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ARTICLES

UNDERSTANDING THE CONSTITUTIONAL REVOLUTION

Jack M. Balkin[*] *and Sanford Levinson*[**]

INTRODUCTION: WHERE WE ARE

WE live in extraordinary times. In the past year the Supreme Court of the United States has decided an election and installed a president. In the past ten years it has produced fundamental changes in American constitutional law. These two phenomena are related. Understanding the constitutional revolution that we are living through means understanding their connections.

The new occupant of the White House—we will call him "President" after he has successfully prevailed in an election conducted according to acceptable constitutional norms—has taken the oath of office and has begun to govern. But his claim to the presidency is deeply illegitimate. He and the political party that he leads seized power through the confluence of two important events that would have caused widespread outrage and produced vigorous objections from neutral observers if they had occurred in a third world country.

The first is the disenfranchisement of black voters in Florida in violation of the Voting Rights Act of 1965.[1] Concerned about alleged

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[1] See U.S. Commission on Civil Rights, Draft Report: Voting Irregularities in Florida During the 2000 Presidential Election (Approved by the Commissioners on June 8, 2001),

voter fraud in the 1997 Miami mayoral election, Florida state officials hired Database Technologies, a private firm with Republican connections, to purge the voter rolls of suspected felons.[2] "Suspected," it turned out, is the key word, because a substantial number of the purged voters turned out to be guilty of nothing more than the crime of being African-American.[3] Although Database Technologies repeatedly warned that their methods would produce many false positives, Florida officials insisted on eliminating large numbers of suspected felons from the rolls and leaving it to county supervisors and individual voters to correct any inaccuracies. Clay Roberts, director of the state's division of elections, explained that "[t]he decision was made to do the match in such a way

available at http://www.usccr.gov/vote2000/stdraft1/main.htm (last modified Aug. 10, 2001), at ch. 1 (noting "strong basis" for belief that § 2 of the Voting Rights Act was violated) [hereinafter Voting Irregularities]. The story of black disenfranchisement was first revealed by British journalists covering the election. See Gregory Palast, Inside Republican America: A Blacklist Burning for Bush, The Observer (London), Dec. 10, 2000, at 9 [hereinafter Palast, Inside Republican America]; Julian Borger, How Florida played the race card: 700,000 people with criminal past banned from voting in pivotal state, The Guardian (London), Dec. 4, 2000, at 3; see also Gregory Palast, Florida's 'Disappeared Voters': Disfranchised by the GOP, Nation, Feb. 5, 2001, at 20 (noting black disenfranchisement). American papers picked up the story months later. See Melanie Eversley, Testimony says legal Florida voters blocked, Atlanta Journal-Constitution, Apr. 1, 2001, at D5; Christian Goffard, Felon list flaws victimize voters, St. Petersburg Times, Apr. 1, 2001, at B1; John Lantigua, How The GOP Gamed The System In Florida, Nation, Apr. 30, 2001, at 11; Melanie Eversley, Florida's flawed vote haunts minorities; Many suspect GOP plot, Atlanta Journal-Constitution, May 28, 2001, at 8A; Robert E. Pierre, Botched Name Purge Denied Some the Right to Vote, Wash. Post, May 31, 2001, at A1.

[2] Voting Irregularities, supra note 1, at chs. 1, 5.

[3] The problem was that the system used a very broad matching system to identify possible felons among voters—for example, whether the first four letters of a voter's first name or eighty percent of the letters in the voter's last name matched those of a felon on the list—and then used the race of the felon to narrow down the possibilities:

> [I]f someone named, say, John Smith was identified as a felon, and 10 matches came up, only the ones of the same race were likely to be purged. . . . Since about half of felony convictions involve African Americans—while barely one in seven Floridians are black—this methodology ensured that a disproportionate number of law-abiding black voters would be disenfranchised.

Gregory Palast, The Wrong Way To Fix the Vote, Wash. Post, June 10, 2001, at B1 [hereinafter Palast, Wrong Way]; see also Voting Irregularities, supra note 1, at ch. 1 (noting that African-Americans were much more likely to be incorrectly placed on the list of felons than whites and Hispanics). Using different search and matching criteria could have almost completely eliminated the problem of false positives, but Florida state officials refused to do this because they were more concerned about preventing felons from remaining on the voting rolls. Palast, supra. The irony, of course, is that the purge lists were so inaccurate that many county supervisors refused to use them, and as a result, many felons did vote in the 2000 election. See Scott Hiaasen et al., Thousands Of Felons Voted Despite Purge, Palm Beach Post, May 28, 2001, at A1.

as not to be terribly strict on the name."[4] Indeed, the list was so inclusive that one county election supervisor found that she was on it.[5]

It is estimated that at least fifteen percent of the purge list statewide was inaccurate, and well over half of these voters were black.[6] When these unsuspecting voters arrived at their precincts on November 7 in order to exercise their "fundamental political right"[7] to the franchise, they were turned away. Any protests were effectively silenced by the bureaucratic machinery of Florida law.[8] As the U.S. Civil Rights Commission put it, "[p]erhaps the most dramatic undercount in Florida's election was the nonexistent ballots of countless unknown eligible voters, who were turned away, or wrongfully purged from the voter registration rolls by various procedures and practices and were prevented from exercising the franchise."[9] Those voters, wrongfully excluded from the rolls, were almost certainly more than enough to overcome George W. Bush's 537 vote margin in Florida.[10] In addition,

[4] Pierre, supra note 1, at A1.

[5] Palast, Inside Republican America, supra note 1, at 9; Voting Irregularities, supra note 1, at ch. 5.

[6] Palast, Wrong Way, supra note 3, at B1. Database Technologies ("DBT") (later Choicepoint), the private firm which created the lists, did not dispute this figure, which they regarded as a reasonable rate of error given the specifications devised by the state officials who supervised their work. Id. In addition, approximately 2800 other people who were convicted of felonies in states that restore voting privileges after a sentence is served were incorrectly purged. Id. The DBT list also contained many people who had been convicted only of misdemeanors. See Voting Irregularities, supra note 1, at ch. 5. In fact, the fifteen percent figure may be too low: Leon County did an independent assessment of the purge list and was able to confirm that only five percent of the purge list had criminal records. Id.

[7] Harper v. Va. Bd. of Elections, 383 U.S. 663, 667 (1966) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)); see also Bush v. Gore, 121 S. Ct. 525, 529–30 (2000) (citing *Harper* and describing "the right to vote" as "fundamental").

[8] See Voting Irregularities, supra note 1, at chs. 3, 5.

[9] Voting Irregularities, supra note 1, at ch. 9.

[10] Black voters voted approximately nine to one in favor of Gore in the 2000 Election. Pierre, supra note 1, at A1. Gore also did quite well among poor and working class voters generally, see Derrick Z. Jackson, A Touchdown For The People, Boston Globe, Nov. 10, 2000, at A27, so conceivably he might have won the vote even among nonblacks who were wrongfully purged from the rolls. Even if he simply broke even among this group, their votes would cancel out and the black vote would be the deciding margin. Assuming fifteen percent of the 58,000 names on the DBT felon list were false positives and that approximately 2900 other felons whose civil rights were restored were inappropriately added to the list, 11,600 people were wrongfully purged from the voter lists. We do not know what percentage of these eligible voters tried to vote and were rebuffed. News reports suggest that approximately 5,600 people on the DBT felon list did manage to cast votes, in part because some county officials refused to use the list. See Hiaasen et al., supra note 3, at A1. However, as noted previously, supra note 6, not all of these people were actually felons.

many African-Americans who did vote nevertheless had their ballots spoiled and thus left uncounted because they lived in counties with antiquated and unreliable voting equipment. The Civil Rights Commission estimated that black voters were nine times more likely to have their votes rejected than white voters.[11]

Because a violation of the federal Voting Rights Act, even if conclusively proved, does not give rise to a right to a new presidential election, the story of black disenfranchisement was not effectively covered in the American mass media during the December 2000 struggle over the Florida election. The media tended to be interested primarily in the horse race—who was ahead and who was most likely to win. The Gore forces had almost no interest in playing up the problem of black disenfranchisement, because it would not help their man win the election. The Bush forces had even less interest in emphasizing it; not only would it not help their man win, but several of them were actually responsible for the disenfranchisement in the first place. Hence most of the coverage of black disenfranchisement occurred through the European press, which was understandably puzzled that most Americans seemed unconcerned that a presidential election was being stolen from under their noses.[12] The U.S. Civil Rights Commission has since issued a report on black disenfranchisement, and lawsuits have been filed.[13] But that has occurred after the beginning of the Bush Administration, when the horse, as some Texans might say, is already out of the barn.

Yet even the purging of black voters was not enough to swing the election to George W. Bush. The second act of dubious legality occurred on December 9, 2000, when five members of the United States Supreme Court issued a stay halting recounts in Florida, recounts which almost all observers at the time believed would put Al Gore ahead.[14] On December

[11] Statewide, ballots cast by blacks were rejected at a rate of 14.4%, compared with 1.6% for other voters. See Voting Irregularities, supra note 1, at ch. 1.

[12] See supra note 1.

[13] See Voting Irregularities, supra note 1; Dana Canedy, Rights Panel Begins Inquiry Into Florida's Voting System, N.Y. Times, Jan. 12, 2001, at A20 (noting that the NAACP, the ACLU, and other civil rights groups, citing the massive disenfranchisement of black voters, filed a lawsuit in federal court in Miami against state election officials).

[14] Those observers included U.S. Supreme Court Justice Antonin Scalia, who justified the Court's stay on the grounds that Bush would be irreparably harmed by aspersions that a Gore lead would cast on his legitimacy. Bush v. Gore, 121 S. Ct. 512, 512 (2000) ("*Bush I*") (Scalia, J., concurring). In fact, the outcome was very much in doubt. Later audits by journalists suggested that Gore might have pushed ahead only under some standards for counting chads but not under others. See Larry Eichel, Latest Florida study lends credence to

12, the same five members of the Court halted the recounts for good in *Bush v. Gore*.[15] The opinion was hastily written and poorly reasoned. Its conclusion—that all recounts should stop—did not easily follow from its premise—that the recounts should be conducted according to principles of equal protection of the laws. Nevertheless, the opinion had the desired effect. The recounts stopped. Gore conceded. Bush took the oath of office.

