of policy, much less constitutional law, prior to the Court's decisions.

All four areas result in substantial part from the retreat from the liberalism of the mature Warren Court, the continuing leftward movement of the Democratic Party for the quarter-century after Lyndon Johnson's landslide victory, and the dramatic rightward thrust that Ronald Reagan gave the Republican Party. Not surprisingly, the parties' positions on all four issues were initially politically driven. There is an additional issue that splits the parties. That is the role of the Court itself. We begin there and then proceed to the four substantive issues.

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35. A different but complementary source making the same point is MARK V. TUSHNET, THE NEW CONSTITUTIONAL ORDER (2003).

36. Because we focus on areas where the parties differ both with each other and the Court, we will not discuss areas, such as presidential war-making, where the parties (may) differ with each other, but where the Court has taken no position. Another reason for avoiding presidential powers is that the parties' positions have a decidedly opportunistic slant depending on who controls the presidency. As discussed below there may well be other areas involving a similar three-way split.

A. THE SUPREME COURT: GREAT OR SMALL?

From its lofty pronouncements in *Cooper v. Aaron*,[37] *Powell v. McCormack*,[38] and *United States v. Nixon*,[39] to *Casey*'s[40] musings on the relationship between the Court and "the country's understanding of itself as a constitutional republic,"[41] the Court has periodically pondered its role in the American system of government. But each party has a more basic view of the Court, which speaks to each of the four issues on which the parties are divided.

It is all but impossible to believe that Franklin Roosevelt never inserted the Court, even obliquely, into the 1936 campaign. However urgently he might have wanted to change its rulings, Roosevelt remained silent until he announced the Court-packing plan three months after his landslide victory. Roosevelt had more reason to attack the Court than any other twentieth century president, but no major party candidate had discussed the Court during a presidential campaign during the century,[42] and he didn't either.[43] Barry Goldwater, after wrenching his party away from the so-called "me too" Republicans,[44] broke

37. 358 U.S. 1 (1958).

38. 395 U.S. 486 (1969).

39. 418 U.S. 683 (1974).

40. Planned Parenthood of Southeastern Pennsylvania v Casey, 505 U.S. 833 (1992) (plurality). *Casey* goes further than *Cooper*, *Powell*, or *Nixon* because the plurality also orders the losers to still their voices on the topic of abortion.

41. *Id.* at 865. Justice Jackson once opined that the Court was not final because it was infallible; it was infallible only because it was final. Brown v. Allen, 344 U.S. 443, 540 (1953)(dissent). Now, if O'Connor, Kennedy, and Souter are to be believed, the Court is infallible—at least in truly big cases—because the country wants it so.

42. Although Progressives in both parties were hostile to judicial review and the Supreme Court in the first quarter of the century, Robert LaFollette's third-party effort in 1924 was the first to attack the Court during an election campaign. By 1922 he had already claimed in a published article that the "Supreme Court Rules the Nation." EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 314 n.67 (2000). His Progressive Party's platform called for both direct election of federal judges and a grant of power to Congress to overturn Supreme Court decisions. KENNETH CAMPBELL MACKAY, PROGRESSIVE MOVEMENT 11, 144 (1947). An even stronger statement comes in 1912 from Eugene Debs's Socialist Party Platform calling judicial review of federal legislation a "usurpation" and demanding its abolition so that a federal statute could only be repealed by Congress itself or a national referendum of the people. 3 HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 2202–03 (Arthur M. Schlesinger, Jr. & Fred L. Israel, eds., 1971).

43. Nor did his cabinet. "[P]ublication of Agriculture Secretary Henry Wallace's systemic critique of the Court was delayed." STEPHENSON, *supra* note 1, at 150. Stephenson aptly notes that direct attacks on the Court would have played into the Republican argument that FDR was an aspiring dictator. *Id.* at 150–51. *But see* KEVIN MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE WAY TO BROWN (2003) (discussing FDR's strategy contemplating the use of law).

44. The wing now called the Rockefeller (or country club) Republicans.

that tradition in his suicidal campaign against Lyndon Johnson, the New Deal, and the liberalism of the 1960s.[45] That liberalism was coalescing around the view that a Great Society needs a Great Supreme Court[46] and that the United States already had one headed by Chief Justice Earl Warren.

With the Warren Court as its ideal, Democratic liberals came to a constitutional vision totally opposed to their Progressive roots and the Democratic Party's previous positions. The United States needs a big Court, one willing to stand up to both Congress and the states in defense of newly created rights. With *Brown*,[47] *Engel*,[48] *Gideon*,[49] *Reynolds*,[50] and the dismantling of the domestic-security program[51] as models, Democrats not only abandoned their prior fears of conservative or reactionary Courts; they embraced an activist judiciary capable of protecting and enlarging individual rights that even liberal legislatures might hesitate to protect.

Roe v. Wade[52] sealed the deal. Moreover, it showed the political wisdom of the four liberals on the Senate Judiciary Committee in opposing Richard Nixon's nomination of the incompetent segregationist, G. Harrold Carswell, to the Court, (in part) because he was "insensitive to human rights"[53] and might prove "timorous in the responsibility he has to knock down a law which Congress may pass" that violates the Constitution.[54] Harry Blackmun, Lewis Powell, and later David Souter were neither insensitive nor timorous and accordingly were able to gravitate toward the ideal of a Great Court. Therefore, despite Republi-

45. In two books, THE POLITICS OF RAGE (1995) and FROM GEORGE WALLACE TO NEWT GINGRICH (1996) and a two-part PBS American Experience program, *Setting the Woods on Fire*, Dan T. Carter has persuasively portrayed George Wallace as the precursor to the Republican Party of the past two decades. We dissent with trepidation from such a perceptive historian, but on the point of creating and articulating an alternative constitution, Goldwater was first. Wallace added race as an essential theme, but he came later.

46. Mark V. Tushnet, *The Politics of Constitutional Law*, 79 TEX. L. REV. 163, 187 (2000).

47. Brown v. Board of Education, 347 U.S. 483 (1954).

48. Engel v. Vitale, 370 U.S. 421 (1962).

49. Gideon v. Wainwright, 372 U.S. 335 (1963).

50. Reynolds v. Sims, 377 U.S. 533 (1964).

51. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 310–17 (2000).

52. 410 U.S. 113 (1973).

53. *Nomination of George Harrold Carswell*, Exec. Rep. 91–14 at 13 (91st Cong. 2nd Sess. 1970) (individual views of Sen. Birch Bayh, Philip A. Hart, Edward M. Kennedy, and Joseph D. Tydings).

54. George Harrold Carswell, *Hearings Before the Committee on the Judiciary* 40 (91st Cong. 2nd. Sess. 1970) (Sen. Birch Bayh).

can dominance of the selection process, whereby a quarter of a century passed between the nominations of Thurgood Marshall and Ruth Bader Ginsburg, the Democrats with their rights-based universalism[55] did not waver on what the Court should be doing.

For Democrats, there was an important division of labor between the Court and the elected branches in a joint march toward complementary goals.[56] The elective branches would take the initiative to create and implement necessary legislation (with the Court quick to validate their actions). Where the legislative process was unsuited to deal with a given problem—such as Goldwater's two main targets, criminal procedure and school prayer—then the Court would take the lead, while Congress and the President would approve its actions.[57] "It was simply a matter of determining which institution was best-suited to handle a specific problem."[58] Thus the Court took responsibility for reforming criminal justice because it was "the branch of government most familiar with the problems and most capable of supervising the solutions."[59]

By contrast, Goldwater articulated what would be the Republican Party's position for the rest of the century. Regardless of its staffing, the federal judiciary had become too big for its own breeches, much less the country's. Thus of all three branches of government, "today's Supreme Court is least faithful to the constitutional tradition of limited government, and to the principle of legitimacy in the exercise of power."[60]

Republicans ran against the Warren Court in both 1964 and 1968,[61] and they wanted a truly diminished role for any future Court. Yet Republicans could not find the clean picture of an ideal Court that the Democrats possessed because Republicans wanted some, but not much, judicial intervention. Nixon's "strict

55. *See* JOHN GERRING, PARTY IDEOLOGIES IN AMERICA 253 (1998). The 1972 Democratic platform committed the party "to resuming the march toward equality: to enforcing the laws supporting court decisions and enacting new legal rights as necessary to assure every American true opportunity, to bring about a more equitable distribution of power, income and wealth." 30 CONG. Q. WEEKLY RPT. 1730 (1972).

56. Because the idea of the Great Court crystallized during the Great Society, the operative assumption was that the elected branches would be controlled by the Democrats.

57. President Kennedy provided the perfect model here with his strong defense of *Engel*. *See* POWE, *supra* note 51, at 189.

58. *Id.* at 214.

59. *Id.* at 494.

60. 22 CONG. Q. 2534 (1964).

61. *See* POWE, *supra* note 51, at 238, 391–92, 410, 474–75.

constructionist" and "judicial restraint" were about as good as could be done.[62] The Bushes prefer "not legislating from the bench."[63] Even as Republicans came to condemn *Roe v. Wade*, they did not wish to adopt the stance of the Progressives and claim judicial review was illegitimate.

The only effort after the Carswell nomination that the Republicans attempted to delegitimize the Court came from Attorney General Edwin Meese. In a 1985 speech to the American Bar Association he demanded a jurisprudence of original intent.[64] A little over a year later in a speech commemorating the Bicentennial of the Constitution, he proclaimed the obvious fact that there was a distinction between Supreme Court decisions and the Constitution itself, but then offered a controversial attack on *Cooper v. Aaron*[65] that only the text of the Constitution represented "the supreme law of the Land."[66] Three weeks later, Meese recanted, claiming only that there was a right to criticize the Court and its decisions.[67] Meese's trial balloon had been greeted by a cascade[68] of anathemas and was virtually undefended (if not indefensible).[69] Furthermore, Republicans knew

62. Nixon promised that his "nominees to the high court . . . would be strict constructionists who saw their duty as interpreting law not making law." E.W. Kenworthy, *Nixon, in Texas, Sharpens His Attack*, N.Y. TIMES, Nov. 3, 1968, at 1, 79. It is interesting how closely Nixon's language comes to that of liberals in condemning substantive due process. For example: "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. . . . We refuse to sit as a 'superlegislature to weight the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.'" Ferguson v. Skrupa, 372 U.S. 726, 729, 731–32 (1963).

63. Like father: Susan Page, *Bush Selects Little-Known* Judge, NEWSDAY, July 24, 1990 at 3, like son: Rick Klein, *Miers Speeches Backed Stronger Executive Branch*, BOSTON GLOBE, Oct. 18, 2005, at A1.

64. Edwin Meese, III, *The Attorney-General's View on the Supreme Court: Toward A Jurisprudence of Original Intention*, 45 PUB. ADMIN. REV. 701 (1985).

65. 358 U.S. 1, 18 (1958): ("Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that 'It is emphatically the province and duty of the judicial department to say what the law is.'").

66. Edwin Meese,III, *The Law of the Constitution* (delivered at Tulane University, October 21, 1986); Edwin Meese, III, *The Law of the Constitution*, 61 TULANE L. REV. 979 (1987).

67. Edwin Meese, III, *The Tulane Speech: What I Meant*, WASH. POST, Nov. 13, 1986, at A21, *reprinted in* 61 TULANE L. REV. 1003 (1987).

68. Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TULANE L. REV. 991, 991 n.1 (1987) (collecting sources).

69. Anthony Lewis accused Meese of "making a calculated assault on the idea of law in this country." *Law or Power*, N.Y. TIMES, Oct. 27, 1986, at A23. While finding Meese to be like "a stopped clock [that] is right twice a day," Sandy Levinson offered the

that some government actions relating to race or restraining the (typically Republican) President could slide over the constitutional line, and they wanted a Supreme Court capable of saying so (not to mention that such a Court might be necessary to "save" the country from the anarchy[70] of having a state court or legislature or the United States House of Representatives choose the nation's President).[71] Nevertheless, the very examples of "beyond the Beltway" jurists, who seemed less conservative on the Court than when nominated,[72] caused Republicans to worry that the Court itself was, at some fundamental level, untrustworthy.

Republicans often advocated achieving their constitutional vision through the Article V process. This has been merely a tactical way of signaling a desired constitutional outcome by an appeal to what appears to be a politically popular outcome. At all times the Republicans have believed that the Constitution, properly interpreted, yielded their desired outcome. The barrier was the Court's erroneous interpretation. The Article V route was necessary because it seemed highly unlikely that the Court would reverse course in the near future. Essentially Republicans demanded constitutional reform only when the offending decision commanded at least seven Justices. When the results were closer, 5-4 and 6-3, the Republicans did not call for an amendment. Instead they looked to normal attrition (two Justices per presidential term) to pave the way for the necessary constitutional change.

Unlike the Republicans, the Democrats have never demanded a constitutional amendment to overturn an unfavorable Supreme Court opinion. This may have resulted from the Democrats' belief in a Great Supreme Court and the assumption that revising a decision by amendment would undermine that belief. Or it may have stemmed from the fact that the Democratic

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sound historical perspective that Meese's speech echoed the views of both Abraham Lincoln and Franklin D. Roosevelt. Sanford V. Levinson, *Could Meese Be Right This Time?*, 243 THE NATION 689 (1986) *reprinted in* 61 TULANE L. REV. 1071, 1078 (1987).

70. Paul Gigot, *Liberals Discover the Tyranny of the Courts*, WALL ST. J., Dec. 15, 2000, at A16 ("saved the country from another month of fighting before reaching the same result"); Charles Krauthammer, *Defenders of the Law*, WASH. POST, December 15, 2000, at A41 (averted "a true constitutional crisis").

71. Or saving the country from the trauma of not knowing for about another month who the next president would be (something that had always been handled well enough in the month prior to any election).

72. Unlike Scalia and Thomas (as well as Bork and Rehnquist), who were nominated while working within the District, Blackmun, Powell, O'Connor, Kennedy, and Souter each came to the Court from outside the Beltway.

side of contested issues was never sufficiently popular to make a constitutional amendment even thinkable. More to the point, the Democrats fudged how strongly they supported a given proposition. As discussed below, strong church-state separation and quota-like affirmative action are prime examples.