Why do we begin an article on the constitutional revolution with an account of the illegality of the 2000 election and the illegitimacy of the Bush Presidency? The answer is depressingly simple: Five members of the United States Supreme Court, confident of their power, and brazen in their authority, engaged in flagrant judicial misconduct that undermined the foundations of constitutional government. That is worth pointing out even if, empirically, they appear to have gotten away with it and most opinion elites are more worried about the value of their stock portfolios than about the consequences of the 2000 election for a country that is dedicated to "government of the people, by the people, and for the people."[16] The election is like the stinking carcass of a pig dumped unceremoniously into a parlor. The smell of rot is everywhere. How can you avoid talking about it? A colossal act of illegality that subverts constitutional structures deserves at least some comment in a law review. So it was with Watergate in 1974 (although there the Court was the remedy for the illegality and not its cause). So it is today.

Simply put, a constitutional coup occurred last year.[17] The Florida Republican Party and its operatives were central players in that coup.[18]

Democratic mantra, Phila. Inquirer, May 17, 2001; Tim Nickens, Ballot reviews agree on this: It was close, St. Petersburg Times, June 3, 2001, at 1A; Recount Would Have Increased Bush Win, Papers Say; Politics: His Margin Of Victory In Florida Would Have Hit 1,665, Review Of 'Undervotes' Finds. But Gore Would Gain If New Tally Began From Scratch, L.A. Times, Apr. 4, 2001, at A10; 2nd Review of Florida Presidential Vote Is Inconclusive, N.Y. Times, May 11, 2001, at A29. But this does not affect what people reasonably believed at the time.

[15] 121 S. Ct. 525 (2000) ("*Bush II*").

[16] Abraham Lincoln, Gettysburg Address, *reprinted in* Garry Wills, Lincoln at Gettysburg: The Words that Remade America 263 (1997).

[17] We are not alone in this estimation. See Bruce Ackerman, Anatomy of a Constitutional Coup, London Rev. of Books, Feb. 8, 2001, at 3.

[18] In addition to the problems of black disenfranchisement, the *New York Times* has recently uncovered evidence that Republican operatives pressured local Florida election officials to accept absentee ballots in GOP-leaning counties that did not comply with Florida election law and to reject equally problematic absentee ballots in counties favoring Al Gore. David Barstow & Don Van Natta, Jr., How Bush Took Florida: Mining the Overseas Absentee Vote, N.Y. Times, July 15, 2001, at A1. The Times has also suggested that Florida

So too were the five conservatives on the nation's highest Court. There is, we hasten to add, no evidence the two groups acted in concert or conspiracy. This does not, however, diminish the importance of the fact that together they undermined a presidential election and installed a person in the White House who had no demonstrable constitutional right to that office. Governor Bush's claim to the presidency is illegitimate. He rules by adverse possession. It is hard to pretend as if nothing happened and just go on to talk about the cases. And yet one *must* go on to talk about the cases, not only because that is the expectation of someone turning to an issue of a law review, but also because they are an equally important part of our story.

The Supreme Court's decision in *Bush v. Gore* did not occur in a vacuum. It occurred against the background of a veritable revolution in constitutional doctrine that has been going on for some fifteen years. We are in the middle of a paradigm shift that has changed the way that people write, think, and teach about American constitutional law. Those changes are still ongoing; their full contours have yet to be determined. Black disenfranchisement and *Bush v. Gore* seem revolutionary, if only because they occurred over a relatively short period of time. But there is a larger revolution going on of which they are only a part—one that has occurred slowly over the course of a decade. That larger constitutional revolution is the subject of this Article. As we shall explain, *Bush v. Gore* may play a very important role in the maintenance and ultimate success of that revolution. But it is not the whole story. Even without *Bush v. Gore*, one must still account for a fundamental shift in constitutional thought and constitutional doctrine.[19]

Secretary of State (and co-chair of the Florida Bush campaign) Katherine Harris essentially gave her office and its computers over to fellow Republican partisans to promote Bush's candidacy. David Barstow, Data Permanently Erased From Florida Computers, N.Y. Times, Aug. 8, 2001, at A10.

[19] To be sure, in this "revolution" there has been no armed uprising against constituted authority. Instead, the constitutional revolution is being led by those in authority, including presidents, speakers of the House, senators, and justices of the United States Supreme Court. Nevertheless, we regularly speak of the "constitutional revolution" of 1937. See, e.g., Barry Cushman, Rethinking The New Deal Court: The Structure Of A Constitutional Revolution (1998); William E. Leuchtenburg, The Supreme Court Reborn: The Constitutional Revolution In The Age Of Roosevelt (1995); Robert Justin Lipkin, Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism (2000). Although Cushman is quite critical of Leuchtenburg, Cushman, supra, at 3–5, he nonetheless accepts the proposition that a genuine revolution in thought occurred in cases like *United States v. Darby*, 312 U.S. 100 (1941), and *Wickard v. Filburn*, 317 U.S. 111 (1942). See Cushman, supra, at 224–25. As we describe below, there is ample reason to

The first stirrings of this shift occurred in 1986, when President Reagan promoted then-Associate Justice William H. Rehnquist to Chief Justice while the vacancy left by the retirement of Chief Justice Warren Earl Burger was filled by the substantially more conservative Antonin Scalia.[20] But the revolution really took off in 1991, when Justice Clarence Thomas replaced Justice Thurgood Marshall.[21] This event was as important as the replacement of Justice Felix Frankfurter with Justice Arthur Goldberg in 1962. Just as the replacement of Frankfurter with Goldberg cemented a strong liberal majority—and gave rise to many of

believe that the current Court and its champions are engaged in an enterprise that, if successful, will rival the period of 1934–42 in its degree of constitutional transformation. Thus Professor Steven Calabresi, who, just as relevantly, is one of the co-founders of the Federalist Society, penned an article in the *Wall Street Journal* immediately after *Printz v. United States*, 521 U.S. 898 (1997), titled "A Constitutional Revolution," which enthusiastically applauded the possibility that the Court was indeed embarking on a "revolution[ary]" transformation of established constitutional doctrine. Steven Calabresi, A Constitutional Revolution, Wall St. J., July 10, 1997, at A14; see also Linda Greenhouse, Divided They Stand: The High Court and the Triumph of Discord, N.Y. Times, July 15, 2001, at § 4, at 1 ("There is a revolution in progress at the court, with Chief Justice William H. Rehnquist and Justices Scalia, Sandra Day O'Connor, Anthony M. Kennedy and Clarence Thomas challenging long-settled doctrines governing state-federal relations, the separation of powers, property rights and religion."). Chistopher Schroeder's essay, "Causes of the Recent Turn in Constitutional Interpretation," 51 Duke L. J. (forthcoming Oct. 2001) (manuscript on file with authors), raises many of the same themes; we discovered it too late to incorporate its many insights into our own work.

[20] It is perhaps worth noting that Antonin Scalia, the first Italian-American nominated to the high court, was confirmed unanimously, while William Rehnquist, who had already sat on the Court for 15 years, received the quite astonishing number of thirty-three negative votes. The Oxford Companion to the Supreme Court of the United States 971 (Kermit L. Hall ed., 1992).

[21] David H. Souter, of course, had been named to the Court a year earlier to replace William J. Brennan. At the time, that was viewed as a major change, but Souter, during his decade of service, has behaved far more like William Brennan than anyone would ever have predicted at the time. We await with interest the opening of relevant papers from the administration of President George H.W. Bush to determine whether he was truly snookered by former New Hampshire Senator Warren Rudman, Souter's major sponsor, or whether the naming of this unknown New Englander was part of a brilliant political strategy to maintain *Roe v. Wade*, 410 U.S. 113 (1973), on the books and protect the Republican party's electoral chances. Under this view preserving *Roe* actually helped Republicans: Maintaining the precedent would provide a useful target for conservative Republicans. At the same time, it would comfort pro-choice voters who might defect if there was a real danger that *Roe* would be overturned. As long as *Roe* was in place, Republican legislators would never have to take responsibility for criminalizing abortion. It is possible that this strategy is still in place. Compare the statements made during the 2000 campaign by President Bush's son, Governor George W. Bush, who seemed repeatedly to discourage any possible inference that he would appoint judges hostile to *Roe* even as he affirmed his "personal" distaste for abortion. See Edward Lazarus, Bush and the Court, Wash. Post, Oct. 24, 2000, at A27.

the decisions we now identify with the Warren Court[22]—the replacement of Marshall with Thomas created a reliable conservative majority with regard to a plethora of issues.[23]

In the past ten years, the Supreme Court of the United States has begun a systematic reappraisal of doctrines concerning federalism, racial equality, and civil rights that, if fully successful, will redraw the constitutional map as we have known it.[24] This newly vitalized majority has, to be sure, not rethought every part of constitutional doctrine—paradigm shifts almost never do that—but it has made an important mark on constitutional law. And, not surprisingly, this same bloc of five conservatives handed the presidency to George W. Bush in *Bush v. Gore*. By doing so, they helped ensure a greater probability for more conservative appointments and more changes in constitutional doctrine. The conservative five are not through yet. They have selected a president to keep their constitutional transformation going. And if George W. Bush has his way, they may have only just begun.

Perhaps the best way to understand the constitutional revolution we are living through is through the lens of a single case from last Term, *Board of Trustees of the University of Alabama v. Garrett*.[25] *Garrett* is important not only for its holding—that plaintiffs may not sue states for money damages for violations of Title I of the Americans with Disabilities Act—but also as a symbol of the constitutional revolution that has occurred in the past decade. It is important to understand that only several years ago the result in *Garrett* would have been unthinkable. After all, in 1985 the Supreme Court held in *Garcia v. San Antonio Metropolitan Transportation Authority*[26] that the political process would serve as the principal guarantor of state autonomy, and as late as 1991 the Court accepted the legitimacy of congressional regulation of state employment practices so long as Congress had made a clear statement of its intent to do so.[27] Earlier cases had also upheld the

[22] See Lucas A. Powe, Jr., The Warren Court And American Politics 211 (2000).

[23] The exception, of course, is abortion, where Justices O'Connor and Kennedy still remain unwilling to join their more conservative colleagues in overturning *Roe*. See Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[24] On the importance of cognitive maps of constitutional values, see Sanford Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637 (1989).

[25] 121 S. Ct. 955 (2001).

[26] 469 U.S. 528 (1985).

[27] This was, after all, the import of *Gregory v. Ashcroft*, 501 U.S. 452 (1991). The Court in *Ashcroft* did not hold that Congress was without the power to apply its age discrimination

right of Congress to waive state sovereign immunity in order to achieve important national objectives.[28] A fortiori, it seemed obvious that states would not be immune from suit when they violated their citizens' federally guaranteed civil rights.

In 1996, however, in *Seminole Tribe v. Florida*,[29] the increasingly confident new conservative majority created a new state immunity, purportedly based on the Eleventh Amendment but in reality made up out of whole cloth. It held states immune from money judgments when they violated federal rights created under Congress's commerce powers. Three years later, an even more astonishing decision, *Alden v. Maine*,[30] held states immune from suits for violations of the same federal laws in state courts. Because the Eleventh Amendment applies by its terms only to federal judicial power, the five conservatives discovered this new immunity in the Tenth Amendment. They argued that regardless of the text of the Eleventh Amendment, or indeed, of the Constitution generally, allowing states to be held responsible for violations of federally created rights would impugn their dignity.[31]

In 1997, *City of Boerne v. Flores*[32] limited congressional power to pass civil rights legislation under Section 5 of the Fourteenth Amendment. Congress could only remedy violations of constitutional rights as the Court interpreted them. Moreover the remedy had to be—at least in the Court's opinion—congruent and proportional to the scope and frequency of violations.[33] That was important not only because it limited congressional power to pass civil rights legislation, but also because only legislation passed under Section 5 would be free from the Tenth and Eleventh Amendment immunities the Court had just created in *Seminole Tribe* and *Alden*. The limitations created in *Boerne* were taken up by the five conservatives with gusto and made altogether more strict in *Florida Prepaid*,[34] *Morrison*,[35] and *Kimel*.[36] Taken together,

law to Missouri's state judges, but rather that Congress had to make a plain statement of its intentions if wanted to make such an incursion on state autonomy. Id. at 460–61.

[28] See, e.g., Parden v. Terminal Ry., 377 U.S. 184 (1964) (permitting constructive waiver of Eleventh Amendment immunity), overruled by College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 680 (1999).

[29] 517 U.S. 44 (1996).

[30] 527 U.S. 706 (1999).

[31] Id. at 749 (quoting *In re Ayres*, 123 U.S. 443, 505 (1887)).

[32] 521 U.S. 507 (1997).

[33] Id. at 520.

[34] Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999).

these cases produce the result in *Garrett*, which seems to hold states immune from damage suits for violations of the Americans with Disabilities Act, probably the most important civil rights act passed since 1964.[37] Indeed, the logic of *Garrett* seems to hold states immune from damage suits for violations of many other federal civil rights laws, unless—one presumes—the state is charged with racial or sexual discrimination.

But there is more. In 1995, the same five conservatives decided *United States v. Lopez*,[38] in which the Court—for the first time in over a half-century—invalidated an act of Congress regulating private parties as beyond Congress's power to regulate interstate commerce, regardless of whatever effects the behavior in question had on interstate commerce. Five years later, to demonstrate that *Lopez* was no fluke, the conservatives invalidated portions of the Violence Against Women Act in *Morrison*.[39]

And we're not done yet. We have not mentioned the series of sharply split decisions limiting federal regulation of state instrumentalities, such as *New York v. United States*[40] and *Printz*;[41] the curtailment of affirmative action in *Croson*[42] and *Adarand*,[43] the narrowing of civil rights legislation through interpretation in *Alexander v. Sandoval*,[44] and the limitation on race-conscious redistricting in *Shaw v. Reno*,[45] *Miller v. Johnson*,[46] and their progeny.[47] When one adds the Court's slow but steady evisceration of the *Lemon*[48] test in Establishment Clause cases like *Agostini v. Felton*[49] and *Mitchell v. Helms*,[50] one can see that great

[35] United States v. Morrison, 529 U.S. 598 (2000).
[36] Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).
[37] *Garrett*, 121 S. Ct. at 967–68.
[38] 514 U.S. 549, 555 (1995).
[39] *Morrison*, 529 U.S. at 617.
[40] 505 U.S. 144 (1992).
[41] Printz v. United States, 521 U.S. 898 (1997).
[42] City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
[43] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).
[44] 121 S. Ct. 1511 (2001) (holding that no private right of action existed to enforce regulations under Title VI that prohibited discriminatory impact of conduct by federal funding recipients).
[45] 509 U.S. 630 (1993).
[46] 515 U.S. 900 (1995).
[47] See Shaw v. Hunt, 517 U.S. 899 (1996); Bush v. Vera, 517 U.S. 952 (1996).
[48] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[49] 521 U.S. 203 (1997).
[50] 530 U.S. 793 (2000).

changes have been afoot for some time.[51] *Bush v. Gore* seems merely to be the icing on the cake.

As noted earlier, the constitutional revolution we see in these cases has not extended to every part of constitutional law. This is scarcely surprising; revolutions never occur everywhere at once. For every historian who emphasizes sharp change, there is another who takes delight in pointing to the invariable (and often considerable) continuities in many areas of doctrine. Thus, for example, if religion and takings clause jurisprudence has been affected, sex equality law remains roughly the same.[52] The Court has moved back and forth on gay rights issues without clear direction.[53] Criminal procedure has been in retrenchment from the days of the Warren Court almost continuously since the 1970s.[54] Here, the Rehnquist Court has simply carried on the work of its predecessors, though it proved unwilling in 2000 to overrule that great bete noire of American conservatism, *Miranda v. Arizona*.[55]

How far could this revolution go? By its own terms *Morrison* seems to draw a line between economic and non-economic subjects of regulation.[56] Hence it seems to preserve the reasoning of *United States v. Darby*[57]and *Wickard v. Filburn*[58] at least with respect to situations that the court sees as essentially "economic."[59] Presumably that includes most federal labor and employment, and economic regulation. The

[51] For the record, we should note that Levinson does not bewail the changes in the Establishment Clause doctrine.

[52] See, e.g., United States v. Virginia, 518 U.S. 515 (1996).

[53] Compare Romer v. Evans, 517 U.S. 620 (1996) (holding unconstitutional state constitutional amendment which limited the ability of local governments to pass antidiscrimination laws protecting gays, lesbians, and bisexuals), with Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (holding unconstitutional, as applied to Boy Scouts of America, New Jersey's public accommodation statute that prohibited discrimination on the basis of sexual orientation).

[54] See, e.g., John F. Decker, Revolution to the Right: Criminal Procedure Jurisprudence during the Burger-Rehnquist Court Era (1992); David J. Bodenhamer, Reversing the Revolution: Rights of the Accused in a Conservative Age, *in* The Bill of Rights in Modern America: After 200 Years 101–19 (David J. Bodenhamer & James W. Ely, Jr. eds., 1993); Michael J. Klarman, The Puzzling Resistance to Political Process Theory, 77 Va. L. Rev. 747, 763 (1991) (noting "retrenchment" in criminal procedure from Warren Court to Burger and Rehnquist Courts).

[55] See Dickerson v. United States, 530 U.S. 428, 432 (2000) (reaffirming *Miranda v. Arizona*, 384 U.S. 436 (1966)).

[56] *Morrison*, 529 U.S. at 609–10 (2000).

[57] 312 U.S. 100 (1941).

[58] 317 U.S. 111 (1942).

[59] *Morrison*, 529 U.S. at 609–10 (2000).

Commerce Clause limitation in *Morrison* seems mainly directed at civil rights protections that fall outside of the employment context, crimes with no obvious economic connections, and perhaps at some forms of environmental protection. But we do not know whether these concessions are "strategic," designed largely in order to keep a possibly wavering vote, or whether the conservative majority simply wishes to proceed slowly but surely toward more thoroughgoing changes, one case at a time.

Thus, we do not yet know the full contours of the present revolutionary situation. It could become much more radical and far ranging. For example, the Court might hold that certain environmental regulations are beyond the commerce power.[60] It might prohibit suits against the states for violations of the Family and Medical Leave Act.[61] Finally, it might hold that older civil rights laws involving race and sex are effectively inapplicable to states. Two examples would be application of disparate impact liability under Title VII of the Civil Rights Act of 1964[62] and the prohibition of pregnancy discrimination under the Pregnancy Discrimination Act,[63] each of which offers protections well beyond what the Constitution requires under the Court's existing equal protection jurisprudence.[64]

At least up to now, the Court's federalism decisions have more struck an ideological blow for limited federal government than truly put a significant damper on federal regulatory power. As scholars on both the right and left have demonstrated,[65] a Court truly committed to

[60] See Solid Waste Agency v. United States Army Corps of Eng'rs, 121 S. Ct. 675 (2001) (construing the Clean Water Act not to apply to abandoned sand and gravel pits with seasonal ponds that provide habitat for migratory birds, where such construction might raise constitutional questions about Congress's powers to impinge on the states' traditional and primary power over land and water use).

[61] See Kazmier v. Widmann, 225 F.3d 519 (5th Cir. 2000) (holding that an employee could not sue a state in federal court for violations of the Family and Medical Leave Act).

[62] See Griggs v. Duke Power Co., 401 U.S. 424 (1971) (offering theory of disparate impact liability under Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq. (2000)).

[63] Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2000).

[64] See Washington v. Davis, 426 U.S. 229 (1976) (finding disparate impact not sufficient for violation of equal protection clause); Geduldig v. Aiello, 417 U.S. 484 (1974) (finding discrimination based on pregnancy not sex discrimination under the equal protection clause).

[65] See, e.g., Matthew D. Adler and Seth F. Kreimer, The New Etiquette of Federalism: New York, Printz, and Yeskey, 1998 Sup. Ct. Rev. 71; Lynn A. Baker, Conditional Federal Spending after Lopez, 95 Colum. L. Rev. 1911 (1995); Lynn A. Baker, Conditional Federal Spending and States' Rights, 574 Annals 104 (2001); Ernest A. Young, State Supreme Sovereign Immunity and the Future of Federalism, 1999 Sup. Ct. Rev. 1.

reinvigorating state autonomy must engage in far more active monitoring of conditional federal spending, the series of doctrines through which the federal government can get states to do things by threatening to withhold federal funds. *New York v. United States* and *Printz* have comparatively less bite—indeed, they become almost mysterious—when their supporters, such as Justice Sandra Day O'Connor in *New York*, emphasize the power of the federal government to achieve almost identical ends simply by threatening states with withdrawal of federal funding if they do not agree to help in the enforcement of federal programs.[66]

The Court last revisited these doctrines in *South Dakota v. Dole*,[67] in which Chief Justice Rehnquist, over the dissents of the odd couple of Justices Sandra Day O'Connor and William J. Brennan,[68] appeared to endorse almost complete judicial deference to congressional policy. Part of the explanation may be the belief that there is no way to distinguish between conditional funding of individuals and of states, and the conservative majority generally supports the former.[69] If the Court significantly revised its view of the Spending Clause so that the federal government could not easily condition state behavior on continued federal funding, it might change the balance of federal and state power very quickly. This would truly be the first major rollback of federal regulatory power since the New Deal.