With divergent visions of the Court serving as the backdrop, we turn to the evolution of the parties' divergent visions of the Constitution.

B. CRIMINAL PROCEDURE

1. Try the Criminal, Not the Police: Goldwater's attack on the Court for "contributing to the breakdown of law and order in the cities"[73] echoed attacks by police chiefs on *Mapp*[74] and *Escobedo*.[75] Even former President Eisenhower urged Republican delegates at the 1964 convention "not to be guilty of maudlin sympathy for the criminal who, roaming the street with switchblade knife and illegal firearms seeking a prey [sic], suddenly becomes upon apprehension a poor, underprivileged person who counts upon the compassion of our society and the weakness of many courts to forgive his offense."[76] But the Republican attack on the Court was premature. Americans did not yet perceive crime as a major issue;[77] by *Miranda*,[78] they would.[79]

In retrospect, especially after both Nixon and George Wallace expanded Goldwater's critique in the context of rising crime rates and annual summer race riots, the "law and order" position had come to be seen as being about race. But Goldwater was no racist, having opposed the Civil Rights Act on libertarian principles, and Americans could be genuinely disturbed about the decade's rising crime rates. "Law and order was a *separable* issue from race but it was not always a *separated* issue."[80] Beginning at least with Gerald Ford in 1966, Republicans fused race and crime for political gain: "How long are we going to abdicate law and order—the backbone of civilization—in the form of the soft

73. POWE, *supra* note 51, at 391–92.
74. Mapp v. Ohio, 367 U.S. 643 (1961).
75. Escobedo v. Illinois, 378 U.S. 478 (1964).
76. THEODORE H. WHITE, THE MAKING OF THE PRESIDENT 1964, 241–42 (1965).
77. Walter F. Murphy and Joseph Tanenhaus, *Public Opinion and the Supreme Court*, 32 PUB. OPINION Q. 31, 36 (1968).
78. Miranda v. Arizona, 384 U.S. 436 (1966).
79. POWE, *supra* note 51, at 399–400.
80. JAMES L. SUNDQUIST, DYNAMICS OF THE PARTY SYSTEM 382 (1983) (emphasis in original).

social theory that the man who throws a brick through your window or tosses a fire bomb into your car is simply the misunderstood and underprivileged product of a broken home?"[81] Eventually, we would have Willie Horton ads.

Fusing race and crime did work politically, but it would be a mistake to discount concerns over crime. "The right to be free from domestic violence"[82] can stand on its own.[83] *Miranda*, after all, had been accompanied by stories of confessed murderers going free[84] and Senator Sam Ervin was not alone in his reaction that "enough has been done for those who murder and rape and rob!"[85] That held true regardless of the race of the criminal. Nixon argued that *Miranda* nearly ruled out confessions as a law enforcement tool[86] and his punch line during the 1968 campaign was that "some of the courts have gone too far in weakening the peace forces against the criminal forces."[87] Wallace, of course, went further, much further.[88] Their campaigns tapped a growing concern over personal safety,[89] and they firmly embedded in the Republican Constitution the idea that the criminal trial should be about the defendant's guilt or innocence, not about police (mis)behavior.[90] "We must reestablish the principle that men are accountable for what they do and that criminals are responsible for their crimes."[91] When the Court put the death penalty into play,[92] the Republicans proclaimed their fealty to it.[93]

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81. JAMES L. SUNDQUIST, POLITICS AND POLICY 286 (1968) (quoting Ford).

82. John W. Finney, *Nixon and Reagan ask War on* Crime, N.Y. TIMES, Aug. 1, 1968, at 1. By domestic violence Nixon did not mean intrafamily violence; he meant violence by strangers.

83. Nixon did not always see it that way. After watching a "law and order" commercial he stated, "this hits it right on the nose. . . . It's all about law and order and the damn Negro-Puerto Rican groups out there." JOE MCGINNISS, THE SELLING OF THE PRESIDENT 1968, at 23 (1969).

84. FRED P. GRAHAM, THE SELF-INFLICTED WOUND 185 (1970).

85. Nan Robertson, *Ervin Protests Curbs on Police*, N.Y. TIMES, July 23, 1966, at 54.

86. POWE, *supra* note 51, at 410.

87. 2 STEPHEN E. AMBROSE, NIXON 154 (1989).

88. GRAHAM, *supra* note 84, at 10 ("If you walk out of this hotel tonight and someone knocks you on the head, he'll be out of jail before you're out of the hospital, and on Monday morning they'll try the policeman instead of the criminal.").

89. AMBROSE, *supra* note 87, at 201 ("In the past forty-five minutes this is what happened in America. There has [sic] been one murder, two rapes, forty-five major crimes of violence, countless robberies and auto thefts.").

90. *See* 32 CONG. Q. ALMANAC 906 (1976)("Emphasis must be on protecting the innocent and punishing the guilty.").

91. 24 CONG. Q. ALMANAC 988 (1968).

92. Furman v. Georgia, 408 U.S. 238 (1972).

93. 32 CONG. Q. ALMANAC 906 (1976).

Crime had become a Republican issue. Republican platforms robustly emphasized the problem of violence in society and the need for public safety.[94] They were never conflicted on whether or how to use the issue. Republicans worked to solve the crime problem; Democrats contributed to it. "We have solid evidence the war on crime is being won. The American people know that once again the thrust of justice in our society will be to protect the law-abiding citizenry against the criminals rather than absolving the criminal of the consequences of his own desperate acts."[95] Even before the Willie Horton ads, the elder George Bush sounded as if he were running against the American Civil Liberties Union (in which Michael Dukakis had trumpeted his membership while seeking the Democratic nomination).[96] However much the Court retreated, first under Burger and then under Rehnquist, it was never enough for Republicans. The hated *Miranda* and *Mapp* decisions had to be overruled, and they weren't. Indeed when *Miranda*'s day came, it was reaffirmed by Rehnquist with two more positive votes than it originally garnered.[97]

2. The Criminal Justice Process Must Be Scrupulously Fair: Democrats applauded the Warren Court's criminal procedure decisions.[98] No elected branch of government could have taken the antiquated criminal justice system and transformed it, especially against skeptical or hostile public opinion. Like the views of Nixon's "law and order," however, the Democrats' views on crime were intertwined with race. Just as African-Americans had been major beneficiaries of the Warren Court's revolution, so too were they disproportionately involved with the criminal justice system, and Democrats would not consider appearing hostile. Thus the 1968 platform, which firmly established the party's positions for at least two decades, stated that the "entire nation

94. "Republicans will address real problems that face Americans in their neighborhoods day by day—deterioration and urban blight, dangerous streets and violent crime that makes millions of Americans . . . fearful in their own neighborhood and prisoners in their own homes." 36 CONG. Q. ALMANAC 64B (1980). "Safety and security are vital to the health and well-being of people in their neighborhoods and communities." *Id.* at 66B. "Those convicted of serious offenses must be jailed swiftly, surely and long enough to ensure public safety." 40 CONG. Q. ALMANAC 51B (1984).

95. 30 CONG. Q. WEEKLY RPT. 2160 (1972).

96. David G. Savage, *Strategy Focuses Attention on Liberal Group*, L.A. TIMES, Aug. 30, 1988, at 14: "Dukakis' 'entire attitude' on social issues is 'best summed up in four little letters: A.C.L.U.,' Bush said."

97. United States v. Dickerson, 530 U.S. 428 (2000).

98. THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION 9 (1991).

is united in its concern over crime" and then proceeded to treat the issue as if it were political poison.[99]

Pledging a "vigorous and sustained campaign against lawlessness in all its forms,"[100] the Democrats placed organized crime and white collar crime first. Murder, rape, armed robbery, and other violent crimes were unmentionable by name. These were simply placed last as "other violations of the rights and liberties of others," as if they were incidentals or accidents.[101] In subsequent years the Democrats would decry domestic violence,[102] violence against "health care providers" and their female patients,[103] and the "unethical and unlawful greed among too many of those who have been governing our nation,"[104] but not until Bill Clinton's candidacy did the Democrats acknowledge forthrightly that "crime is a relentless danger to our communities."[105]

Because questioning criminality was deemed racist, the Democratic response was to ignore the criminal—except to assure everyone that his rights were to be respected and to pledge to attack the "root causes" of crime: "in fighting crime we must not foster injustice. Lawlessness cannot be ended by curtailing the hard-won liberties of all Americans."[106] "We can protect all people without undermining fundamental liberties by ceasing to use law and order as a justification for repression."[107]

By 1972, and especially thereafter, those liberties that had been "hard-won" under the Warren Court were being quite successfully undermined by the Burger Court.[108] The Democrats were doubly frozen. They did not believe that hard-won rights should be changed,[109] calling for "fairness in every part of the criminal justice system."[110] The 1980 platform talked of reform,

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99. 24 CONG Q. ALMANAC 1040 (1968).
100. *Id.*
101. *Id.*
102. 36 CONG. Q. ALMANAC 106B (1980).
103. 40 CONG. Q. ALMANAC 93B (1984).
104. 44 CONG. Q. ALMANAC 88A (1988).
105. 48 CONG. Q. ALMANAC 62A (1992).
106. 24 CONG. Q. ALMANAC 1040 (1968).
107. *Id.*
108. Yale Kamisar, *The "Police Practices" Phases of the Criminal Process and the Three Phases of the Burger Court*, *in* THE BURGER YEARS 143 (Herman Schwartz ed., 1987).
109. In 1976 the Democrats stated that they supported criminal justice reform, "but we oppose any legislative effort to introduce repressive and anti-civil libertarian measures in the guise of reform." 32 CONG. Q. ALMANAC 863 (1976).
110. 30 CONG. Q. WEEKLY RPT. 1739 (1972).

but always with caveats that could have been written by the ACLU: "scrupulously protecting fundamental liberties,"[111] "the very real concern about protecting civil liberties,"[112] "fully protecting civil liberties."[113] Nowhere did a platform show such concerns for protection against violent crime; the 1980 platform, quoted above, worried instead about "excessive or illegal police force."[114] In what is nice retrospective irony, the Democrats worried less about violence than how the "unethical and unlawful greed among too many of those who have been governing our nation, procuring our weapons and polluting our environment has made far more difficult the daily work of local policemen, teachers and parents who must convey to our children respect for justice and authority."[115] The crimes that should concern Americans were those that Republicans were prone to commit.

The 1972 platform was especially interesting. First, it sought to blame the rise in crime on the Nixon administration.[116] Then it devoted more space to advocating the restoration of the rights of ex-felons than to combating street violence.[117] In 1980 domestic violence received more attention than all other crimes, which were unmentioned by name but nevertheless "condemned," but then quickly understood as parts of "a life of poverty and despair" which Democrats would attempt to remedy.[118] Four years later, the Democrats condemned the Ku Klux Klan and other hate groups, but never mentioned violent crime even under the sonorous euphemism of "other violations of rights and liberties."[119] They were opposed in 1984, however, to the sale of "snub-nosed handguns"[120] and, four years later, so-called "cop killer" bullets.[121]

In retrospect, Michael Dukakis's pod-person response in the 1988 Presidential debate to the hypothetical concerning the rape

111. 36 CONG. Q. ALMANAC 106B (1980).
112. *Id.*
113. *Id.* at 108B.
114. *Id.* at 109B.
115. 40 CONG. Q. ALMANAC 88A (1988).
116. Nixon's pledge "to strengthen the 'peace forces'... has been broken [and] [v]iolent crime has increased by one-third... Effective law enforcement requires tough planning and actions. This Administration has given us nothing but tough words... [and] unequal law enforcement." 30 CONG. Q. WEEKLY RPT. 1739 (1972).
117. *Id.* at 1740.
118. 36 CONG. Q. ALMANAC 105B (1980)
119. *Id.* at 94B.
120. 40 CONG. Q. ALMANAC 97B (1984).
121. 44 CONG. Q. ALMANAC 88A (1988).

and murder of his wife is fully explicable.[122] Democrats worried about hard-won liberties and the possibility that repression and miserly federal spending precluded the alleviation of the root causes of crime. Thus while Democrats saw the Willie Horton ad as Nixon's "law and order" redux, Republicans saw Horton as the symbol of the logical outgrowth of the Democrats' obsessive concern with the rights of criminals (and not simply those just accused of crime) and the Democrats' lack of concern over crime itself.[123]

Bill Clinton did not repeat Dukakis's errors. He returned to Arkansas just before the 1992 New Hampshire primary to oversee the execution of Rickey Ray Rector, an African-American cop-killer who gave himself a frontal lobotomy by a gunshot wound to the head and thereby reduced himself to the erratic comprehension of a young child.[124] For a variety of reasons, not the least of which was demographic, violent crime dropped during the Clinton era, and crime was not an issue in the 2000 election. The problem of mistakes in the capital punishment system received full media attention, but it was a press issue, not one in which the Democratic ticket showed the slightest interest even though the Texas system was an extremely inviting target.

In giving his support to a constitutional amendment on victims' rights (in time for the 1996 campaign), Clinton stated that he had "learned what every victim of crime knows too well: As long as the rights of the accused are protected and the rights of victims are not, time and again, the victims will lose."[125] After the Oklahoma City bombing, Clinton had shown that Democrats, too, could be tough on criminals. He "vigorously supported"[126] the Effective Death Penalty and Antiterrorism Act,[127] a Republican measure—taken from Newt Gingrich's Contract with America—to speed the habeas process and supposedly to

122. Richard Cohen, *A Man in Hiding*, Wash. POST, Oct. 16, 1988, at C7.

123. EDSALL & EDSALL, *supra* note 98, at 224.

124. His pistol shot to his head (coming after he had casually shot the police officer) took away the front three inches of his brain. Marshall Frady, *Death in Arkansas: Annals of Law and Politics*, 69 THE NEW YORKER, Feb. 22, 1993, at 105. Rector left the dessert from his last meal uneaten because he always withheld some food for later consumption, and he intended to return to finish it. "One of his attorneys had earlier stated that Rector 'thinks he'll be back in his cell on Saturday morning.'" *Id.*

125. *U.S. Newswire*, June 25, 1996.