Any significant reinvigoration of state autonomy would also require a reversal of the present capacious notions of preemption. The Court often finds that federal legislation prohibits state legislation affecting similar issues, even in the absence of an express statement by Congress and even when the state legislation does not directly conflict with federal

[66] *New York*, 505 U.S. at 167.

[67] 483 U.S. 203 (1987).

[68] Id. at 212 (Brennan, J., dissenting) (arguing that states have the power to regulate liquor under the Twenty-first Amendment); id. (O'Connor, J., dissenting) (arguing that a closer connection between the conditions imposed and the purpose for which funds are distributed is necessary to prevent interference with state autonomy).

[69] See, e.g., Rust v. Sullivan, 500 U.S. 173 (1991) (holding constitutional the withdrawal of federal funds from Title X reproductive services clinics if the clinics discussed abortions). This makes the recent opinion in *Legal Services Corp. v. Velazquez*, 121 S. Ct. 1043 (2001), especially interesting. There Justice Kennedy, writing for himself and the four liberals, struck down limitations on the kinds of arguments lawyers working for the Legal Services Administration could make in representing their clients. Id. at 1052–53.

law.[70] In June 2000, the Court unanimously invalidated Massachusetts's attempt to limit collaboration with a tyrannical regime in Myanmar,[71] though Congress most certainly did not dictate this result, nor was the Massachusetts law demonstrably in conflict with the national legislation.[72] The best explanation of the result may be the Court's view that the United States needed to speak, through the President, "for the Nation with one voice in dealing with other governments" and its concomitant fear that this capacity for monologue is "compromise[d]" by the Massachusetts law.[73] That the separation of powers, including its vertical dimension of federalism, may have the specific purpose of promoting a dialogue among different voices even with regard to foreign policy issues does not seem to have occurred to the Court.[74] Perhaps less explicable, at least from a federalism perspective, is the conservative majority's decision in *Circuit City Stores*,[75] which preempted state employment law and forced a federal scheme of arbitration on private employees even when the federal statute easily lent itself to a different reading that would have preserved state prerogatives.[76] Possibly the latter decision reflects a simple desire to protect business from regulation—a different sort of conservative value—but it surely does nothing to promote the autonomy and the dignity of sovereign states.[77]

This review of the revolutionary behavior of the past decade brings us back where we began, to *Bush v. Gore*. *Bush v. Gore* is less important doctrinally—indeed, its muddled reasoning barely passes for legal

[70] Ernest Young makes this argument especially effectively in his article cited supra note 65, at 38.

[71] See Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

[72] See Sanford Levinson, Compelling Collaboration with Evil? A Comment on Crosby v. National Foreign Trade Council, 69 Fordham L. Rev. 2189 (2001).

[73] *Crosby*, 530 U.S. at 381.

[74] See Levinson, supra note 72, at 2195–96. As Ernest Young has recently written, "'foreign affairs' is no more sustainable as a category than 'interstate commerce' or 'state police power' was in 1937." Ernest A. Young, Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception, 69 Geo. Wash. L. Rev. 139, 188 (2001).

[75] Circuit City Stores v. Adams, 121 S. Ct. 1302 (2001).

[76] See id.

[77] Along the same lines, we should note that the five conservatives' scrupulous concern with protection of state sovereignty and state regulatory prerogatives seems to vanish into thin air when state environmental laws are at stake. The conservative five have greatly expanded Takings Clause jurisprudence in a series of challenges to state environmental regulation. See Palazzolo v. Rhode Island, 121 S. Ct. 2448 (2001); Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

doctrine—than for its practical consequences for the constitutional revolution. By a vote of 5-4, the conservatives decided who would make judicial nominations for the next four years. It gave the Republicans the opportunity to preserve their five-vote majority, and perhaps increase it to six or seven.

If that were to happen, the revolution that began in the late 1980s would go into overdrive. If Justices O'Connor and John Paul Stevens were replaced by jurists acceptable to George W. Bush's base of hard-right Republicans, it is entirely possible that *Roe v. Wade*[78] might finally be overturned.[79] More likely, a Court freshly stocked with strong conservatives would thoroughly rewrite the law of the Establishment Clause, legalizing state grants to parochial schools and, possibly, home schoolers as well.[80] Certain forms of state-sanctioned prayer and religious ceremonies would make their way back into the public schools.[81] One can imagine a quick end to any degree of constitutional protection for gay rights, as well as increased restrictions on state antidiscrimination laws under an expanded conception of freedom of association.[82] The Court might well refuse to follow Justice Lewis F. Powell's opinion in *Bakke*[83] and eliminate diversity as a justification for race-based affirmative action.[84] This would effectively end affirmative action in public university admissions programs. Following the examples of *Wards Cove Packing Co. v. Antonio*,[85] *Patterson v.*

[78] 410 U.S. 113 (1973).

[79] As we mentioned, supra note 21, we doubt that this would have the best consequences for the Republican Party, and so even a very conservative president might not appoint Justices pledged to overturn *Roe*. Nevertheless, precisely because Justices are not held politically accountable for their decisions in the way that politicians are, a six or seven person conservative majority might feel emboldened to overturn *Roe* even though this would harm Republican electoral chances, in the same way that liberal Justices harmed the Democrats' electoral coalition in the 1960s through their criminal procedure and desegregation decisions.

[80] See, e.g., *Mitchell*, 530 U.S. at 793.

[81] See, e.g., Brown v. Gilmore, 258 F.3d 265 (4th Cir. 2001) (upholding the constitutionality of Virginia's "moment of silence" in the face of a challenge under the Establishment Clause).

[82] See, e.g., Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

[83] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[84] See, e.g., Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (holding that the University of Texas School of Law could not use race as a factor in admissions in order to achieve a diverse student body); Grutter v. Bollinger, 137 F. Supp. 2d. 821 (S.D. Mich. 2001) (rejecting diversity rationale for affirmative action).

[85] 490 U.S. 642 (1989) (adopting a narrow construction of disparate impact liability under Title VII).

McClean Credit Corp.,[86] and *Alexander v. Sandoval*,[87] the Court would probably narrowly interpret federal civil rights laws to limit liability. In line with the federalism decisions of the past decade, the Court would also probably discover more and more ways of limiting federal power—especially federal civil rights power under the Reconstruction Amendments—and expanding state sovereign immunity. Finally, the Court might even be tempted to accept Justice Anthony M. Kennedy's invitation to overrule *Ex Parte Young*,[88] leaving ordinary citizens without any possibility of injunctive relief for many state violations of federal law.

I. POLITICS HIGH AND LOW

Bush v. Gore and *Garrett* are two great symbols of the Rehnquist Court's constitutional revolution. Both were decided this past Term by the same five Justice majority. But they figure into that revolution in quite different ways. *Garrett* is the latest installment in a long-term transformation in constitutional doctrine. That transformation involves a fairly consistent application of a core set of ideological premises: limitations on federal power, promotion of states' rights, narrow construction of federal civil rights laws, a theory of neutrality in religion cases, and colorblindness as a theory of racial equality. *Bush v. Gore*, on the other hand, does not promote any of these larger ideological goals. It simply installed a Republican president in the White House. Perhaps the only theme that *Bush v. Gore* shares with the other cases we have discussed is the conservative majority's apparent distrust of the Congress and of the national political process. Resolving disputes about presidential elections is, after all, Congress's constitutionally assigned job under Article II and the Twelfth Amendment, and Congress passed two acts, one in 1845 and one in 1887, to deal with just such contingencies.[89] Nevertheless, the five justice majority apparently feared

[86] 491 U.S. 164 (1989) (adopting a narrow construction of 42 U.S.C. § 1981).

[87] 121 S. Ct. 1511 (2000).

[88] Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 271–81 (1997) (opinion of Kennedy, J.) (arguing that the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), should apply only to a small class of cases). Although Justice Kennedy could not gain a majority for this portion of his opinion in *Coeur d'Alene*, this does not, of course, portend that he will necessarily be unsuccessful with a new set of colleagues.

[89] Act of Jan. 23, 1845, ch. 1, 5 Stat. 721 & Act of Feb. 3, 1887, ch. 90, 24 Stat. 373 (now codified at 3 U.S.C. §§ 1–15 (1994)).

that the Congress would not be up to the task, and that it was the Court's "unsought responsibility to resolve the federal and constitutional issues the judicial system ha[d] been forced to confront"[90] by ending the recounts and placing Bush in office.

In fact, *Bush v. Gore* is a much more troubling event in the constitutional revolution than *Garrett*. It is troubling because of the possibility that the Court was motivated—whether consciously or not—by partisan considerations. This is not simply the familiar objection that courts are "playing politics" when they write their ideologies or policy preferences into the law. We should make a distinction between two kinds of politics—"high politics," which involves struggles over competing values and ideologies, and "low politics," which involves struggles over which group or party will hold power.[91] In *Garrett* the five conservatives seem to be clearly engaged in "high politics"—the promotion of certain core political principles in constitutional doctrine. By contrast, *Bush v. Gore* seems to involve "low politics"—with the five conservatives adopting whatever arguments were necessary to ensure the election of the Republican candidate, George W. Bush. If *Bush v. Gore* serves the ideological agenda typified by *Garrett*, it does so only indirectly, by allowing the Court to pick the person who will pick their colleagues and successors in the Supreme Court and the federal judiciary. Whereas in *Garrett* the Court is entrenching particular *political principles* for many years to come, in *Bush v. Gore* it is

[90] *Bush II* , 121 S. Ct. at 533. This phrase is one of the great howlers of Supreme Court history, as ridiculous in its own way as Justice Henry Brown's insistence that it was the fault of "the colored race" if they found segregation demeaning, Plessy v. Ferguson, 163 U.S. 537, 551 (1896), or Justice Hugo Black's insistence that the internment of American citizens of Japanese descent had nothing whatsoever to do with racial prejudice, Korematsu v. United States, 323 U.S. 214, 223 (1944).

[91] See Sanford Levinson, Return of Legal Realism, Nation, Jan. 8, 2001, at 8. Justice Stephen Breyer exemplified this distinction when he proclaimed that

> [p]olitics in our decision-making process does not exist. By politics, I mean . . . will it help certain individuals be elected? . . . Personal ideology or philosophy is a different matter. . . . Judges have had different life experiences and different kinds of training, and they come from different backgrounds. Judges appointed by different presidents of different political parties may have different views about the interpretation of the law and its relation to the world.