126. Mark V. Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws*, 47 DUKE L.J. 1, 21 (1997).

127. 110 Stat. 1214, 1221 (1996) (amending 28 U.S.C. §2244(b)).

reduce the "thousands upon thousands of frivolous petitions [that] clog the federal district court dockets."[128]

Whether Clinton's approach to criminals represents the Democratic position after his presidency, we do not know. If it does, then the Democrats will have merged their official position with that of the Court. If not—and we suspect that it does not—then the three-way split will continue with many Republicans unsatisfied, with some tempted to slip into demagoguery, and with the Democrats believing that the criminal justice system is unfairly tilted against the defendant.

C. RACE

1. The Constitution Is Color-Blind: Abraham Lincoln's party believed it had largely completed its work when it joined Northern Democrats to pass the Civil Rights Act of 1964 and the Voting Rights Act a year later. Those statutes' strong anti-discrimination features[129] combined with a formal rejection of race-conscious remedies in employment.[130] Despite Goldwater's negative vote on the Civil Right Act, Republicans had provided the necessary and overwhelming support to break Southern filibusters against both bills. Nevertheless, the civil rights movement, these laws, and Goldwater's presidential candidacy would place African-Americans squarely within the Democratic Party.[131] This, combined with annual summer race riots during the 1960s, had immediate consequences for Republicans. Driven by politics, not ideology, they came to be perceived as less supportive of civil rights. Thus the 1968 platform almost completely ignored race and civil rights,[132] and observers saw Nixon's "law and order" campaign as explicitly appealing to white voters and therefore implicitly anti-civil rights.

The move from color-blindness to race-consciousness was swift, unexpected, and, initially, not much debated. First, the NAACP intentionally and successfully swamped the Equal Em-

128. CONTRACT WITH AMERICA 44 (Ed Gillespie and Bob Schellhas, eds., 1994).

129. As explained by Hubert Humphrey, the floor leader, discrimination was "a distinction in treatment given to different individuals because of their different race." 110 CONG. REC. 5423 (1964). The prohibition on discrimination necessarily barred "preferential treatment for any particular group." *Id.* at 11,848.

130. ANDREW KULL, THE COLOR-BLIND CONSTITUTION 183–84 (1992); HERMAN BELZ, EQUALITY TRANSFORMED 24 (1991); THOMAS SOWELL, CIVIL RIGHTS 37 (1983).

131. EDSALL & EDSALL, *supra* note 98, at 35–36.

132. The sole mention was a boiler-plate statement that the country "*must* attack the root causes of poverty and eradicate racism, hatred and violence." 24 CONG. Q. ALMANAC 987 (1968). There was no elaboration.

ployment Opportunity Commission with Title VII complaints.[133] Case-by-case adjudication of individual cases would take forever in a workforce where seniority and jobs were entrenched by past union discrimination. Then, with Nixon's approval, Secretary of Labor George Shultz established the so-called "Philadelphia Plan," which required construction unions in greater Philadelphia to set "goals and time tables" for the hiring of African-Americans for craft union jobs.[134] Within a year, the "goals and time tables" approach[135] was incorporated in regulations governing all federal contractors with greater than fifty employees.[136] A year later, in *Griggs v. Duke Power*,[137] the Supreme Court stripped employers of their ability to set job qualifications not driven by business necessity if the qualifications had an adverse disparate impact on minority groups.[138] *Griggs* was a large step toward a legal regime in which an employer would have to explain why the racial ratio of its work force did not match that of the geographical area.

If it seems strange that the Nixon administration rather than its predecessor was the one that abandoned colorblind nondiscrimination (absent a judicial order), it was. Nevertheless, the Philadelphia Plan made sense. First, it offered a potential solution to a huge problem of privilege based on racial discrimination. More importantly, it pitted what were then two prime Democratic Party constituencies—organized labor and African Americans—against each other.[139]

At virtually the same time, the Nixon administration tried to slow down the escalating desegregation orders coming in the

133. *See generally* JACK GREENBERG, CRUSADERS IN THE COURTS 412–14 (1994).

134. Paul Marcus, *The Philadelphia Plan and Strict Racial Quotas on Federal Contracts*, 17 UCLA L. REV. 817 (1970).

135. "The rate of minority applicants recruited should approximate or equal the rate of minorities to the applicant population in each location." Department of Labor Order No. 4, as reported in the *New York Times*, Jan. 16, 1970, at 15.

136. They were required to establish goals and timetables for "underutilization," defined as "having fewer minorities or women in a particular job group than would reasonably be expected by their availability." 41 C.F.R. § 60-4.6(b) (2005).

137. 401 U.S. 424 (1971).

138. *Id.* at 436 (requiring tests to be "demonstrably a reasonable measure of job performance").

139. According to John Erhlichman, Nixon's chief domestic advisor, "Nixon thought that Secretary of Labor George Shultz had shown great style in constructing a political dilemma for labor union leaders and civil rights group.... Before long, the AFL-CIO and the NAACP were locked in combat over one of the passionate issues of the day and the Nixon administration was located in the sweet and reasonable middle." EDSALL & EDSALL, *supra* note 98, at 97.

wake of *Green v. New Kent County*.[140] Specifically the administration opposed busing as a desegregation tool, and Nixon publicly vowed to "hold busing to the minimum required by law."[141] Then he led an unsuccessful Republican effort to undo legislatively[142] the major busing decision, *Swann v. Charlotte-Mecklenburg Board of Education*.[143] Nixon's stand against busing was the key aspect of his strategy to move conservative white Southern Democrats into their natural ideological home, the Republican Party.[144] Therefore busing was an issue on which the Republicans never varied their stance, only the tone of their rhetoric. They certainly liked the phrase "forced busing."[145]

The Republicans favored a race-conscious remedy in employment where past discrimination was by private parties and was assumed but not proven. The Republicans then opposed what was thought to be the only effective remedy for public school desegregation where state laws had previously mandated discrimination and federal judges had found continuing effects of that specific unconstitutional action. The inconsistency of the two positions was ameliorated by how neatly they met the Republicans' political needs. Yet when the Democrats mandated quotas for delegates to their 1972 convention, Nixon cynically exploited George Wallace's message by turning on his own administration's affirmative action employment efforts: "When young people apply for jobs . . . and find the door closed because they don't fit into some numerical quota, despite their ability, and they object, I do not think it is right to condemn those young people as insensitive or even racist."[146]

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140. 391 U.S. 430 (1968).

141. AMBROSE, *supra* note 87, at 460–61. When Elliot Richardson, Secretary of HEW, seemed too supportive of busing decrees, Nixon informed aide John Ehrlichman "to jump on Richardson and Justice and tell them to *Knock off this Crap*. I hold them personally accountable to keep their left-wingers in step with my express policy—Do what the law requires and not *one bit more*." *Id.* (emphasis in original).

142. *See* JAMES T. PATTERSON, GRAND EXPECTATIONS 733 (1996).

143. 401 U.S. 1 (1971).

144. *Id.* at 730–31.

145. *See, e.g.*, 32 CONG. Q. ALMANAC 907 (1976): "We believe segregated schools are morally wrong and unconstitutional. However, we opposed forced busing to achieve racial balances in our schools. . . . If Congress fails to act, we would favor consideration of an amendment to the Constitution forbidding the assignment of children to schools on the basis of race." 36 CONG. Q. ALMANAC 63B (1976): "We must halt forced busing and get on with the education of all our children." 30 CONG. Q. WEEKLY RPT. 2159 (1972): "We are committed to guaranteeing equality of educational opportunity and to completing the process of ending *de jure* school segregation. At the same time, we are irrevocably opposed to busing for racial balance."

146. AMBROSE, *supra* note 87, at 637.

With Bradford Reynolds as the head of the civil rights division of the Reagan Justice Department, the Republicans enshrined their view that "it was impermissible to use policies to promote groups that might have suffered past discrimination—i.e., blacks—against the interests of individuals in the present—i.e., whites."[147] This conclusion took aim at the recent *Bakke*[148] and *Fullilove*[149] decisions, which held quotas illegal but nevertheless sustained significant amounts of affirmative action in higher education and government contracting. Reynolds believed that the job of government was not to remedy historic patterns of discrimination; it was to protect individuals from specific acts of discrimination. Along with busing, affirmative action was unconstitutional and out.[150] Reynolds's policies, President Reagan made clear, were Reagan's.[151]

Reagan also wanted to end the Voting Rights Act of 1965 when it expired during his first term, but widespread bipartisan support forced him to endorse reauthorization.[152] The 1982 Act's new language on voter dilution, it turned out, offered an irresistible opportunity for "the ultimate political one-night stand."[153] The Republicans took it.[154] At the urging of strategist Lee Atwater, the first Bush Justice Department joined with civil rights groups to demand as many safe black legislative districts as possible. Affirmative action for black Democratic candidates diluted the strength of white Democrats, possibly moved some of them into the Republican Party, and offered the opportunity to pack Democrats into their own very safe districts. Republicans knew that the position was inconsistent with their colorblind approach to on all other race issues,[155] but the potential political

147. CARTER, *supra* note 45, at 56.

148. Board of Regents v. Bakke, 438 U.S. 265 (1978).

149. Fullilove v. Klutznick, 448 U.S. 448 (1980).

150. "I am, most candidly, offended by all forms of discrimination; I regard government tolerance of favoring or disfavoring individuals because of their skin color, sex, religious affiliation or ethnicity to be fundamentally at odds with this country's civil rights policies." William Bradford Reynolds, *The Reagan Administration and Civil Rights*, 1986 U. ILL. L. REV. 1014.

151. "Mr. Reynolds' civil rights views reflect my own. The policies he pursued are the policies of this administration, and they remain our policies as long as I am president." Howard Kurtz, *Reynolds' Nomination Voted* Down, WASH. POST, June 28, 1985, at A1.

152. CARTER, *supra* note 45, at 58.

153. Jim Sleeper, *Rigging the Vote by Race*, WALL ST. J., Aug. 4, 1992, at A14 (quoting journalist Peter Brown).

154. Samuel Issacaroff, *The Constitutional Contours of Race and Politics*, 1995 SUP. CT. REV. 45, 54–55.

155. "You don't sell your birthright for a few votes" was the comment of William Bennett. Richard L. Berke, *Strategy Divides Top* Republicans, N.Y. TIMES, May 9, 1991,

gains in the legislatures were too appealing for principle to prevail.[156]

Surprisingly, after pushing so hard for "max-black" districts, the Republicans reversed themselves and reverted to arguing for race neutrality in their amicus brief in *Shaw v. Reno*.[157] The reason for the return to form is not clear. Perhaps it was Atwater's early death. Perhaps it was the unknown of the Clinton administration's civil rights division. Perhaps it was because the "max-black" policy did not yield the expected Republican congressional gains in the 1992 elections. For whatever reason, once the reversion was made, the Republicans had a consistent colorblind principle on race. But "max-black" in 1994 helped produce the Republican victory,[158] and the threat to their majority in the 2002 elections prompted Republicans to readopt it in two Southern states.[159]

Then, after the surprising Republican victory in the off-year elections, incoming Senate Majority Leader Trent Lott launched into one of his periodic laments that the nation had not followed Mississippi in backing Strom Thurmond's 1948 Dixiecrat presidential campaign. Reporters and webloggers dug up ample evidence of Lott's affinities for Thurmond's views. To recover, Lott engaged in "serial, unprincipled apologies" going so far on Black Entertainment Television as to support affirmative action "absolutely across the board."[160] Democrats and the *New York Times* called on the Bush administration to follow Lott's lead and abandon its beliefs and to cynically support affirmative action because it's "the right thing" to do.[161] The assertion was that to cleanse itself of its racist past (and perhaps present), the Republicans should seek absolution by supporting the University of Michigan in *Bollinger*.[162] Indeed, delighted by Lott's hoof-in-

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at A7.

156. The Bennett quote in the previous footnote was rejected by the Republican Party's general counsel with the statement that the Bush Justice Department was just "carrying out the Voting Rights Act." *Id.*

157. 509 U.S. 630 (1993).

158. Timothy G. O'Rourke, Shaw v. Reno*: The Shape of Things to Come*, 26 RUTGERS L.J. 723, 725–28 (1995).

159. David E. Rosenbaum, *Fight Over Political Map Centers on Race*, N.Y. TIMES Feb. 21, 2002, at A18 (Mississippi); Adam Cohen, *Why Republicans Are Shamelessly in Love with the Voting Rights Act*, March 24 2002, §4 at 14 (Georgia).

160. Editorial, *Lott and the Race Card*, Wall ST. J., Dec. 19, 2002, at A14.

161. Editorial, *Stand Up for Affirmative Action*, N.Y. TIMES, Dec. 19, 2002, at A30: "[Lott] sounded cynical under the circumstances, but it was also the right thing to say."

162. Democratic Senator Patrick Leahy went so far as to state that the Bush Administration "will have to intervene [as amicus] to uphold" the Michigan program. "This Week" ABC, Dec. 22, 2002.

mouth disease, Democratic Senate leader Tom Daschle claimed that failure to support Michigan "should be viewed as a litmus test of the administration's commitment to civil rights."[163]

Some Republican operatives also thought that Bush should support Michigan because of the abysmally small percentage of the African-American vote he received in 2000 and his need to court Hispanic voters.[164] Instead, Bush engineered Lott's ouster as the GOP leader and then filed an amicus brief opposing the University of Michigan's programs (but not declaring that colleges could never consider race).

The Rehnquist Court itself edged away from *Bakke* and *Fullilove* (as well as *Metro Broadcasting*[165]) in *Croson*,[166] *Adarand*,[167] and *Shaw v. Reno*,[168] but it never went all the way to the Republican race-neutral position. The Court's stopping point, as articulated in *Easley v. Cromartie*[169] and implemented in the Michigan cases, appears to be that some but not too much use of race is consistent with the Constitution.[170] Michigan's undergraduate admissions policy gave each minority application 20 out of 150 possible points (with 100 points guaranteeing admission) just for applying.[171] Its law school's "holistic" approach ensured that each class would contain a "'critical mass' of [underrepresented] minorities."[172] Like eight Justices who split evenly on these cases, the Solicitor General's brief saw no constitutional difference between Michigan's programs. Justice O'Connor, however, did. The former was an unconstitutional quota, while the latter was acceptable at least for a generation. She may have found a happy compromise because President Bush put the best face he could on the Administration's defeat by declaring the opinions "a careful balance" and joined the Court in "look[ing]

163. Neil L. Lewis, *Bush and Affirmative* Action, N.Y.TIMES, Jan. 16, 2003 at A1, A24.

164. Jason L. Riley, *President Bush Needs to Lead his Party on Race*, Wall ST. J., Jan. 16, 2003, at A12; Adam Nagourney, *Bush and Affirmative Action*, N.Y. TIMES, Jan. 16, 2003, at A24. Howard Kurtz, *Media Notes*, WASHINGTONPOST.COM, Jan. 16, 2003.