Stephen G. Breyer, The Work of the Supreme Court, Am. Acad. of Arts and Sci., Sept.–Oct. 1998, at 47, quoted in Howard Gillman, What's Law Got to Do with It? Judicial Behavioralists Test the 'Legal Model' of Judicial Decision Making, 26 Law & Soc. Inquiry 465, 490 n.26 (2001).

installing particular *persons* in power (and the persons they will in turn appoint) for many years to come.

The distinction between high and low politics is important because it suggests two different sorts of criticisms that one might make about the Court's behavior during a period of constitutional revolution. As we shall argue in more detail later on, constitutional revolutions always concern "high politics"—the promotion of larger political principles and ideological goals. This was true during the New Deal and it is true today. Thus, one might criticize *Garrett* because one disagrees with the political principles of the five conservatives, which, one believes, are false to the best understandings of the Constitution.

But the objection to *Bush v. Gore* is quite different. The result in *Bush v. Gore* is not easily explained as the promotion of principles of "high politics." The five conservatives were the least likely, one would think, to extend the Warren Court's equal protection doctrines in the area of voting rights. Indeed, one member of the majority, Justice Scalia, is on record as opposing novel interpretations of the Equal Protection Clause that undermine traditional state practices.[92] It is hard to imagine that if the parties had been reversed—and Vice-President Gore had been ahead by 537 votes—the five conservatives would have been so eager to review the decisions of a Republican Florida Supreme Court that was trying to ensure that every vote had been counted.[93] The unseemliness of *Bush v. Gore* stems from the overwhelming suspicion that the members of the five person majority were willing to make things up out of whole cloth—and, equally importantly, contrary to the ways that they usually innovated—in order to ensure a Republican victory and keep their constitutional revolution going. It was obvious to everyone—including the Justices—that many of the key cases in this revolution have been decided by a bare 5-4 majority, and that the party controlling the White House in the next decade would determine the fate of the revolution. Conservative Justices would propel it forward; liberal Justices would curtail or unravel it. With a Republican in the White House, conservative Justices could retire with the expectation that they would

[92] See, e.g., United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting).

[93] For different versions of the "reversal of names" point, see Alan Dershowitz, Supreme Injustice: How the High Court Hijacked Election 2000, at 95–96 (2001); Jack M. Balkin, Bush v. Gore and the Boundary Between Law and Politics, 110 Yale L.J. 1407, 1435 (2001); Michael J. Klarman, Bush v. Gore: Through the Lens of Constitutional History, 89 Cal. L. Rev. (forthcoming Dec. 2001).

be replaced by persons of like mind. If one of the more liberal Justices left the Court, the conservative majority might even increase.

Even if these thoughts never entered the mind of any of the Justices, the circumstances of the decision created the appearance of a conflict of interest and a strong inference of impropriety.[94] The Justices could have avoided the appearance of a conflict of interest by simply remaining out of the fray, but they seemed altogether too eager to get involved.[95] Had *Bush v. Gore* been an easy case involving clear precedents and rigorous legal argument, one might put some of these concerns to rest. But *Bush v. Gore* is so shoddily argued and so badly reasoned—from the initial stay on December 9 through the bizarre chain of reasoning that justified the remedy[96]—that it is almost impossible to believe that the best explanation of the result is the internal logic of the law. The case is not only unpersuasive; it is an embarrassment to legal reasoning.

To be sure, the Justices who have spoken out since the decision was handed down have denied that any political motivations or calculations were involved. Justice Thomas, for example, has insisted that the Court has never been motivated by partisan considerations during his time on the bench, that the last political act that Justices engage in occurs during their confirmation hearings, and that he never thought about the political result in *Bush v. Gore* but was concerned only about the proper implementation of the law.[97] But the more the Justices offer these protestations, the more unbelievable they seem.[98] There is no reason to believe them unless one credits the notion that members of the judiciary

[94] On the conflict of interest faced by the Justices, see Balkin, supra note 93, at 1439–41.

[95] See id. at 1408–10, 1433–41.

[96] For a discussion of the problems in the opinion, see id. at 1410–31.

[97] In a talk with high school students shortly after the decision, Justice Thomas was quoted as saying, "'I have yet to hear any discussion, in nine years, of partisan politics" among the Justices. "I plead with you that, whatever you do, don't try to apply the rules of the political world to this institution; they do not apply." In fact, he claimed that "[t]he last political act we engage in is confirmation." Linda Greenhouse, Another Kind of Bitter Split, N.Y. Times, Dec. 14, 2000, at A1. Shortly thereafter, Chief Justice Rehnquist "was asked by a reporter if he thought Justice Thomas's remarks about nonpartisanship were especially appropriate in light of the recent case." He replied, "Absolutely." Neil A. Lewis, Justice Thomas Speaks Out on a Timely Topic, Several of Them, in Fact, N.Y. Times, Dec. 14, 2000, at A23. Addressing a conference of judges and lawyers in July 2001, Justice Thomas repeated his claims: "I think one of the ways our process is cheapened and trivialized is when it's suggested we have a way to make decisions that have more to do with politics." Oregon Democrats Seek to Oust Justices, N.Y. Times, July 23, 2001, at A15.

[98] It is a bit like listening to Bill Clinton repeatedly insisting with great conviction that he never misled anyone or had sex with Monica Lewinsky.

are almost altogether different from other Americans who have succeeded in the political world and that they have no agendas of their own or any desire to leave a "legacy" in their decisions.[99]

Bush v. Gore is a decision that lends itself easily to criticism.[100] But the constitutional revolution exemplified by *Garrett* cannot be dismissed in the same way, for it represents a steady accumulation of self-reinforcing and self-perpetuating doctrines. *Bush v. Gore* is a one shot affair that put a President in office for four years. It remains to be seen how much of a doctrinal edifice the Court will build upon it.[101] The cases that lead up to *Garrett*, on the other hand, have become part of the warp and woof of constitutional doctrine. One needs a very different approach to evaluate and criticize the work of the Court in a sustained period of constitutional revolution. And to do this, one first needs to understand what constitutional revolutions are and why they occur.

II. HOW CONSTITUTIONAL REVOLUTIONS OCCUR: A THEORY OF PARTISAN ENTRENCHMENT

The most important factor in understanding how constitutional revolutions occur, and indeed, how judicial review works, particularly in the twentieth century, is a phenomenon we call partisan entrenchment. To understand judicial review one must begin by understanding the role of political parties in the American constitutional system. Political parties are among the most important institutions for translating and

[99] For critiques of such assumptions, see Richard Posner, Overcoming Law 109–10 (1995); Frederick Schauer, Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior, 68 U. Cin. L. Rev. 615, 618–31 (2000). We do not necessarily accuse the Justices of subjective bad faith in speaking as they do. Basic psychological theory demonstrates that people tend to adopt, with all sincerity, views that make performance of their social roles easier. See, e.g., Leonard Berkowitz, A Survey of Social Psychology 64–68 (1986).

[100] There is now a substantial critical literature on *Bush v. Gore*, to which each of us has contributed. Balkin, supra note 93; Jack M. Balkin and Sanford Levinson, Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore, 90 Geo. L.J. (forthcoming Nov. 2001); Sanford Levinson, Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?, 5 U. Ill. L. Rev. (forthcoming Nov. 2001); Sanford Levinson and Ernest A. Young, Who's Afraid of the Twelfth Amendment, 29 Fla. St. U. L. Rev. (forthcoming Feb. 2001).

[101] Indeed, the majority went out of its way to suggest that the equal protection doctrines crafted in *Bush v. Gore* were good for that case only. *Bush II*, 121 S. Ct. at 532 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

interpreting popular will and negotiating among various interest groups and factions. Political parties are both influenced by and provide a filter for the views of social movements. Both populism and the Civil Rights Movement influenced the Democratic Party, for example, which, in turn, accepted some but not all of their ideas.[102] The same is true of the popular insurgency that accounted for much of Senator Barry Goldwater's support in 1964, which became the base for the ultimate takeover of the Republican Party by conservatives rallying around Ronald Reagan.[103]

When a party wins the White House, it can stock the federal judiciary with members of its own party, assuming a relatively acquiescent Senate. They will serve for long periods of time because judges enjoy life tenure. On average, Supreme Court Justices serve about eighteen years.[104] In this sense, judges and Justices resemble Senators who are appointed for 18-year terms by their parties and never have to face election. They are temporally extended representatives of particular parties, and hence, of popular understandings about public policy and the Constitution. The temporal extension of partisan representation is what we mean by partisan entrenchment. It is a familiar feature of American constitutional history. Chief Justice John Marshall kept Federalist principles alive long after the Federalist Party itself had disbanded. William O. Douglas and William Brennan, two avatars of

[102] On the Democratic Party's decision to run on populist themes and the Populists' capitulation to the candidacy of William Jennings Bryan in 1896, see Lawrence Goodwyn, The Populist Moment: A Short History of the Agrarian Revolt in America 315–17 (1978). On the Civil Rights Movement and the Democratic Party, see Hugh Davis Graham, The Civil Rights Era: Origins and Development of National Policy, 1960–1972 (1990).

[103] See Rick Perlstein, Before The Storm: Barry Goldwater and the Unmaking of the American Consensus (2001).

[104] The twenty-five Justices who served their terms between the appointment of Hugo Black in 1937 and the retirement of Harry A. Blackmun in 1994 served a total of 404 years, for an average of 16.1 years per Justice. However, this number is skewed slightly by the very short terms served by the three Justices who resigned for reasons other than ill health: James Byrnes, who resigned after one year on the Court to become Roosevelt's Secretary of State in 1942; Arthur Goldberg, who left the Court after three years to serve as the United States' representative to the United Nations; and Abe Fortas, who was forced off the Court after four years because of financial scandals. If one drops them, the average service then becomes almost exactly eighteen years. Of the current members of the Court, the longest in terms of service are William Rehnquist, celebrating his thirtieth year on the Court in 2001, and John Paul Stevens, who just crossed the quarter-century mark. The Court's "rookie" is Stephen Breyer, appointed in 1994. Thus even Breyer, if a senator, would already be in his second term. See Lawrence Baum, The Supreme Court 283–84 (5th ed. 1995).

contemporary liberalism, promoted the constitutional values of the Democratic party for decades, just as William Rehnquist has for thirty years now proved to be a patient but persistent defender of the constitutional values of the right wing of the Republican Party.

Partisan entrenchment is an especially important engine of constitutional change. When enough members of a particular party are appointed to the federal judiciary, they start to change the understandings of the Constitution that appear in positive law. If more people are appointed in a relatively short period of time, the changes will occur more quickly. Constitutional revolutions are the cumulative result of successful partisan entrenchment when the entrenching party has a relatively coherent political ideology or can pick up sufficient ideological allies from the appointees of other parties. Thus, the Warren Court is the culmination of years of Democratic appointments to the Supreme Court, assisted by a few key liberal Republicans.[105]

Partisan entrenchment through presidential appointments to the judiciary is the best account of how the meaning of the Constitution changes over time through Article III interpretation rather than through Article V amendment. In some sense, this is ironic, because the original vision of the Constitution did not even imagine that there would be political parties. Indeed, the founding generation was quite hostile to the very idea of party, which was associated with the hated notion of "faction."[106] This vision collapsed no later than 1800; among other things, the Twelfth Amendment is a result of that collapse and the concomitant recognition of the legitimacy of political parties. A key function of political parties is to negotiate and interpret political meanings and assimilate the demands of constituents and social movements; as such, parties are the major source of constitutional transformations. They are also the major source of attempts to maintain those transformations long enough for them to become the new "conventional wisdom" about what the Constitution means.

[105] Not all of the Democrats on the Warren Court were 1960s liberals—for example Felix Frankfurter and Byron White often voted with the conservatives. Conversely, two key members of the Warren Court's liberal majority were Earl Warren, the former Republican Governor of California, and William Brennan, a New Jersey Democrat appointed by Dwight Eisenhower to attract the Catholic vote.

[106] The Federalist No. 10 (James Madison); see Richard Hofstadter, The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780–1840, at 9–10 (1969); Larry D. Kramer, Putting The Politics Back Into The Political Safeguards Of Federalism, 100 Colum. L. Rev. 215, 269–70 (2000).

But Presidents cannot appoint just anyone to the federal judiciary or to the Supreme Court. The Senate, which may be controlled by a different political party, must advise and consent.[107] This means that judges—and particularly Supreme Court Justices—tend to reflect the vector sum of political forces at the time of their confirmation. That is why Dwight D. Eisenhower appointed a Catholic Democrat, William Brennan, rather than a conservative Republican in 1956.[108] And it is also why although Harry Blackmun and Antonin Scalia were both Republicans who were appointed by Republican presidents, they turned out so differently. Blackmun was appointed in 1969, when liberalism was still quite strong. Although the Democrats had lost the White House in 1968, they still retained control of Congress.[109] Two Southern nominees were rejected by the Democratic Senate before President Nixon nominated the far more centrist Harry Blackmun, a close friend of Chief Justice Burger from Minnesota.[110]

[107] Former President Clinton (and many of his judicial nominees) discovered this fact during the six years following the Republican victory in 1994. Many of Clinton's nominees never got out of the Republican controlled Senate Judiciary Committee; some never even got a hearing before that committee. The Senate practice of "holds" on nominations, as well as the intransigence of many Republican Senators (of whom the most notorious is Senator Jesse Helms of North Carolina) doomed many a Democratic judicial nominee. For example, although four of the Fourth Circuit's judgeships were authorized to be filled by North Carolinians, Helms vetoed three of Clinton's black nominees. They were denied even a hearing before the Senate Judiciary Committee, leaving North Carolina with no representation on the appeals court. See David G. Savage, Senate Confirms 3 of Bush's Judicial Nominees; Courts: Choice for 4th Circuit—named to the post temporarily by Clinton—is the bench's first black member, L.A. Times, July 21, 2001, at A12.

[108] See David Alistair Yalof, Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees 55–61 (1999). According to Professor Yalof, Eisenhower's "marching orders" to his aides were that any name suggested for a Supreme Court nomination should be "a Catholic [and] a Democrat," as well as possessing significant experience as a judge, preferably at the state level. Id. at 58. Brennan fit the bill perfectly. Eisenhower certainly had no inkling of the degree of William Brennan's liberalism, especially since he asked his advisors for a conservative Catholic Democrat; however, some of his advisors probably knew that Brennan was a liberal. See Powe, supra note 22, at 89-90.

[109] This is reflected in the domestic agenda of the Republican administration that took office in 1969. Indeed, in hindsight, Richard Nixon was much more liberal than most contemporary Republicans and in substantial measure consolidated the liberal welfare state and Lyndon Johnson's "Great Society." See, e.g., Joan Hoff, Nixon Reconsidered 20–21 (1994). Nixon was, to be sure, a vigorous critic of the Warren Court's criminal procedure opinions, and he often suggested that he had some sympathy for Southern whites critical of ambitious programs to alleviate racial segregation. But these strategic features of Nixon's rhetoric and politics were not accompanied by a fundamental critique of the New Deal and the welfare state.

[110] See Yalof, supra note 108, at 112–14.

Scalia, on the other hand, was appointed in 1986. Not only had President Reagan been triumphantly reelected in 1984, but Republicans also continued to control the Senate. Scalia, who had in effect been auditioning for the Supreme Court since his appointment to the Court of Appeals for the District of Columbia, easily won unanimous confirmation in spite of his refusal to discuss even *Marbury v. Madison* with the Senate Judiciary Committee.[111] There is little doubt that Robert Bork would have made it to the Court had he been nominated in these glory days of the Reagan Revolution, before the 1986 elections that returned the Senate to Democratic control (and the discovery that Reagan and renegades like Oliver North had traduced the law in the so-called "Iran-Contra" scandal). Following the 1986 elections, however, Democrat Joseph Biden, and not a senior Republican, headed the Senate Judiciary Committee. That meant, among other things, that extended hearings would take place, with ample opportunity for Bork's opponents to elaborate the reasons for their position and to generate widespread popular opposition to the former Yale professor.[112] Ultimately, of course, Justice Powell's successor was not Bork, but, rather, Anthony Kennedy. It should occasion no surprise that Scalia, who faced a Senate controlled by Republicans, has turned out to be more conservative than Kennedy, who had to run the gantlet of a Democratic Senate.[113]

To be sure, judges and Justices grow and develop over time, though, we strongly suspect, there is less "growth" and "development" than is suggested by the ideologically-freighted reassurance that one often hears that Justices are ruggedly independent and have thoroughly unpredictable views. Indeed, there may be reason to think that Justices are *less* likely to change in part because they remain significantly isolated in Washington, D.C., and are too often surrounded by adoring clerks and other admirers who reinforce their existing structures of belief. Still, it would be foolhardy to deny that Justices' views sometimes do change, along with the rest of the country. But their

[111] Id. at 154–55.

[112] Ethan Bronner, Battle for Justice: How the Bork Nomination Shook America (1989), remains the best overview of the nomination and its aftermath.

[113] Of course, Clarence Thomas also had to run the same gantlet, but President George H.W. Bush correctly surmised that he could nominate a much more conservative candidate if the candidate were African-American. For the same reason, the current White House occupant may take a lesson from his father and nominate a conservative Hispanic to fill the first Supreme Court vacancy, daring the Democrats to oppose the first Hispanic appointment to the United States Supreme Court.

starting points are the forces at work when they are confirmed. And those starting points are particularly important in assessing the development of their careers. Presidents will sometimes make "mistakes" like William Brennan and David Souter, both of whom turned out to be considerably more liberal than the Presidents who appointed them hoped would be the case. But this is a familiar feature of democratic politics. People often make mistakes in electing or appointing people who turn out to be more conservative or liberal than originally predicted. George W. Bush has turned out to be a much more conservative chief executive than most people expected. The only difference is that judges and Justices serve longer, so mistakes are much costlier to the appointing party.

Furthermore, we must remember that the parties are not ideological monoliths. There are many contending factions within a party at any point in time, and a President may have sound political reasons for favoring one faction over another given the balance of forces at the time of confirmation. Moreover, the ideological centers of the major parties shift over time; as already noted, the Republican Party today is far more conservative than it was in 1968 or in 1975, the date of Gerald Ford's appointment of John Paul Stevens. Thus, we can expect that even if one party nominates most of the Justices in a particular period, there will be ideological fractures among those Justices, with later appointees, almost by definition, being more "representative" of current party positions than appointments made years before, when the political constellations might have been quite different. That Harry Blackmun was a more or less centrist Republican in 1969 did not prevent him from being accurately perceived, two decades later, as one of the Court's leading liberals. The same is obviously true of Stevens. Of Nixon's four appointees, the only one who turned out to be strongly conservative in terms of the parameters of our own era is Rehnquist, whose name Nixon seems quite literally not to have known when he appointed him.[114] The selection of Rehnquist—a relatively anonymous Justice Department lawyer at the time—along with Lewis Powell—a courtly Southern Democrat and

[114] On one of the Nixon Tapes, the President notoriously refers to him as "Renchburg." Brad Snyder, How the Conservatives Canonized Brown v. Board, 52 Rutgers L. Rev. 383, 449 n.428 (2000) (quoting "The Name Was Renchburg?" Wash. Post, July 19, 1974, at A12); see also George Lardner, Jr., Rehnquist Got the Call that Baker Missed For Nixon Court Nomination, Wash. Post, Dec. 18, 1998, at A6 (noting Nixon had referred to his nominee as "Renchburg" and "Renchquist").

former President of the American Bar Association—seems in many ways an effort simply to fill the vacancies left by Justices John Marshall Harlan and Hugo Black with appointees who would be easily confirmable and thus allow Nixon to move on to other issues about which he cared far more.[115]

In addition to the fact that parties are themselves pluralistic, one must also take into account that presidents have a relatively short-term time horizon when making appointments. They attempt to influence certain issues that are most salient to them at the time. When genuinely new issues of constitutional interpretation arise, former allies may disagree heatedly about how to resolve them. For example, the harbingers of the "Roosevelt Revolution"—Justices Black, Douglas, Frank Murphy,

[115] William Rehnquist was, at the time of his nomination, a "stealth Justice," little known in the country and much more deeply conservative than many Democrats expected. He owed his selection largely to the considerable chaos within the Nixon Administration concerning how to fill Supreme Court vacancies.

In the wake of the fortuitously timed joint resignations of Justices Black and Harlan in September 1971, Nixon had very much wanted to appoint both the first woman to the Supreme Court and a Southern conservative. See Yalof, supra note 108, 114–25. The initial selections were two remarkably obscure people, California state judge Mildred Lillie and Herschel Friday, a Little Rock lawyer who had represented the local school board in resisting school desegregation. Id. at 120–21. When word leaked of their imminent nomination, public reaction, pretty much across the political spectrum, was vigorously negative. Chief Justice Burger apparently threatened to resign, id. at 123, if Nixon did not appoint "more distinguished" Justices than those on a list that had widely circulated, which included, in addition to Friday and Lillie, four others, all six of whom were described by the conservative columnists Rowland Evans and Robert Novak as "uniform in both mediocrity and acceptability to the segregationist South." Id. at 122. Moreover, the American Bar Association voted only 6-6 that it was "not opposed" to Friday, while declaring Lillie "unqualified" by a vote of 11-1. Id. at 123.