165. Metro Broadcasting v. FCC, 497 U.S. 547 (1990).

166. Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

167. Adarand Constructors v. Pena, 515 U.S. 200 (1995).

168. 509 U.S. 630 (1993).

169. 532 U. S. 234 (2001).

170. John Hart Ely characterized the Court's position as "indeterminate to the point of incoherence." *Confounded by* Cromartie, 56 U. MIAMI L. REV. 489, 496 (2002).

171. *See* Gratz v. Bollinger, 539 U.S. 244 (2003)

172. *See* Grutter v. Bollinger, 539 U.S. 306 (2003)

forward to the day when America will truly be a color-blind society."[173]

2. Race-Consciousness Is Essential: If there had been any doubt about the move of African-Americans to the Democrats after the Civil Rights Act and Voting Rights Act, Nixon's Southern strategy closed all exits. Furthermore the long-time goal of a national policy of nondiscrimination was no longer a goal; it was also the supreme law of the land. New goals were necessary, and the idea of a color-blind society passed from the scene almost before the ink was dry on the 1964 and 1965 Acts. Thus when *McLaughlin v. Florida*[174] invalidated an interracial cohabitation law, it marked the last time that the NAACP Legal Defense Fund offered its heretofore standard citation to the first Justice Harlan's *Plessy* dissent for the proposition that the Constitution was colorblind and race was a constitutional irrelevance. Three years later, the LDF brief in *Loving v. Virginia*[175] for the first time omitted any reference to the *Plessy* dissent.[176]

In the long run, equal opportunities leading to changed results in the work place depended on improved education. Democrats backed the Court's busing decisions. Just as the Republicans condemned busing, the Democrats deemed it essential, but muted their support in light of busing's unpopularity.[177]

The promise of busing to create an integrated society was undermined by the Court in *Milliken v. Bradley,*[178] which held that federal judges lacked the power to change school district lines and order interdistrict busing. Majority black school districts would therefore remain that way; indeed, they would probably become increasingly one-race districts. The Court then seemingly closed the door on judicial creation of the Democratic ideal of an integrated society in *Washington v. Davis,*[179] which held that the disparate impact of laws on African-Americans did not even require an explanation, let alone make the laws unconstitutional. The combination of the two cases pushed affirmative

173. *Split Decisions*, SAN ANTONIO EXPRESS-NEWS, June 24, 2003, at A1.
174. 378 U.S. 184 (1964.
175. 388 U.S. 1 (1967).
176. POWE, *supra* note 51, at 286.
177. 28 CONG. Q. ALMANAC 1728 (1972)(Busing is "another tool.") 32 CONG. Q. ALMANAC 861 (1976) ("It is clearly our responsibility as a party and as citizens to support the principles of our Constitution.") 36 CONG. Q. ALMANAC 100B (1980) ("Mandatory transportation . . . remains a judicial tool of last resort.").
178. Milliken v. Bradley, 418 U.S. 717 (1974).
179. 428 U.S. 153 (1976).

action to the fore as the remaining way to achieve an integrated society.

African-Americans were Democrats, very loyal ones, and therefore the Democrats were committed to race-conscious remedies. The limit seemed to be quotas, a poisonous word for another Democratic constituency, Jews, and an end that everyone found objectionable during the debates on the Civil Rights Act.[180] "By 1969, the bipartisan consensus on which the Civil Rights Act rested had collapsed, and civil rights was a bitterly partisan issue. The Democratic party . . . [t]rying to retain the support of organized labor and middle class opinion . . . concealed and obfuscated its growing commitment to race conscious remedies."[181] Mention of quotas was forbidden.

Then in 1972 in a stunning and politically disastrous[182] move, the Democrats required quotas for delegates to their 1972 convention. Racial and gender quotas were mandatory. One result was to unseat Mayor Richard Daley's Chicago delegation.[183] George McGovern tried to escape this issue with an unequivocal "reject[ion of] the quota system as detrimental to American society."[184]

Unfortunately for African-Americans, strident Republican opposition to abortion drove many affluent voters into the Democratic Party, and the Democrats' economic agenda became less progressive.[185] As a result, Democrats would grant African-Americans all kinds of affirmative action, but what the Democrats would not offer was more money for social programs. In the process the Democrats became completely wedded to aggressive affirmative action as "an essential component of our commitment to expanding civil rights protection."[186] Jesse Jackson's 1984 candidacy drove the party to candor that almost encom-

180. *See* BELZ, *supra* note 130, at 24. "The sponsors of Title VII unequivocally rejected the view that it was in any way intended or capable of being interpreted to promote race-conscious preferential practices."

181. *Id.* at 34.

182. *Id.* at 94 ("When millions of Americans saw delegates on television who had been selected according to strict affirmative action rules, it stimulated fears that jobs and education would also be apportioned on the basis of quotas rather than merit.").

183. PATTERSON, *supra* note 142, at 760.

184. Editorial, *The Quota Controversy*, THE NEW REPUBLIC, Oct. 21, 1972, at 9.

185. MARK GRABER, RETHINKING ABORTION 133 (1996) ("As the Democratic Party becomes a better vehicle for pursuing the liberal abortion policies favored by most affluent Americans, that party has become a worse vehicle for pursuing the liberal redistributive policies favored by less affluent Americans.").

186. 36 CONG. Q. ALMANAC 105B (1980). One might well substitute "only" for "essential."

passed using the forbidden term quota: "The Party reaffirms its longstanding commitment to the eradication of discrimination in all aspects of American life through the use of affirmative action, goals, timetables, and other verifiable measurements to overturn historic patterns and historic burdens of discrimination."[187]

With Bill Clinton, the Democrats for the first time had an administration fully supportive of affirmative action, right down to quotas in the Cabinet.[188] Furthermore, in Deval Patrick, Clinton's second choice to head the Civil Rights Division, Clinton had the exact opposite of Reagan's Bradford Reynolds. Whereas Reynolds could not find an affirmative action plan he could tolerate, Patrick could not find one that went too far. Patrick won an intramural battle to intervene in *Taxman v. Piscataway,* where a white teacher was dismissed in favor of an African-American teacher with identical seniority because budget cuts required one to go. What made *Taxman* particularly unappealing as a vehicle to sustain affirmative action was that the Piscataway High School already had double the requisite percentage of African-American teachers.[189] Then, after the California voters adopted Proposition 209 with its anti-discrimination language,[190] Clinton's spokesman Mike McCurry told reporters that the President was following the issue "very carefully" and agreed with the Justice Department and a district court judge[191] that it was unconstitutional.[192] President Clinton then ordered the Justice Department to intervene on behalf of a challenge to the voters' right to end affirmative action.[193]

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187. 40 CONG. Q. ALMANAC 92B (1984).

188. "A Cabinet that looks like America" had the requisite 70 percent attorneys.

189. The school's rationale for dismissing Sharon Taxman was that "diversity" was essential not only in the high school as a whole, but in each department as well. Supporters of affirmative action breathed a national sigh of relief when Taxman was bought out after the Court granted certiorari. 522 U.S. 1010 (1997).

190. Cal. Const. Art. 1, §31(a) ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.").

191. Coalition for Economic Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996).

192. David Tell, *Sophistry and Affirmative Action*, The WEEKLY STANDARD, Feb. 3, 1997, at 9. At a time when *Adarand* made it arguable that all of California's programs were unconstitutional, a judge ruled that the Fourteenth Amendment prohibited the California voters from discontinuing them, and Clinton and his Justice Department thought so, too.

193. Michael Kelly, *Breach of Promise*, The NEW REPUBLIC, April 28, 1997 at 4. The intervention did not help the challengers as the Ninth Circuit reversed. Coalition for Economic Equity v. Wilson, 110 F.3d 1431 (9th 1997).

The 1994 election changed the politics of affirmative action by giving the Republicans control of both houses of Congress and therefore the first chance legislatively to implement their views. Nevertheless, a Clinton veto could have negated their less than supermajority. As it happened, however, *Adarand* changed the landscape by moving executive action to the foreground while the legislature watched. Clinton offered "mend it, don't end it," a thorough reanalysis by the Civil Rights Division of federal affirmative action programs.

Clinton's support for affirmative action foreshadowed the outcome of the review. Essentially "mending" it meant eliminating only gratuitous discrimination against whites.

> It does not mean—and I don't favor—the unjustified preference of the unqualified over the qualified of any race or gender. It doesn't mean—and I don't favor—numerical quotas. It doesn't mean—and I don't favor—rejection or selection of any employee or student solely on the basis of race or gender without regard to merit."[194]

Not surprisingly, only token corrections were necessary to "mend it," and "ending it" was never considered. Yet when even Ronald Dworkin acknowledged that "unless the court changes direction, affirmative action is finished as a means of securing racial diversity in industry or business,"[195] the Clinton administration's tenacity was an extraordinary testament to the Democrats' commitment to race consciousness.

D. ABORTION

1. Roe *Must Go:* When abortion emerged as a political issue, it recognized no party lines.[196] Robert Packwood introduced legislation both to create a national right to abortion[197] and to liberalize the District of Columbia's law.[198] Nelson Rockefeller

194. THE NEW REPUBLIC, April 28, 1997 at 4. This was, however, movement from the Justice Department's position in *Taxman.*

195. Ronald Dworkin, *Race and the Uses of Law*, NEW YORK TIMES, April 13, 2001, at A19.

196. Thus one of the initial votes on the Hyde Amendment to prevent funding of abortions had the following divisions in the House (with the negatives in the majority): Republicans 98–70, northern Democrats 96–35, southern Democrats 53–18. 30 CONG. Q. ALMANAC, 93rd Cong., 2d Sess., 76-H (1974)

197. The National Abortion Act would "guarantee and protect" the "fundamental constitutional right" of a woman to "control her own fertility." S. 3746, 91 Cong. 2d Sess. (1970).

198. S. 3501, 91st Cong. 2d Sess. (1970).

presided over the legalization of abortion in New York.[199] George McGovern was mildly pro-abortion.[200] Republicans were the leaders on both sides in the congressional battles of the 1970s.[201] With "elites in both parties favoring legal abortion, the elite Justices on the Supreme Court proved quite sympathetic to the claims that women had a constitutional right to terminate an unwanted pregnancy."[202]

Although some commentators expected *Roe* to settle the abortion controversy, *Roe* instead moved a state issue into national politics, where neither party was ready to deal with it.[203] While both Gerald Ford and Jimmy Carter felt that *Roe* had gone too far, abortion was peripheral to the 1976 campaign. Four years later, George Bush ran for the presidency with an identical position in a changed political landscape: no federal funding of abortion and no constitutional amendments to roll back *Roe*.[204]

In both legalizing and politicizing abortion, *Roe* managed simultaneously to create its own opposition[205] as well as to cause its supporters to demobilize (at least partially),[206] thereby yielding the offense to its opponents, initially led by the Catholic Church.[207] Henry Hyde offered the first successful assault on *Roe* with his amendment prohibiting the federal funding of abortions. The votes on the Hyde Amendment indicated strong Republican support in the House with Democrats more evenly split.[208] But

199. In 1970 New York adopted a law legalizing all abortions in the first twenty-four weeks of a woman's pregnancy. *See* BARBARA H. CRAIG & DAVID M. O'BRIEN, ABORTION AND AMERICAN POLITICS 42, 74 (1993).

200. CONG. Q. WEEKLY REP., Sept. 7, 1972 at 2222. (Abortion was "a private matter which should be decided by a pregnant woman and her own doctor" while inconsistently also stating abortion was "a matter to be left to state governments.") Following Hubert H. Humphrey's lead in California primary against McGovern, Republicans referred to McGovern as the "triple A" candidate: "Abortion, Acid, Amnesty." PATTERSON, *supra* note 142, at 759.

201. CRAIG & O'BRIEN, *supra* note 199, at 117.

202. GRABER, *supra* note 185, at 153.

203. In their platform Republicans conceded the issue of abortion was "one of the most difficult and controversial of our time." They protested the Court's "intrusion into the family structure" and supported a constitutional amendment. They also called for a "public dialogue" on the issue. Republican Party Platform, CONG. Q. WEEKLY REP., Aug. 21, 1976, at 2298. The Democratic Party Platform "fully recognize[d] the religious and ethical nature of the concerns which many Americans have on the subject of abortion." CONG. Q. WEEKLY REP., July 17, 1976, at 1918.

204. CRAIG & O'BRIEN, *supra* note 199, at 165.

205. GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 182–89 (1991).

206. GRABER, *supra* note 185, at 126.

207. CRAIG & O'BRIEN, *supra* note 199, at 43–45.

208. The Senate votes reflected less enthusiasm against *Roe* by both parties, but the Senate could only force compromise language upon the House.

the votes may have been misleading as abortion supporters did not fight as hard as they might have because they were confident that any legislative defeats would be erased in the judiciary.[209]

Roe also coincided with the social and political strengthening of "born again" Christians. By the end of the 1970s, opposition to *Roe* took on a conservative cast and placed itself squarely into the Republican Party, where it found a champion in Ronald Reagan. The former California governor had signed a liberalization law in California in 1967[210] but ran as a firm antiabortion candidate in 1976 and even more so in his successful 1980 bid for the Republican nomination, when he labeled *Roe* "an abuse of power as bad as the transgressions of Watergate and the bribery on Capital Hill."[211] On securing the nomination, Reagan brought the Republican Party fully to an anti-*Roe* position from which Republicans have not retreated.[212] In 1988, the second time George Bush ran for the presidency, his position, like that of Reagan, was solidly[213] antiabortion.[214] George W. Bush, at the beginning of his administration, reinstated Ronald Reagan's executive order (which Bill Clinton repealed) prohibiting United States funding of international agencies that subsidize abortion.[215]

The Reagan administration moved well beyond the denials of federal funding[216] that had previously represented a popular

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209. *See* GRABER, *supra* note 185, at 121–22. Furthermore, prominent pro-choice groups like the National Abortion Rights Action League, Planned Parenthood Federation, the National Organization for Women, and the American Civil Liberties Union were organizations with strong legal staffs and central offices and had a natural bias favoring litigation over politics. STEPHENSON, *supra* note 1, at 199.

210. ROSENBERG, *supra* note 205, at 268.

211. Byron W. Daynes & Raymond Tatalovich, *Presidential Politics and Abortion, 1972-1988*, 22 PRESIDENTIAL STUDIES Q. 545, 549 (1992) (quoting Reagan).

212. The plank in the Republican platform on abortion always "reaffirms" the party's "support" for a constitutional amendment overturning *Roe*. There is a helpful comparison of the two parties' platforms on abortion in CRAIG & O'BRIEN, *supra* note 199, at 166–68.

213. Graber calls it "rabidly" pro-life. Graber, *supra* note 185, at 140.

214. "After years of sober and serious reflection on the issue, I think the Supreme Court's decision in *Roe* was wrong and should be overturned . . . I promise the president hears you now and stands with you in a cause that must be won." Laura Sessions Stepp and Ann Devroy, *Bush Cites Abortion 'Tragedy' in Call to 67,000* Protesters, WASH. POST, Jan. 24, 1989, at A1.

215. 66 FED. REG. 3878 (2001). Network news coverage of the Clinton and Bush actions was scrupulously fair. Peter Jennings on ABC reported that Clinton had "kept his word on abortion rights." Bush was "taking a hard line." Tom Brokaw of NBC agreed that Clinton had "kept the campaign promise" while Bush's action was "controversial." Dan Rather on CBS concluded that Bush had acted to "please the right flank of his party." National Public Radio, "Morning Edition," February 1, 2001.

216. Funding cut-offs to poor women not only were constitutional, *see* Maher v. Roe,

nibbling at *Roe*.[217] By 1983, the Justice Department made the overruling of *Roe* goal number one. While awaiting that happy day, but finding it a little far off, the Administration showed its devotion to "life" by proposing "Baby Jane Doe" regulations that would have imposed upon hospitals, doctors, and parents the duty to save newborns with the severest birth defects through their last possible painful dying breath.[218]

The judicial battle over *Roe* commenced with a pattern of stacking the lower federal courts with judges opposed to abortion[219]—so much so that a charitable contribution to Planned Parenthood was disqualifying.[220] Then the Justice Department applied the same standard at the Supreme Court, with two conservatives from the D.C. Circuit, Antonin Scalia and then Robert Bork. Scalia sailed through a Republican Senate as the Democrats misfired at the elevation of Rehnquist to Chief Justice.[221] Bork, however, faced a newly Democratic Senate, and from the time Reagan nominated Bork until Bill Clinton defeated Bush, the abortion battle was played out at the Supreme Court, either in litigation or with efforts to find the ever-elusive fifth vote to kill *Roe*.

The hearings on Bork's nomination—the "borking of Bork"—gave the entire nation a basic and easily understood lesson in Legal Realism 101.[222] The Constitution protected a right to an abortion. No Article V changes in the Constitution were possible. If Bork were confirmed, then the Constitution would change and not protect a right to an abortion. Therefore, we are

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432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980), they did not affect the most ardent supporters of abortion, affluent women. *See* GRABER, *supra* note 185, at 126, 136–37.

217. "The Republican Senate rolled over its moderate leadership . . . and approved the strongest anti-abortion provisions Congress has ever passed." Helen Dewa, *Toughest Curbs on Abortion Funds Voted by Senate*, WASH. POST, May 22, 1981, at A1. The House was always more antiabortion than the Senate.

218. 49 FED. REG. 1622 (1984).

219. The 1980 Republican Party Platform demanded "the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life." CONG. Q. WEEKLY REP., July 19, 1980, at 2046. "Innocent human life" was anti-abortion code for the unborn.

220. Andrew Frey, a deputy Solicitor General, had his nomination withdrawn—at the behest of thirteen Senators—on this basis. *See* CRAIG & O'BRIEN, *supra* note 199, at 175. *See generally* SHELDON GOLDMAN, PICKING FEDERAL JUDGES (1997).

221. L.A. Powe, Jr., *From Bork to Souter*, 27 WILLAMETTE L. REV. 781, 784–85 (1991).

222. *Bork*: a verb, gerund, or noun. *To bork* is to use character assassination and gross distortions against a nominee whose position on the only issue worth caring about is diametrically opposed to the borker and has the likelihood of prevailing. Borkers justify borking on the highest principle: that the end justifies the means.

(at least in part) a government of men and not of laws. Republicans overwhelmingly backed Bork, but the Senate was Democratic.[223]

The defeat of Bork did not lessen Reagan's and (perhaps) Bush's desire to undo *Roe*. It demanded a different strategy, one that played out with David Souter and Clarence Thomas. Besides being Republicans, their attraction was that neither had a so-called "paper trail." Souter, "the stealth candidate,"[224] was so obscure that no one had heard of him. Thomas was better known, having been in the Reagan administration before going on the D.C. Circuit,[225] but he claimed never to have debated *Roe* in his life.[226] With no paper trail, too many Democrats believed there was no legitimate reason to vote no.[227] Republicans needed no convincing.[228]

Republicans were outraged when Souter (and Kennedy) joined O'Connor in the conclusion that *Roe* was too politically divisive to overrule and therefore everyone should cease debating the issue.[229] The half a loaf ceded—that regulations not unreasonably burdensome on the core right to an abortion were valid—was just not enough. Not only had the Court-packing strategy for overruling *Roe* failed, it had come to a forced ending with the Clinton election, so much so that after two further Supreme Court appointments even the procedure labeled by anti-abortion activists as "partial birth abortion" could not be

223. Republicans voted 40–6 to confirm, but were overwhelmed by a solid Democratic vote, 52–2 to reject (David Boren of Oklahoma and Ernest Hollings of South Carolina).

224. STEPHENSON, *supra* note 1, at 214 (quoting Sen. Howell Heflin's description).

225. Before going on the D.C. Circuit, Thomas had been head of the Equal Employment Opportunity Commission. Like the Republican Party generally, he opposed race-based remedies, except where the specific individual had been discriminated against by the defendant.

226. *See Hearings before the Committee on the Judiciary United States Senate* 102nd Cong. 1st. Sess. J-102–40 at 1450–51 (1991). Critics suggested that Thomas was either lying or incompetent (or perhaps both). It turns out that he was giving a "very Clintonesque" answer. William Branford Reynolds states: "I know we discussed it. I think that he thought little of Roe v. Wade. . . . From a scholarly standpoint, we were talking about constitutional law, constitutional issues, and Supreme Court decisions. It was clear he didn't think much of it." ANDREW PEYTON THOMAS, CLARENCE THOMAS 246 (2001) (quoting Reynolds).

227. Democrats supplied 46 of the 48 negatives with eleven voting for Thomas. One of the 11, Richard Shelby of Alabama, subsequently switched parties. Anita Hill's allegations about sexual advances (in the climate of 1991 and the fact that Thomas had been at the EEOC at the time of the advances) supplied the legitimate reason for opposing him.

228. Republicans voted 41–to 2 to confirm. Robert Packwood of Oregon and James Jeffords of Vermont voted against Thomas. Jeffords left the Republican Party in 2001.

229. *Casey*, 505 U.S. at 865–69.

banned.[230] At best, the overruling of *Roe* could be revived as a hope and threat every fourth year.

Republicans also knew that the electorate agreed with *Casey*: restrict abortions, but keep them legal.[231] Both as governor and as presidential candidate, George W. Bush acknowledged his party's platform calling for an amendment to ban abortions and brushed it aside as having no chance of passage. Although he would not pledge to appoint only antiabortion Justices to the Court,[232] he gave no indication that he wouldn't, especially when he called attention to the fact that his favorite Justices were Scalia and Thomas. His controversial nominees to the courts of appeals signal that he will nominate only pro-life Justices to the Court. Nevertheless, neither John Roberts nor Samuel Alito, while pro-life, could definitively be placed in the anti-*Roe* camp.

2. Choice Without Restrictions: The Democratic position on abortion jelled in response to the Republicans. The votes on the Hyde Amendment had shown that northern Democrats with minimal Catholic constituencies were solidly in favor of abortion. And the pro-litigation bias of abortion proponents, with its implicit offer of a legislative pass as necessary, undoubtedly masked some latent Democratic support for *Roe*. But Reagan's assault on *Roe* solidified the Democrats.[233] Their 1980 platform "fully recognized the religious and ethical concerns" Americans had about abortion, but supported *Roe* as the "law of the land."[234] Four years later, the agonizing was gone. Reproductive freedom was "a fundamental human right," and Democrats opposed any "interference," especially a "lack of funding for poorer women."[235] The language thereafter changed a bit, but reproductive choice was always so "fundamental" that it should

230. Stenberg v. Carhart, 530 U.S. 914 (2000).

231. "[*Casey*] was the perfect ruling. The Court basically came out where the American people are, [that is] abortion should remain legal, but reasonable restrictions can apply." WILLIAM SALETAN, BEARING RIGHT 149 (2003) (quoting ABC reporter Cokie Roberts). "[T]hat's the kind of approach that the public opinion polls say the voters like.... So the Justices ... may have come down just about where the country is on this one." *Id.* (quoting CBS reporter Bruce Morton).

232. *Id.* at 248, 251

233. GRABER, *supra* note 185, at 137–38 ("The Democratic Party adopted much stronger pro-choice positions during the 1980s than during the 1970s. As a result, that coalition lost the allegiance of some strongly pro-life New Dealers, but it attracted some strongly pro-choice voters who formerly had supported GOP candidates.).

234. 36 CONG. Q. ALMANAC 97B (1980).

235. 40 CONG. Q. ALMANAC 93B (1984).

be available without regard for ability to pay regardless of what the Court had concluded.[236]

The Democrats' shift can be perfectly seen in Al Gore, whose moves were the mirror opposite of the elder Bush.[237] As a congressman, Gore talked the talk and voted the vote of the antiabortion movement.[238] As a Senator running for President in 1988, he was firmly pro-choice. After eight years as Vice-President, he denied he had ever been anything but a fan of *Roe*.[239] But a Democrat must be even more. Thus Gore "seized on the close vote in *Stenberg v. Carhart* [to preclude banning so-called partial birth abortions] to warn that Mr. Bush, if elected, would appoint conservative Supreme Court Justices hostile to abortion rights."[240]

Thus by the mid-1980s, "the national Democratic and Republican parties offered voters a clear choice on abortion."[241] After the defeat of Bork, the Democrats remained worried about Supreme Court appointees, but *Casey* and Clinton's 1992 win enabled the Democrats to survive the Republican surge. Or so everyone thought until the 1994 Republican upset. Thereafter the Democrats had to play serious defense, which they did by adopting the joint playbooks of the National Rifle Association and the American Civil Liberties Union. They opposed any laws, no matter how reasonable, that restricted abortions. The reasoning, like that of the NRA and ACLU, was quite simple. They did not want to give their opponents any legislative victories that might offer even the slightest encouragement. They did not want a single wedge that could lead to further judicial weakening of

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236. *See* CRAIG & O'BRIEN, *supra* note 199, at 167–68.

237. Richard Gephardt is an equally illustrative example. On January 21, 2003, all the 2004 Democratic presidential hopefuls swore fealty to *Roe*, and the most interesting was Gephardt, who had been pro-life during his first decade in the House, but who explained to the audience how he had changed on the issue by coming to understand the wisdom of the pro-choice position. He did not mention that this nicely coincided with his first attempt at the presidency in 1988. Adam Nagourney, *In Turn, 6 Presidential Hopefuls Back Abortion Rights*, N.Y. TIMES, Jan. 22, 2003, at A17.

238. "What is clear from a review of his public statements on the issue and the votes he cast in Congress is that the vice president's position on abortion has changed over the trajectory of his political career. And it was not a small shift: in the early 1980's, when Mr. Gore was representing middle Tennessee in the House, the National Right to Life Committee said he had voted in line with the group's views 84 percent of the time." Robin Toner, *Shifting Views over Abortion Fog Gore*, N.Y. TIMES, Feb. 25, 2000, at A1.

239. Ceci Connolly & Mike Allen, *Abortion Stance Evolved, Gore Says*, WASH. POST, Jan. 30, 2000, at A14.

240. Jim Yardley, *Al Gore Claims Bush Would Appoint Anti-Abortion Judges*, N.Y. TIMES, July 9, 2000, at A1.

241. GRABER, *supra* note 185, at 138.

the constitutional right. Thus President Clinton vetoed the so-called partial birth abortion laws each time Congress presented them to him,[242] and Democratic votes sustained the vetoes.[243] And when congressional Republicans in 2001 again[244] introduced the Unborn Victims of Violence Act, a bill imposing penalties on people who harm a fetus during an assault on a pregnant women, Democrats voiced displeasure, even though the bill protected a woman's right to choose.[245] Their votes followed their objections.[246] No one noted the irony that Democrats would have happily protected the woman if she were not pregnant, while the Republicans would not have because the crime would have been a state issue. The 2004 version of the bill, now known as the Laci Peterson Law[247] after the eight-months pregnant woman who was murdered Christmas Eve 2002, was highlighted in a Bush/Cheney ad called "Values." The ad noted that although John Kerry had missed two-thirds of all Senate votes while campaigning, he was present to vote "no" on this law.[248]

This has been matched by executive orders (in limited cases) defining "child" and "fetus." President Clinton proposed a definition of "fetus" as "the product of conception during pregnancy until a determination is made after delivery that it is viable."[249] President Bush, in turn, authored expansion of prenatal care by labeling the fetus an unborn child.[250]

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242. *See* H.R. 1833, 32 Weekly Comp. 645 (1996); H.R. 1122, 33 Weekly Comp. 1545 (1997).