In response, Nixon dropped the plan to appoint a woman, apparently because he was convinced that he could "never find a conservative enough woman for the Supreme Court." Id. at 123 (quoting H. R. Haldeman, Haldeman Diaries 365 (1994)) (Diary entry of Oct. 15, 1971). He then turned to Lewis Powell, who had been recommended for the position by Chief Justice Burger. Although Powell had twice rejected earlier entreaties from Attorney General John Mitchell, id. at 124, he was persuaded by Nixon, in a personal phone call, that it was his duty to accept the appointment. As for the remaining seat, apparently it was at first tentatively offered to Tennessee Senator Howard Baker, who asked for a day to think about the offer. Id. In the meantime, another White House aide brought Rehnquist to Nixon's attention. According to Professor Yalof, "Nixon saw in Rehnquist a genuine stalwart conservative with sterling credentials," and Baker was informed when he called the next morning that Rehnquist had been selected. Id. Powell's nomination sailed through 98-1. Rehnquist's selection was considerably more controversial, and he was confirmed by a vote of 68-26 on December 10, 1971. Id. at 125. We can only speculate on the subsequent history of Supreme Court doctrine if Howard Baker, a comparatively moderate Republican, had accepted Nixon's initial invitation on the spot.

Stanley Reed, and Frankfurter—were all appointed between 1937 and 1940 largely to legitimize Franklin Roosevelt's New Deal policies. Roosevelt had no reason to be disappointed: All of them opposed strict—some would say any—review of ordinary social and economic legislation, and all of them agreed that the federal government should be given immense regulatory power. Yet in later years when the focus of attention shifted to civil liberties and civil rights—a concern much less important to Roosevelt—they differed strongly, indeed bitterly, among themselves. Reed, for example, was basically opposed to *Brown v. Board of Education*,[116] acquiescing in the Court's decision only after being assured that the consequences of enforcement would be relatively minimal.[117] And, of course, the feuds between Felix Frankfurter and Hugo Black over the degree of judicial deference in civil liberties cases were legendary.[118]

If judicial review and constitutional change tend to operate through partisan entrenchment, it is fairly easy to explain *Garrett* and its predecessors. The federalism, voting rights, and affirmative action cases that we have witnessed in the last decade are the predictable (though not inevitable) product of a conservative Republican hegemony during the 1980s and early 1990s that produced judges and Justices sympathetic with Reagan's vision of federalism and states' rights, a vision well reflected in a 1987 executive order setting out a series of "fundamental federalism principles."[119]

Lower court judges often play a role in constitutional change altogether different from what might be suggested by their constitutional designation as "inferior."[120] It is, for example, unthinkable that the Supreme Court would ever have reviewed the federal statute at issue in *Lopez* if the Fifth Circuit had not struck it down in the first place.[121] The same may well be true with regard to the Violence Against Women Act,

[116] 347 U.S. 483 (1954).

[117] Richard Kluger, Simple Justice 698 (1975); Jack M. Balkin, Brown v. Board of Education: A Critical Introduction, *in* What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision 39 (Jack M. Balkin ed., 2001).

[118] See James F. Simon, The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America (1989).

[119] See Paul Brest et al., Process of Constitutional Decisionmaking 511 n.47 (4th ed. 2000).

[120] U.S. Const. art. III; Sanford Levinson, On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation, 25 Conn. L. Rev. 843, 850–51 (1993).

[121] United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993), aff'd 514 U.S. 549 (1995).

whose relevant provisions had been held unconstitutional by the Fourth Circuit in an opinion written by the extremely conservative Circuit Judge Michael Luttig.[122]

It is usually easier to appoint strongly ideological lower court judges than Justices because there is less scrutiny by the Senate. Indeed, one interesting fact about both Robert Bork and ClarenceThomas is that each had easily won confirmation to the Court of Appeals.[123] Because the federal docket is so large, lower court judges are given—or, perhaps more accurately, take—the practical power to float all sorts of new possibilities in constitutional interpretation. These ostensibly "inferior courts" often prove to be testing grounds for what will later be recognized as constitutional revolutions. Perhaps the most interesting example of this phenomenon is the Fifth Circuit. During the 1950s and early 1960s, it, far more than the Supreme Court, was the true cutting edge of the "civil rights revolution."[124] With its decision in *Hopwood v. State of Texas*,[125] which struck down an affirmative action plan at the University of Texas Law School, it may equally prove to be the harbinger of the demise of central aspects of that revolution. In neither case, though, did the judges of the Fifth Circuit remain silently in their seats waiting for firm guidance from the Supreme Court, which has been substantially more hesitant to pronounce on the subject.[126] The Fourth Circuit has no comparable legacy of progressivism to renounce. By now, it is probably the most conservative in the nation, and it has fed a number of important cases to the Rehnquist Court.[127] Moreover, and altogether to the point, several judges from that court, like others throughout the land, have basically been auditioning for the plaudits of

[122] Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820 (4th Cir. 1999), aff'd sub nom. United States v. Morrison, 529 U.S. 1062 (2000).

[123] Bork was confirmed to the D.C. Circuit on February 8, 1982 by an unanimous vote (no roll call). The ABA rated him "Exceptionally Well Qualified." Clarence Thomas, who took Bork's seat on the D.C. Circuit following Bork's retirement, was confirmed on March 6, 1990, also unanimously (no roll call vote). He was rated "Qualified" by the ABA. E-mail from Sheldon Goldman, Professor, University of Massachusetts, to Sanford Levinson, Professor, University of Texas School of Law (Aug. 10, 2001) (on file with authors).

[124] See Sanford Levinson, Hopwood: Some Reflections on Constitutional Interpretation by an Inferior Court, 2 Tex. F. on C.L. & C.R. 113, 117–22 (1996).

[125] 78 F.3d 932 (5th Cir. 1996).

[126] See Texas v. Hopwood, 121 S. Ct. 2550 (2001) (denying cert); Texas v. Hopwood, 518 U.S. 1033 (1996) (denying cert).

[127] See. e.g., *Morrison*, 529 U.S. at 598 (striking down the Violence Against Women Act); Dickerson v. United States, 530 U.S. 428 (2000) (upholding *Miranda v. Arizona*).

the Federalist Society and a possible nomination to the United States Supreme Court.[128]

In short, there is nothing surprising about the transformation of constitutional law viewed in hindsight. If you stock the federal judiciary with enough Reagan Republicans, you can expect that some fifteen to twenty years later they will be making a significant impact on the structure of constitutional doctrine. And so they are. And they will continue to have that impact long after Reagan's retirement.

Indeed, given that the Democrats did not have a single Supreme Court nomination between 1967 and 1993, it is hard to expect otherwise. If one doesn't like the decisions of the Rehnquist Court, one should really have been putting more Democrats in the White House during the 1970s and 1980s. Put another way, if you don't like what the Court is doing now, you (or your parents) shouldn't have voted for Ronald Reagan.

The theory of partisan entrenchment sees the relationship between constitutional law and politics as roughly but imperfectly democratic. It is in some sense the opposite of Alexander Bickel's famous "countermajoritarian difficulty" that has troubled constitutional theorists throughout the second half of the twentieth century.[129] Parties who

[128] It would be untactful to offer specific names. As to institutional vetting, we note that one of the first acts of the Bush Administration was to end the fifty-year-old practice of vetting potential nominees to the federal judiciary with the American Bar Association before they were announced and to convey the professional evaluation of such nominees to the Justice Department. See Neil A. Lewis, White House Ends Bar Association's Role in Screening Federal Judges, N.Y. Times, Mar. 23, 2001, at A13. On the ABA's role in judicial nominations, see Sheldon Goldman, Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan, passim (1997). The exclusion of the ABA from any formal capacity in evaluating judicial nominees was welcomed by many conservatives who had been especially upset by the ABA's unwillingness to endorse Robert Bork as "qualified" to be on the Supreme Court. See Ethan Bronner, supra note 112, at 205–06. (The ABA *had* found Bork "well qualified" to serve on the United States Court of Appeals for the District of Columbia, however, in 1992. Id. at 205.) Whatever may be said about the merits of ABA participation, it can scarcely be said that the Bush Administration seems unwilling to have potential nominees vetted by those with strong political and ideological views. One of the best qualifications for access to the federal bench now appears to be close connections to the Federalist Society.

[129] Alexander M. Bickel, The Least Dangerous Branch 111–98 (2d ed. 1986). For a critique of Bickel's assumptions, see Barry Friedman, The History of the Countermajoritarian Difficulty, Part Five: The Birth of an Academic Obsession (2001) (unpublished manuscripton file with authors); see also Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577 (1993) (tracing the history of claims about a countermajoritarian difficulty and arguing that the idea is misconceived); Barry Friedman, The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy, 73 N.Y.U. L. Rev. 333 (1998) (same)..

control the presidency install jurists of their liking—given whatever counterweight the Senate provides. Those jurists in turn create decisions which are embodied in constitutional doctrine and continue to have influence long after those who nominated and confirmed the jurists have left office. One might think of this as "counter-majoritarian," but in fact, it is not. It represents a temporally extended majority rather than a contemporaneous one. Many features of American constitutional structure extend partisan influence over time. Senators, for example, serve for three times as long as members of the House of Representatives. A senator who chooses not to seek reelection can do all sorts of things that his or her constituents don't like. As we noted, we might think of judges as analogous to senators who are elected for a term of roughly eighteen years and never have to face reelection. That is what is meant by the familiar claim that the courts are relatively isolated from day-to-day politics. It does not mean that they are isolated from politics. It means only that they are isolated from a certain form of political discipline—reelection. That is precisely what enables them to extend partisan influence over time.