243. In 1997 House Democrats voted 127–77 to support the ban, but the House Republican vote of 218–8 was enough for an override. The Senate, however, could not override, with Democrats providing 32 of the 36 negative votes (and only 13 affirmative (Southerners, Catholics, and those representing substantial Catholic populations): Biden, Breaux, Byrd, Conrad, Daschele, Dorgan, Ford, Hollings, Johnson, Landrieu, Leahy, Moynihan, and Reid. J144 CONG. REC. 896 (1998).

244. It had passed the House in the previous Congress, but the Senate took no action because there were not the votes to override the automatic Clinton veto.

245. Juliet Eilperin, *House GOP Pushes New Abortion Limits*, WASH. POST, March 16, 2001, at A1 (quoting Rep. Jerrold Nadler): "[the] real purpose is to establish a doctrine, contrary to the Supreme Court decision in Roe v. Wade, that the fetus is a separate person. This is driven by the politics of abortion rather than the substantive effort to fight violence against women."

246. Republicans provided 198 of the 252 ayes; Democrats, 150 of the 172 negatives. Alison Mitchell, *House Approves Bill Criminalizing Violence to Fetus*, N.Y. TIMES, April 27, 2001, at A1.

247. The official name is the "Unborn Victims of Violence Act of 2004." Pub. L. No. 108–212, 118 Stat. 568 (2004).

248. The Senate vote was 61–38. The only prominent Democrat to vote yes was Tom Daschle, who was up for reelection.

249. 66 FED. REG. 3879 (2001).

250. 67 FED. REG. 61,956 (2002) (to be codified at 42 C.F.R. pt. 457).

The issues the Democrats could never win were government funding for low-income abortions, preventing parental notification laws, and finally the procedure opponents described as partial birth abortion. Without a Democrat in the White House to veto a procedure viewed even by some Democrats as morally repugnant,[251] Senate Democratic leader Thomas Daschle concluded that it was time to move the matter out of Congress and into the courts.[252]

Democrats may have yielded on the Partial-Birth Abortion Ban Act of 2003,[253] but not on their support for *Roe*. In the twenty years following the Carter presidency, not a single pro-life Democrat made a dent in the presidential derby. Congressman Dennis Kucinich had a zero rating from the National Abortion and Reproductive Rights Action League in 2000. Running for President in 2003, he proposed a litmus test of support for *Roe* without so much as missing a beat.[254] The Democrats' fealty on the issue ran so deep that Pennsylvania governor Robert Casey was not even allowed to speak at the 1992 convention because of his pro-life position.[255]

E. RELIGION

1. Pledging in Public: Prior to *Roe*, no case produced a bigger flood of hostile mail than *Engel v. Vitale*.[256] *Engel* came without warning and was met with a huge public outcry.[257] It drew an immediate effort by Congressman Frank Becker, a Catholic Republican from New York, supported by Southern Democrats and Midwestern Republicans, to overturn it via a constitutional amendment. Interestingly, those Protestants most hostile to *Engel* and the next year's addition, *Schempp*,[258]—

251. Kate Michelman, president of Naral Pro-Choice, lamented that the Republicans "ran away with this debate in the public domain by constantly describing this procedure." Sheryl Gay Stolberg, *Bill Barring Abortion Procedure Drew Big Backing from Many Friends of* Roe v. Wade, N.Y. TIMES, Oct. 23, 2003, at A16. An earlier statement by Senator Rick Santorum showed how effective antiabortion rhetoric could be: "There may be a medical need to terminate a pregnancy, but there is never a need to kill a baby." SALETAN, *supra* note 231, at 234.

252. Stolberg, *supra* note 251, at A16

253. Pub.L. No. 108–105, 117 Stat. 1201 (2003).

254. William Saletan, *Early Labor*, SLATE.COM, May 19, 2003.

255. Walter Goodman, *The Convention Images*, N.Y. TIMES, July 18, 1992, at 48.

256. 370 U.S. 421 (1962).

257. *See* POWE, *supra* note 51, at 187–89. Earl Warren recalled a headline proclaiming that "Court outlaws God." MEMOIRS OF EARL WARREN 316 (1977).

258. Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

fundamentalists, evangelicals, Pentecostals, and charismatics[259]—sat out this political issue, like all others.[260] As Jerry Falwell explained in 1965, "We pay our taxes, cast our votes as a responsibility of citizenship, obey the laws of the land, and other things demanded of us by the society in which we live. But at the same time we are cognizant that our only purpose on this earth is to know Christ and to make him known."[261] Instead, at hearings that House Judiciary Chair Emanuel Celler reluctantly called, a veritable "who's who" of organized Protestant denominations lined up to argue against any modification of the establishment clause, and supporters of the proposal knew it was dead.[262] Prayer in schools was not, however, as the Court's decisions were widely and publicly ignored in both the South and Midwest.[263] School prayer has always been more popular with voters than with members of Congress. Verbally supporting it is both easy and cheap, and the Republicans did.[264] Amending the Constitution is something else altogether, and a prayer amendment never saw a vote.

Prayer reappeared as a political issue when the evangelicals came out of their self-imposed exile and entered into electoral politics at the end of the 1970s.[265] They were disgusted by the moral decline of the country on the one hand[266] and were at-

259. These Protestants are often labeled as the Religious or Christian Right, typically by people who have never referred to the Christian Left. For simplicity's sake, we will call them *evangelicals*.

260. "Evangelicals concentrate on conversion, and except for occasional efforts to outlaw what they deem to be personal vices, evangelical Protestant groups largely ignore social and political efforts at reform." Robert Wuthnow, *Political Rebirth of American Evangelicalism*, *in* THE NEW CHRISTIAN RIGHT 168 (Robert C. Liebman and Robert Wuthnow eds., 1983).

261. A. JAMES REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 316 (1985).

262. The National Council of Churches, the Baptists, Lutherans, Presbyterians, Seventh-Day Adventists, Unitarians, and the United Church of Christ opposed any amendment, and the legal department of the National Catholic Welfare Conference advised Catholics to be "very cautious" in supporting any amendment. *See* POWE, *supra* note 51, at 362.

263. *See generally* KENNETH DOLBEARE & PHILIP HAMMOND, THE SCHOOL PRAYER DECISIONS (1971).

264. 30 CONG. Q. WEEKLY REP. 2166 (1972): "We reaffirm our view that voluntary prayer should be freely permitted in public places—particularly, by school children while attending public schools." 32 CONG. Q. ALMANAC 907 (1976): "Local communities wishing to conduct non-sectarian prayers in their public schools should be able to do so."

265. One "bemused" evangelical noted of a Reagan rally, "[t]housands of people were cheering for all they were worth—cheering away the eschatological doctrines of a lifetime, cheering away the theological pessimism of a lifetime." REICHLEY, *supra* note 261, at 322–23.

266. *See id.*, at 316–17. Charles Cade, the first operations director of the Moral Majority, chose this indelicate way of putting it: "Abortion, pornography, homosexuality—those are hard for the average Christians to relate to. They don't read *Playboy*, their

tracted to the 1976 presidential campaign of one of their own, Jimmy Carter, on the other.[267] But the catalyst came when Carter's Internal Revenue Service switched enforcement policy on the tax-exempt status of their all-white Christian schools.[268] Carter had done nothing on issues evangelicals cared about, and the Republicans promised they would. In Reagan, the Republicans offered a candidate who claimed to care, and the evangelicals flocked to his banner[269] and to a party specifically willing to invoke its faith in God.[270]

Using rights-based language usually associated with Democrats, Republicans called on "Congress to restore the right of individuals to participate in voluntary non-denominational prayer in schools and other public facilities."[271] The shift to rights-based rhetoric was important. "Mindful of our religious diversity, we reaffirm our commitment to the freedoms of religion and speech guaranteed by the Constitution of the United States and firmly support the rights of students to openly practice the same, including the right to engage in voluntary prayer in schools."[272] Students could worship Karl Marx, they said; why was there not an equal right to pray to their God? The answer was either "coercion" or Jefferson's metaphorical "wall of separation" between church and state, or both. To the former, the Republicans emphasized the "voluntary" nature of any prayer.[273] To the latter, Republicans adopted the positions Potter Stewart had taken dissenting in the prayer cases:[274] that the real issue was one of

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daughters aren't pregnant, and they don't know any queers." MATTHEW C. MOEN, THE CHRISTIAN RIGHT AND CONGRESS 3 (1989).

267. REICHLEY, *supra* note 261, at 318 ("Without making much public effort, Carter attracted widespread support from evangelicals and fundamentalists, who regarded him somewhat as Catholics had regarded John Kennedy in 1960.")

268. EDSALL & EDSALL, *supra* note 98, at 131–32. Falwell noted that "[i]t was the IRS trying to take away our tax exemptions that made us realize we had to fight for our lives." MOEN, *supra* note 263, at 27. The tax-exempt status of Christian schools had been problematical, at best, since 1970, but the IRS had never challenged the schools' status. *Id.* at 26.

269. *See* REICHLEY, *supra* note 261, at 318–27.

270. 36 CONG. Q. ALMANAC 59B (1980) ("With God's help, let us now, together make America great again."); 40 CONG. Q. ALMANAC 46A (1992) ("free men and women, with faith in God").

271. 36 CONG. Q. ALMANAC 63B (1984). This is an interesting linguistic switch from the 1976 platform, which called for a constitutional amendment. *See* 32 CONG. Q. ALMANAC 907 (1976).

272. 40 CONG. Q. ALMANAC 50B (1984).

273. The emphasis on voluntariness was a shift from the 1976 platform which did not mention the word: "Local communities wishing to conduct non-sectarian prayers in their public schools should be able to do so." 32 CONG. Q. ALMANAC 907 (1976).

274. Engel v. Vitale, 370 U.S. 421, 444 (dissenting); Abingdon School Dist. v. Schempp, 374 U.S. 203, 308 (dissenting).

free exercise rather than establishment, and the free exercise claim trumped. With prayer resting on the rights of individuals to engage in the free exercise of religion, Republican analysis left the establishment clause in the dust.

Even in his confusion during his first debate with Walter Mondale, President Reagan could state the Republican view of the intertwining of the two clauses:

> [Some want] to hinder that part of the Constitution that says the government shall not only not establish a religion, it shall not inhibit the practice of religion. And they have been using these things to have government, through court orders, inhibit the practice of religion. A child wants to say grace in the school cafeteria, and a court rules that they can't do it.[275]

The main success of the free exercise strategy came after Democrats defeated a voluntary prayer amendment.[276] Realizing, albeit belatedly, that simple access to schools could accomplish much the same thing, Republicans took the legislative way and routed the Democrats who couldn't find a way to come out against rights-based equality.[277] The Equal Access Act of 1984[278] extended *Widmar v. Vincent*'s[279] holding that colleges must treat student religious groups who wished to use campus meeting rooms equally with nonreligious ones and applied it to secondary (but not elementary) schools.

Reagan's electoral strength never extended to bring in Republicans to the House, and the Equal Access Act was a one-time legislative victory.[280] After the 1982 elections,[281] efforts

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275. 40 CONG. Q. ALMANAC 111B (1984).

276. The story is best told in ALLEN D. HERTZKE, REPRESENTING GOD IN WASHINGTON 167–94 (1988). The Senate Judiciary Committee also reported out a silent prayer amendment, S. Rep. 99-165, but no amendment is necessary for that and it died without a vote because of lack of enthusiasm. DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS 452 (1996).

277. The *Washington Post*, perhaps speaking for the silent Democrats, ran six editorials against what it called the "Son of School Prayer." *Id.* at 169.

278. Pub. L. No. 98-377, 98 Stat. 1302 (1984).

279. 454 U.S. 263 (1981).

280. The only other religion-related statute that Congress passed was a bill forbidding the Justice Department to take action against schools that allowed silent prayer. Since the Reagan Justice Department had no such intention, this Democratic sponsored piece of legislation was entirely symbolic. *See* MOEN, *supra* note 266, at 97. Tuition tax credits failed.

281. The Democrats gained 26 seats and changed the composition of the Judiciary Committee from a Democratic margin of 16-12 to 20-11. *Id.* at 111. Even Reagan's 1984 landslide victory netted only 17 new Republican House members and a loss of two Senate seats. In 1986 the Democrats gained eight more seats in the Senate to retake control. *See* MICHAEL BARONE, OUR COUNTRY 646, 657 (1989).

quickly paralleled those aiming at *Roe*—change through the judiciary.[282] The Justice Department's vetting of potential judicial nominees is well-known. What is less known is that beginning with the 1982 Term, the Solicitor General began to file amicus briefs urging a doctrinal move to accommodation in all establishment clause cases.[283] The Republicans achieved some modest results in the mid-1980s as the Court relaxed opposition to aid to religious schools,[284] approved payments to a legislative chaplain,[285] and sustained a municipal Christmas-is-the-time-to-shop nativity scene.[286]

At this point, the parallels between abortion and prayer converge to a single story through the first Bush administration. Although nothing logically requires these results, Justices who support *Roe* also support a strong separationist position,[287] whereas Justices who would overturn *Roe* turn out to be quite antiseparationist.[288] Justices striving for middle ground, such as O'Connor and Kennedy, find both some restrictions on abortion and some accommodation of religion consistent with the underlying constitutional principles. Thus it appears that knowing a nominee's views on either of these issues provides a window to the other.[289] But for Republicans it is still a tough prediction because they lack good nonlegal surrogates for public views on the two issues. Nominating a Catholic would work; fundamentalist or evangelical lawyers with the requisite stature are harder to find.[290] Democrats have easy predictive surrogates. Select either a (non-Orthodox) Jew or someone who is not religious. Indeed, for Democrats the only true risk is picking a Catholic.

In this respect, Virginia Governor Douglas Wilder's hysterical reaction to the nomination of Clarence Thomas is instructive. Conceding that Thomas was qualified to sit on the Court, Wilder

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282. STEPHENSON, *supra* note 1, at 206.

283. The change came between *Larkin v. Grendel's Den*, 459 U.S. 116 (1982) during the 1981 Term and *Mueller v. Allen*, 463 U.S. 388 (1983) and *Marsh v. Chambers*, 463 U.S. 783 (1983) which were argued in April 1983. By the start of the next Term, the Justice Department had blessed the Court with its views "on more than half of the 113 cases already set for argument." STEPHENSON, *supra* note 1, at 206.

284. 463 U.S. 388.

285. Chambers, 463 U.S. 783.

286. Donnelly, 465 U.S. 668.

287. Justices Brennan, Marshall, Blackmun, Stevens, and now Breyer and Ginsburg.

288. Justices White, Rehnquist, Scalia, Thomas.

289. Justice Souter may or may not fit this mold, although a good bet may be that if his Establishment Clause position holds, he will become more supportive of *Roe*.

290. Former Attorney General John Ashcroft probably has the stature but would be unconfirmable.

nevertheless pronounced his "devout" Catholicism as the issue. "The question is: How much allegiance does he have to the Pope?"[291] This was hardly the wisest statement for the first African-American to be given a serious chance to win the Democratic presidential nomination (for unlike Jesse Jackson, Wilder drew considerable white support). Not only was the remark bigoted, it was ignorant. Thomas was divorced, remarried, and was attending an Episcopal church.[292] To his credit, Wilder quickly recanted.[293] There were no similar comments with the nominations of John Roberts and Samuel Alito.

Republicans continued to woo successfully the religious right into their electoral base. Apart from rhetoric, however, they did little to promote an accomodationist view of religion as a matter of policy. Republican support for tuition tax credits, and later for school vouchers, implicated the establishment clause and were popular among evangelicals, but those issues and their politics were about much more than religion. The Court's decision in *Zelman v. Simmons-Harris*[294] puts the establishment clause objections largely to rest because the majority opinion offers an easy roadmap for a constitutional program. Future battles over vouchers will be fought on their (educational) merits, and the teachers unions (and therefore the Democrats) will be vocal in opposition.

Then came George W. Bush with a centerpiece of his campaign being his plan to encourage "faith-based initiatives," to help solve social problems. After the inauguration, rhetoric turned to reality when he issued an executive order creating an "Office of Faith-Based and Community Initiatives."[295] After September 11, however, the Bush administration bailed, at least in its initial push.[296] The official justification for the administration's action was that priorities had necessarily changed, and, furthermore, that Americans' generous contributions to charities mitigated much of the need for the legislation. The faith-based

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291. No author, *Gov Wilder is questioning Role of Thomas' Religion*, Wall ST. J., July 3, 1991, at A8.

292. Editorial, *In the Pocket of the Pope?* WASH. POST, July 8, 1991, at A1.

293. *Id.*

294. 536 U.S. 639 (2002).

295. Establishment of White House Office of Faith-Based and Community Initiatives, Exec. Order No. 13,199 (2001).

296. *See* Elizabeth Becker, *Bush is Said to Scale Back His Religion-Based Initiative*, N.Y. TIMES, Oct 14, 2001, at A14 (reporting that Bush had "set aside his most ambitious plans to give federal money to religious charities" and would support a watered-down version of his religion-based initiative).

proposals also looked different after an exchange between two Republican activist evangelical ministers, Jerry Falwell and Pat Robertson, that the September 11 attack might be God's retribution for the nation harboring the likes of the ACLU.[297] No amount of apologizing[298] by the preachers could erase the underlying theocratic vision. Despite Bush's disassociation from the remarks, the episode may well have led to his faith-based initiative being seen in a more hostile light. It also highlighted partisan divisions over competing visions of the Constitution, thereby making compromise unlikely.

After a pause, however, the White House decided to bypass the Congress (and Democratic and to a lesser extent Republican opposition) and use administrative venues to try to accomplish the President's goals. Thus the Department of Interior switched policy on grants for historic preservation to allow federal funds to be used to renovate churches.

2. A High and Impregnable Wall of Separation: Beginning with George McGovern (with assists from Walter Mondale, Jerry Brown, and Bill Clinton), secularists within the Democrats' electoral coalition have increased considerably. Over half of the delegates at the 1992 convention rarely attended church.[299] In a world in which one of the best ways to predict a person's political affiliation is to ask how often he or she goes to church, those who do not are Democrats. This is even truer among party professionals, who are not only unfamiliar with religion, but also are "sometimes quite antagonistic" to it.[300] Candidates do not talk about religion both because it would alienate part of the multicultural Democratic electorate and because the party's position is that religion and government must be kept apart. Thus, the "usual Democratic response" to Ronald Reagan's mention of religion was "either to ignore the religious issue or to denounce Mr. Reagan for mixing religion and politics."[301]

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297. Gustav Niebuhr, *After the Attacks: Finding Fault,* N.Y. TIMES, Sept. 14, 2001, at A18 ("I really believe that the pagans, and the abortionists, and the feminists, and the gays and the lesbians who are actively trying to make that an alternative lifestyle, the ACLU, People for the American Way—all of them who have tried to secularize America—I point the finger in their face and say 'you helped make this happen.'").

298. Robertson, who had agreed with Falwell, claimed not to have grasped what his colleague had said. Falwell, in turn, apologized. John F. Harris, *Falwell Apologizes for Remarks*, WASH. POST, Sept. 18, 2001, at C4.

299. GEOFFREY LAYMAN, THE GREAT DIVIDE 2, 243, 296 (2001).

300. Amy Sullivan, *Do Democrats Have a Prayer*? WASH. MONTHLY, June 2003, at 30, 35.

301. Charles Krauthammer, *The Church-State Debate*, THE NEW REPUBLIC, Sept. 17–24, 1984, at 16.

Before Reagan, prayer in schools was either a nonpartisan issue or an intramural squabble among Republicans. John Danforth, an Episcopalian (one of the so-called mainstream Protestant demoninations that believe in a high wall of separation) stated that "the debate on school prayer is not between the godly and the ungodly."[302] As the Reagan revolution brought evangelicals in and pushed liberal Republicans out, prayer took on a more partisan cast. Yet the usual Democratic response remained the same.[303]

Reagan's victory confirmed that the evangelicals had the offense, and after Justice O'Connor joined the Court, the cases sustaining the nativity scene, the chaplain, and some parochial school aid fused to inspire the title of an Anti-Defamation League book a few years later: *Lowering the Wall.*[304] There had to be a Democratic response. A tactical response in the debate over a constitutional amendment was that prayer in schools was already constitutionally available—so long as it was silent—and that only silent prayer is truly voluntary.[305]

The problems that religion posed for Democrats were real. Why was evangelical participation bad, but participation by African-American ministers good? Why did Catholics err in politicizing abortion but not the nuclear freeze? What if the Republicans' position on prayer was as popular as polls suggested?[306]

The Democratic position, opposing what evangelicals wanted as matters of both politics and principle, was clear. Implementing it was less so. With the exception of African-Americans, Democrats believed in Jefferson's wall of separation. Just as the Burger Court had lowered the wall in the mid-1980s, so too did the Rehnquist Court adopt an accommodationist stance,[307] with the exception of prayer at school functions.[308] Nevertheless, while the Court sustained a voucher program in Cleveland,[309] it drew a line at the attempt to require states to

302. 130 CONG. REC. 4580 (1984).
303. Krauthammer, *supra* note 301, at 16.
304. *See* GREGG IVERS, LOWERING THE WALL (1991).
305. Senator Howard Metzenbaum made both points. 130 CONG. REC. 5835 (1984).
306. Prayer in the public schools consistently received 70 percent support, and Strom Thurmond asserted 80 percent during the debates. 130 CONG. REC. 4319 (1984).
307. Rosenberger v. Rector, 515 U.S. 819 (1995); Good News Club v. Milford Central School, 533 U.S. 98 (2001) Regardless how one wishes to characterize *City of Boerne v. Flores*, 521 U.S. 507 (1997), we believe it is best understood in terms of the Court's vision of its own role in the constitutional order.
308. Lee v. Weisman, 505 U.S. 577 (1992); Santa Fe Indep. School Dist. V. Doe, 530 U.S. 290 (2000).
309. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

treat religious institutions equally with secular ones in funding programs.[310]

The issue of religious accommodation was so touchy that not once did a Democratic platform even mention prayer (voluntary or otherwise). Normally Democrats relied on surrogates such as the American Civil Liberties Union, Americans United for the Separation of Church and State, the Anti-Defamation League, and the newly created People for the American Way, to decry the weakening wall. Nevertheless, during the 1984 campaign, Walter Mondale joined the issue directly when conservative columnist Fred Barnes asked Mondale during the first debate if he considered himself "a born again Christian" and how his religious beliefs would "affect" his decisions as president.[311] As to the first, Mondale replied: "I don't know if I have been born again, but I know I was born into a Christian family."[312] Instead of Jefferson's wall, Mondale referred to a "line" that should never be crossed.[313]

Barnes then asked whether Mondale objected only to conservative ministers in politics. Mondale's wandering response eventually settled on opposition to imposing one's religious views on others: "that's where I draw the line." A better follow-up by Barbara Walters elicited a condemnation of school prayer and praise for the Senate's rejection of a prayer amendment "because it will undermine the practice of honest faith in our country by politicizing it."[314]

Bill Clinton's ease with religion and religious language plus the Republican emphasis on vouchers, which implicated both public schools and teachers' unions, left the religion issue quiescent during his presidency. During the 2000 campaign, Democratic vice-presidential candidate Joseph Lieberman made Democrats uneasy because he was unapologetic about the role of religion in his life. "[O]nce I opened my mouth and actually professed my faith, to give glory and thanks to God for the extraordinary opportunity I had been given, those Hosannas turned to 'How dare he's'".[315] Indeed, he and Republican Rick Santorum cosponsored one of the first bills from the Bush faith-based ini-

310. Locke v. Davey, 540 U.S. 712 (2004)
311. 40 CONG. Q. ALMANAC 110B (1984).
312. *Id.*
313. *Id.*
314. *Id.* at 111B.
315. John B. Judis & Ruy Teixeira, *Majority Rules*, THE NEW REPUBLIC, Aug. 5 & 12, 2002, at 19.

tiative—a bill that provided more tax incentives for charitable contributions.

The Bush program placed Democrats in a politically difficult position. They did not want to be seen as anti-religion, nor did they want to be in a position of opposing anything that helped social programs. Bush, or probably more correctly, John DiIulio, the head of the new office, astutely added to Democrats' discomfort by gaining the support of some prominent African-American ministers and leaders. But the lightning rod on religion arose with the initiatives that came to be known as "charitable choice." In essence, religious charities could receive government money to do social work beyond current arrangements. The first point of contention was the extent and methods of separating religion from social work. The idea that federal money could be used to proselytize made even some Republicans nervous. The Democrats let the Republicans engage in intramural infighting while staying silent themselves although eventually Republicans in the House crafted something that they could support.

When the proposals finally had a congressional hearing, Democrats expressed their latent unease. Happily for them, they were handed a politically acceptable way to oppose the effort by, of all groups, the Salvation Army. An internal Salvation Army document was leaked, claiming that the White House had promised to issue a regulation exempting religious groups from state and local laws that ban discrimination against gays in hiring and domestic partner benefits.[316] The Democrats' opposition could now be cast as an issue of protecting existing nondiscrimination policies. As the *New York Times* reported, "the overarching fear among the Democratic lawmakers was that this effort to improve social services was a needless assault on hard-won civil rights and the separation of church and state."[317] Or as Senate Democratic leader Tom Daschle put it, "Some of the provisions in the bill would allow an exemption [from] the civil rights laws of this country for organizations who are the beneficiaries of this new program. That concerns me a great deal. Rolling back the mandates and the guidelines that we have with regard to tolerance in this country is unacceptable . . . and I think that the Senate will take a very critical view of those provisions of the bill."[318]

316. CONG. Q. WEEKLY, July 14, 2001.

317. Elizabeth Becker, *Bush's Plan to Aid Religious Groups Is Faulted*, N.Y. TIMES, April 27, 2001, at A17.

318. David Boyer, *Bush Prods Senate on Faith-Based Bills*, WASH. TIMES, July 21,

As it turned out, the Senate did not have to decide. By the time the House bill emerged, it had lost much of its glow of bipartisanship as the vote proceeded largely upon party lines. Then September 11 caused (or allowed) the President to change priorities and attempt to implement his program administratively. Whatever unease Democrats felt, they nevertheless have remained silent.

F. SUMMING UP THE PARTIES' VISIONS

Because the two parties' constitutions have been in place for so long, they not only look forward; they also look backward. They look forward, of course, because if either party achieves electoral success, it can hope to do better than the Republicans under Reagan and the first Bush and in fact place a majority of true believers on the Court. Then, the natural assumption is, the new majority will implement the victorious party's constitutional vision. Whether it will work that way in reality is never certain. There are reasons to believe that it will not happen.

More fundamentally, the parties' constitutional visions look backward because the issues were framed by the Warren and early Burger Courts. The two parties' constitutions bracket the Warren Court, with the Republicans retreating almost fifty years and the Democrats about thirty. Both parties build on the Warren Court legacy of forcing the South (and other outliers) to conform to the values of national elites.[319] Because the Warren Court prevailed against the outliers, current constitutional battles are political, not geographical. Thus, by ending the largely sectional nature of constitutional disputes, the Warren Court laid the groundwork for constitutional issues to return to the earlier fault lines of political battles, such as those over slavery[320] and economic regulation. But as we have repeated, there now is a difference because neither party claims the Court's position.

The Republicans have frozen their constitution at *Brown*. It is the bygone world of small-town America, with the decided improvement that racial discrimination is prohibited. Religion can be a part of the schools, abortion may be criminalized, and police practices are largely invisible to judicial scrutiny. Courts know their subordinate place and stay there, though activism may be required to get back to the right status quo.

2001, at A1

319. POWE, *supra* note 51, at 489–94.

320. Recall that Northern Democrats supported the continuation of slavery.

By contrast, the rights-oriented Democratic position requires a return to the Warren Court and a judiciary actively willing to place certain values into the Constitution because that is what right-thinking people would have in a good constitution. Democrats look to a Court with the immodesty of Antonin Scalia and the jurisprudence of William J. Brennan. The "Great Court" is then coupled with an unacknowledged[321] hostility to elections. Whatever their rhetoric about facilitating voting and voters, Democrats are unwilling to let elections decide the federal or state policies on affirmative action, criminal justice, abortion, and religion.

IV. THE THIRD WAY

At least compared to the Republican and the Democratic visions, the Court's doctrines look like bipartisanship personified. The Warren Court's legendary criminal procedure decisions still stand, but not for all they were worth. Affirmative action has been tamed rather than eliminated (or left to run riot). Women retain their right to an abortion, but the public need not fund it, and children need parents. State sponsored prayer is unconstitutional, but it has been almost a generation since the last funding program was struck down on establishment clause grounds. Not all the Court's positions have been popular, but its middle ground may approximate public attitudes better than either of the two parties.

If we are correct that the Court has offered a third constitutional vision not in sync with either party's and that it is a new phenomenon, what is happening? There are many possible explanations, and they are not mutually exclusive. But first, a question arises with our analysis. Have we seen a third vision enunciated by the Court, or have we simply seen a swing vote prevail in what otherwise were positions mimicking those of the political parties?

There are, of course, factions on the Court that agree with the Republican and Democratic positions. What is crucial, however, is that even if the original third vision began as a compromise, it has taken hold. This has occurred by Justices on the Court coming to embrace the third vision, and it has occurred by

321. But not unrecognized. *See* TUSHNET, *supra* note 8, at 177–81; RICHARD POSNER, BREAKING THE DEADLOCK 179 (2001); *see also id.* at 142 ("Judicial liberalism has long signified a distrust of democratic process.").

attrition. Sitting Justices are free to ignore the parties' constitutional visions, but a nominee going through the confirmation process is not so fortunate. A nominee will be acutely aware of parties' positions because they will inform the Senators' questioning. Indeed, new Justices often must be committed to the "compromise" in order to make it through the political process. As long as there is divided government or a closely divided Senate, we are likely to see replacements favoring—or at least nominally committed to continuing—the third way. What was once a compromise or simply the opinion of the swing Justice thus becomes the status quo. Depending upon one's belief about the effect of precedent on Justices, the third way may persist even with a shift to a less divided government. Whether it is a commitment to *stare decisis* or a new preferred outcome is beside the point. The third way holds.

The three-vision world is an unprecedented phenomenon. Why has it occurred? We have just offered two explanations: recruitment and stare decisis. Another issue involving recruitment suggests a more systemic change. Justices the past quarter-century have spent their primary careers as jurists with little or no time in the political vineyards. It was not always so. Justices who came to the Supreme Court from careers as Senators, governors, SEC chairmen, or close friends of the President did not always simply adopt the positions of their parties when they moved to the Court. However, their deep involvement in politics and political parties, often as leaders who helped shape the visions of their parties, surely made them more in sync with the constitutional vision of their parties.

Distinctions among Justices may be even more subtle than whether or not they come to the Court as jurists or politicians. Over the past twenty years, two types of Supreme Court Justices have been appointed. The first are those who took seats on the courts of appeals as a natural stepping stone to the Supreme Court. With that goal in mind, they strove to be visible to the important constituency groups within their party, and they carried out lobbying campaigns (with varying degrees of subtlety) to achieve their goal. Scalia, Thomas, and Ginsburg (not to mention Bork) fall within this category. Not surprisingly, their judicial positions mirror those of their party.

The second type are those who went to the bench without the slightest expectation of ever reaching the Supreme Court.

For them—O'Connor, Kennedy, and Souter—the nomination was just as fluky as if they had been hit by lightning.[322] Since they never expected to reach the Supreme Court, they had neither lobbied for the job nor attached themselves firmly to the ideology of their party.

Whatever their past, judges who are promoted to the Supreme Court generally have needed to disassociate themselves with their parties. Partisanship may well have put them on the bench in the first place, but after their initial appointment, their party ties had to be benched. Indeed, actions on their part that differed from their party's perceived position are often used subsequently as testimony to their independence. This is not to say that career judges are nonideological, but that the things that shape their ideology may differ from those whose ideology has been shaped in the crucible of politics. So, while on many issues the third way may be solely a function of vote aggregation on a closely divided Court, it is also the case that even the more ideological Justices will differ with their parties. The views of Justice Scalia on the First Amendment would have a hard time making it into the Republican platform, sexually related matters excluded, as might the late Chief Justice Rehnquist's views on the Fourth Amendment. Justices differing with their parties is nothing new, but the practice of recruiting Justices from the rank of judges may increase the tendency toward a third way.

Another explanation may involve the judicialization and legalization of politics. Even though the inordinate influence of the judiciary on a democratic polity traces its origins to the very beginning of the republic, few would doubt the ever-growing nature of issues that have become legalized. Increased legalization often involves constitutionalization of issues. At the least, constitutional issues hover overhead. Political decisions are increasingly perceived as penultimate, often awaiting a court's blessing or rejection. Over the past thirty years, Tocqueville's famous observation that political issues become legal ones has become even more descriptive.[323] That said, the activist Warren Court rarely struck down federal statutes and never invalidated a live, important federal statute.[324] Some have argued that politicians

322. O'Connor described her appointment in exactly this term. SANDRA DAY O'CONNOR, THE MAJESTY OF LAW xii (2003).

323. Of course, as Mark Graber demonstrates, Tocqueville's observation was wholly incorrect when made. Mark Graber, *Resolving Political Questions Into Judicial Questions: Tocqueville's Thesis Revisited,* 21 CONST. COMMENT. 485 (2004).

324. *See* L.A. Powe, Jr., *The Politics of Judicial Review*, 38 WAKE FOREST L. REV.

now are willing to make decisions with little rigorous constitutional thinking because it is up to the courts to determine constitutionality. That is not to say that politicians are indifferent to constitutionality or do not opine about the Constitution, but that they do not attend to constitutional issues in the same way knowing that a court will ultimately decide constitutionality.[325] In such an environment it may not be so surprising that the Justices are carving their own way.

In addition to lawmakers and others seeing judicial decisions at all levels as the final step in policymaking, the Justices often seem to believe that about themselves on many of the most important and contentious issues.[326] Though Justices can avoid tackling an issue by denying cert., "digging" a case after they get it, or sidestepping an issue even if they reach the merits, they seem to be less and less willing to do so for major issues.[327] Despite some speculation to the contrary, there was no way that the Supreme Court was going to avoid taking *Bush v. Gore*. Not only did political actors seek the Court's involvement, the Court itself believed its intervention was necessary.[328] The ideas of a robust political question doctrine[329] or "passive virtues"[330] seem almost quaint; indeed in many quarters they are seen as irresponsible. As the parties have diverged in their understanding of the Constitution and Justices of all ideological stripes have become more activist, it is not surprising that more constitutional visions have emerged.

Not only do more issues find their way into courts, when they reach the Court's agenda, with some exceptions, they get decided. Constitutional law is made. Parties and legislatures, on the other hand, have a very different decisional calculus. Parties have the ability to expound their constitutional ideas without ever really reaching a concrete decision. So too with legislatures as the parties in government. Most issues never make the

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697, 721 (2003).

325. Neal Devins, *Congress as Culprit*, 51 DUKE L.J. 435, 440–54 (2001)

326. *See* Powe, *supra* note 324, at 730–31; H.W.PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991).

327. *See* PERRY, *supra* note 326.

328. It would be interesting to learn the cert. vote. It is possible that several Justices engaged in defensive denials, *see id.* at 198–212, but we suspect that most felt that they had to take the case even if they felt that the decision should be made elsewhere.

329. *See* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002)

330. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

agenda, let alone become law.[331] A minority has extraordinary veto powers, and special interest groups on the right and left wield this power with great effect. When an issue does become law, it is almost always the product of compromise. The constitutional vision of a party rarely gets voted on. The point is that the decision processes of courts and legislatures differ. With increased decisional responsibility moving to the Supreme Court, we might expect to see a new phenomenon emerge, such as a persisting third way, that heretofore had not existed.

Though these structural issues such as recruitment patterns and locus of decisions may help explain three visions rather than two, they do not compel the phenomenon. For that, we return to where we began, the need to focus on parties to understand the outputs of governing regimes.

Whether or not one agrees with our evaluation of changes in the Court and among the Justices, there has been an undoubted change in our two national political parties, at least as it relates to the parties in government. By almost any measure, the two national political parties are more ideologically cohesive, and they have become more polarized. We have documented the differences on some major constitutional issues, but it is true over a wide range of issues.[332] We have noted the increase in party cohesion scores within both of the houses and in presidential support scores.

With regard to the parties in the electorate, there has been change as well, though characterizing the change is a bit more complicated than we can elaborate here.[333] Generally speaking, the parties are more "extreme" in their positions and more polarized. There is little ideological overlap. This is explained in large part by the disappearance of conservative Southern Democrats and liberal Republicans. Equally important, however, is where the power centers now lie in the Congress. Southern Democrats not only made the party more conservative, given the

331. *See* JOHN W. KINGDON, AGENDAS, ALTERNATIVES AND PUBLIC POLICIES (1984).

332. *See* STEPEHNSON, *surpa* note 1.

333. The data on the electorate are less clear. There is an extensive debate over whether there has been a partisan realignment in the electorate. The debate includes the definition of a realignment. Paradigmatically, a partisan realignment occurs when the the minority party becomes the majority party. *See* WALTER D. BURNHAM, CRITICAL ELECTIONS: THE MAINSPRING OF AMERICAN POLITICS (1971). Whatever the outcome of the realignment debate, change has occurred. Many Southern Democrats have switched parties, and the strength of Republicans in the South can also be explained by replacement.

seniority system they also wielded a huge amount of power. No longer. In both parties, the safe districts that lead to seniority tend to be at the extremes. Regardless of the increasing polarization of the parties' presidential wings as reflected in the platforms the past structure of congressional power mitigated the output. That is less true today. Ironically, as the politics of Congress becomes more ideologically extreme, ideological noncentrist jurists are less likely to survive a congressional vetting. More to the point, Justices have been and will be less likely to defer to congressional understandings of the Constitution.

CONCLUSION

What we have described is one answer to Larry Kramer's lament in *We the Court*[334] as well as a way of clarifying what Charles Fried finds "perplexing" in *Five to Four*.[335] Even though Kramer is right on target with his explanation of the Rehnquist majority's judicial imperialism, he was not describing a Court that has vanquished the field from constitutional politics. It may well be that "[t]he idea of constitutional politics outside the amendment process is, to the Rehnquist Court, a threatening and possibly oxymoronic proposal"[336] just as once the idea that the earth moves was anathema to the Pope. The Court may wish to preempt constitutional politics, but it cannot. Thus *Casey*'s diktat that Americans should abandon their fights over abortion had the same effect on the abortion debate that the Pope's anti-Copernican conclusion had on the earth's movement around the sun. There is and has been for over thirty years a robust debate outside the Court on the meanings of the Constitution. That debate has been driven by politics and therefore is impossible to halt.

Fried claims "we cannot map the split [on the Court] into a coherent political vision."[337] We have. The split between those who auditioned for the Court and those who didn't represents

334. Larry Kramer, *The Supreme Court, October Term 2000 Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

335. Charles Fried, *The Supreme Court, October Term 2001 Foreword: Five to Four*, 116 HARV. L. REV. 163, 195 (2002).

336. Kramer, *supra* note 334, at 160; *accord* Laurence Tribe, Bush v. Gore *and its Disguises*, 115 HARV. L. REV. 170, 290 (2001) ("[T]he Justices in the *Bush v. Gore* majority have little but disdain for Congress as a serious partner in the constitutional enterprise, and not much patience with 'We the People' as the ultimate sources of sovereignty in this republic.").

337. Fried, *supra* note 335, at 196.

the split between advocates of the Republican and Democratic constitutions and those going a third way. Moreover, apart from that split, it may be that neither the Republican nor the Democratic constitutional vision is sufficiently coherent for Fried. As we have shown, however, politics created those visions, and the parties have found them sufficiently coherent to last for decades.

Even if we are mistaken about causes and predictions, we have nevertheless documented a two-way split between the parties on a number of major constitutional issues and described a very active debate against a background of an imperial Court. Furthermore, we have demonstrated the way that political needs create constitutional visions that, in turn, escalate the intensity of the debate. This has occurred twice before in American history, with the intense debates over slavery and economic regulation. Both times the result was a complete victory for one of the parties.

We have documented what we think is a different, interesting, and important phenomenon over the past thirty years. We also think, however, it provides a template for looking into the future. Divided government has been a recent staple in American politics. Though the government has not always remained divided as some predicted, the margins have been close enough so that neither party is dominating the national political process. Though much has been made of the effect of divided government on policy, we have linked it to outcomes on the Supreme Court. Partisan division may not affect an individual Justice's decisions, but what it may do is give us Souters, Kennedys, and the like, who may reinforce third-way approaches offered by Justices such as O'Connor.

The debates over the confirmation of John Roberts and Samuel Alito demonstrate that at least three of the four issues we highlighted—abortion, religion, and race—remain contested. As with the Clinton presidency, the Democrats appear unwilling to challenge the Court on criminal procedure issues, although we suspect they would like to. It also is interesting to see what issues may take a third path in the future. Arguably, this has occurred with federalism, although like presidential power, it is hard to separate theoretical positions of the parties from immediate policy interests. For example, Republicans rarely seem to mind federally controlled crime policies despite their general argument to return power to the states. Democrats rarely call for more power to Washington as a theoretical matter, though there is little doubt about the difference between the parties on the general

role of states versus the federal government. We may however hear the virtues of states as laboratories for experimentation when it comes to gay marriage. The Democrats' opposition to the Court has largely focused on the specific issue—guns near schools, protection for violence against women, protection of the environment—rather than the issue of federalism per se. One could argue that the Court's federalism jurisprudence is in sync with the Republican Party, but one might equally argue that it has started down a third road. An argument could be made that a third way is beginning to occur with capital punishment, and maybe the same is true with regard to gay rights. One can even imagine it occurring over issues of property rights and gun control. Whatever the Court does, however, it will be accompanied by a full debate between the parties over what the Constitution "really" means.