Perhaps equally importantly, the countermajoritarian concern misses a fundamental point about American democracy. American citizens do not merely have opinions about everyday matters of public policy. They also have views about the meaning of the American Constitution and what rights, powers, and liberties it protects (or does not protect). They have views about those values and structures that should endure as well as policies for the short term. And often questions of short-term policy are caught up in larger questions of constitutional politics. It is no accident, for example, that as soon as the ink was dry on the 1787 Constitution people began talking about land purchases, banks, and internal improvements that raised questions of constitutional construction.[130] Nor is it any accident that many of the key issues in contemporary politics touch on constitutional concerns, like race relations, crime, abortion, campaign finance, electoral reform, and the relationship between church and state. For this reason, political parties are not only the site for the negotiation and promulgation of citizens' views about relatively short-term political proposals; they also serve as sites for working out their adherents' views about constitutional politics.

[130] This point is made with special vividness in David P. Currie, 1 The Constitution in Congress: The Federalist Period, 1789–1801 (1997), which demonstrates the vast array of issues debated before the Congress in constitutional terms.

They collect, filter, co-opt and accumulate the constitutional beliefs and aspirations of the party faithful, of prospective voters, and, perhaps equally crucially, of social movements. For example, the Democratic Party has long stood for the correctness of *Roe v. Wade* and the constitutionality of affirmative action; the Republican Party has long stood for the opposite propositions. Prominent members of the Republican Party exhibit an esteem for the Second Amendment right to bear arms that is rarely shared by their more liberal Democratic colleagues.[131] Political parties represent the people not only in their views about ordinary politics, but also in their views about the deepest meanings of the Constitution and the country. Indeed, in some sense the movement from ordinary politics to constitutional politics is seamless, for many Americans have little idea of the exact contours of constitutional doctrine and tend to associate the Constitution with whatever they regard as most right and just. The ordinary citizen does not distinguish between constitutional politics and something called "ordinary politics" in clear ways.[132]

Although in explaining the phenomenon of partisan entrenchment we have compared judges to Senators, we would be remiss if we did not emphasize the crucial disanalogies between them. An extremely important difference between Senators and judges concerns the role of

[131] See, e.g., Anne E. Kornblut, Ashcroft Pushes New Gun Policy: Attorney General Reinterprets Constitution, Boston Globe, July 15, 2001, at A1 (noting policy shift in Justice Department based on Ashcroft's interpretation of the Second Amendment); Cheryl W. Thompson, Ashcroft Graces NRA Cover, Wash. Post, July 24, 2001, at A19 (reporting on Attorney General John Ashcroft's letter to the NRA reaffirming his belief that the Second Amendment protects an individual's right to own guns).

[132] Nor should they, for the sources of new constitutional ideas and aspirations often come from sources that legally trained professionals do not see as raising constitutional questions at all. On the influence of abolitionism on theories behind the Fourteenth Amendment, see Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986); Harold M. Hyman & William E. Wiecek, Equal Justice Under Law: Constitutional Development 1835–1875 (1982); William E. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine (1988); Jacobus Ten Broek, Equal Under Law (1965); William M. Wiecek, The Sources Of Anti-Slavery Constitutionalism In America, 1760–1848 (1977); Michael Kent Curtis, The 1859 Crisis over Hinton Helper's Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment, 68 Chi.-Kent L. Rev. 1113 (1993). On the influence of the movement for woman suffrage on the Nineteen Amendment and constitutional theories of sex equality, see Reva Siegel, "She the People," 115 Harv L. Rev. (forthcoming Feb. 2002); on the influence of the second wave of American feminism on sex equality law, see Mary Becker, The Sixties Shift To Formal Equality And The Courts: An Argument For Pragmatism And Politics, 40 Wm. and Mary L. Rev. 209 (1998).

judges as legal professionals. Their ability to influence constitutional law is hemmed in by the professional ideology of lawyers and judges. They are constrained by the expectations of what well trained lawyers can say and cannot say, the language of legal doctrines, the received forms and modalities of legal argument, the need to give reasons for their decisions, and their inability to perform legislative tasks like appropriating monies or going to war. So judges who extend partisan influence over time clearly cannot do everything that legislatures can do. But they can do a great deal, and if you give them enough time, they will make significant changes. The current constitutional revolution is an example of this.

The theory of partisan entrenchment has much in common with Bruce Ackerman's theory of constitutional moments, in which he argues that constitutional change often occurs outside the formalities of Article V amendment.[133] Both of us have learned much from Ackerman's work. Ackerman argues, as we do, that we should look to generations of citizens and politicians to understand constitutional change.[134] He also emphasizes the role played by social movements, political parties, and presidents in changing constitutional meanings.[135] But our approach is different in five respects.

First, our theory jettisons the complicated concept of "constitutional moments." Ackerman's theory requires an elaborate mechanism that specifies criteria and procedural conditions for constitutional change to be legitimate.[136] He requires triggering elections, repeated returns to the people, an act of illegality, an unconventional threat or unconventional adaptation, confirming elections, and capitulation by the opposing party.[137] Our theory dispenses with all this because constitutional change does not always occur in the same way.

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[133] See Bruce Ackerman, Higher Lawmaking, in Responding to Imperfection: The Theory and Practice of Constitutional Amendment 63–87 (Sanford Levinson ed., 1995).

[134] See Bruce A. Ackerman, A Generation of Betrayal?, 65 Fordham L. Rev. 1519, 1519 (1997) [hereinafter Ackerman, A Generation of Betrayal].

[135] See Bruce A. Ackerman, Transformative Appointments, 101 Harv. L. Rev. 1164, 1170–79 (1988); Bruce Ackerman, The Broken Engine of Progressive Politics, Am. Prospect, May 1, 1998, at 34.

[136] 2 Bruce Ackerman, We The People: Transformations 20, 26, 359 (1998) [hereinafter Ackerman, We The People].

[137] See 2 Ackerman, We The People, supra note 136, at 166, 207, 211 (noting signaling act of illegality by the Convention/Congress, resistance by conservative branches, recourse to the people through triggering election, unconventional threat of Presidential impeachment, and eventual capitulation in the Reconstruction period); id. at 359 (noting structure of New

Second, Ackerman's theory of constitutional moments requires that actors in the system intuitively recognize and understand the criteria for revolutionary constitutional change.[138] They must understand that a key moment of transition has occurred or that a form of unconventional adaptation has been confirmed through a subsequent election.[139] It demands to some extent that they see the world through the eyes of his model.[140]

Third, Ackerman's theory is of little help normatively. It does not offer much help to someone in the midst of a potential constitutional revolution who wants to know what to do. Ackerman tries to offer historical precedents and measurable criteria for determining when a constitutional moment has occurred. He looks to key triggering and consolidating elections and moments of illegality or, in his words "unconventional adaptation," as signs that the constitutional regime has shifted.[141] But his theory works best in hindsight. Years after the struggle over the New Deal has been completed, one can recognize that the meaning of the Constitution has changed and so one is free to disregard pre-1937 precedents concerning national power and substantive due process. Once the Owl of Minerva has flown, it is much easier to understand what historical events might mean for constitutional interpretation. But Ackerman's theory is of little help during political events that might turn into a full-fledged constitutional moment or might fizzle out at some undetermined point in the future. It does not clearly explain to jurists in the midst of a constitutional controversy whether they should ally themselves with the forces of change or resist with all

Deal revolution involving triggering election, unconventional threat by President Roosevelt, transformative appointments, consolidating election, and consolidating judicial opinions); Bruce Ackerman, Revolution on a Human Scale, 108 Yale L.J. 2279, 2298–99 (1999) [hereinafter Ackerman, Revolution] (noting pattern of signaling, proposing, triggering, and ratifying by the Federalists).

[138] Ackerman, Revolution, supra note 137, at 2283–85 (emphasizing self-consciousness of actors in moments of revolutionary change).

[139] See, e.g., 2 Ackerman, We The People, supra note 136, at 358–59 (arguing that ordinary Americans understood the events of the New Deal as a constitutional revolution, confirmed by the consolidating election of 1940).

[140] See id. at 356–58 (noting Wendell Wilkie's March 9, 1940, statement that Roosevelt had won and that the Supreme Court's decisions "have made the United States a national and no longer a Federal Government").

[141] See, e.g., id., at 20–21, 23–25; Ackerman, Revolution, supra note 137, at 2326–32 (distinguishing between triggering and consolidating elections).

their might. It does not tell Justices in 1939 whether they should consolidate the New Deal Revolution or continue to oppose it.[142]

Nor does Ackerman's theory determine whether a judicial adventure like *Bush v. Gore* can justly be condemned if it might be the opening salvo in a subsequent constitutional revolution.[143] For example, the conservative judicial activism of the Rehnquist Court—including its recent line of federalism decisions—may be lawless and indefensible from the standpoint of pre-1987 jurisprudence. But it remains to be seen whether it will be buttressed and supported by Republican electoral victories in the future. If the Republicans dominate the political landscape in the next decade, and make sufficient appointments to the Supreme Court and the federal judiciary, it will be difficult to call decisions like *Lopez*,[144] *Seminole Tribe*,[145] *Alden v. Maine*[146] and *Morrison*[147] "lawless."[148] Quite the contrary: They will be the very foundations of the constitutional law of this new constitutional

[142] Ackerman explains that on balance, the Court chose the right time to switch during the New Deal. Ackerman, Revolution, supra note 137, at 2337. But that judgment is also one of hindsight. The difficulty is that in Ackerman's theory both resistance and capitulation can be beneficial in promoting constitutional change. Id. at 2321–26 (noting creative role of judicial resistance to constitutional change). Indeed, Ackerman's approach seems to require him to pay homage to Andrew Johnson's egregious opposition to Reconstruction. Johnson's open hostility to civil rights for blacks and his stubborn defiance of the Radical Republicans triggered a constitutional crisis that led to his impeachment, and, ultimately, to ratification of the Fourteenth Amendment. See Sanford Levinson, Transitions, 108 Yale L.J. 2215, 2217 (1999). So although opponents must capitulate at some point, there is no way of knowing at the time when the best moment might be. Moreover, the best time to capitulate depends largely on what values one thinks are supposed to win out. Cf. 2 Ackerman, We The People, supra note 136, at 164 (noting a "paradox of resistance," where resistance by conservative institutions sometimes acts as a catalyst to revolutionary change). Perhaps if Johnson had capitulated earlier, Reconstruction might not have gone so far, and African-Americans would enjoy fewer rights today. Conversely, if Johnson had been more intransigent, he might well have been impeached and Ben Wade, the Radical Republican President Pro Tempore of the Senate, would have assumed the Presidency.

[143] We might make a similar point about the Clinton impeachment, which might have precipitated a constitutional moment, and which, in hindsight, might still be a pivotal event in a conservative transformation of the American Constitution. Ackerman's theory cannot genuinely inform a troubled legislator who wondered, in 1998–99, exactly what constituted an impeachable offense under Article II of the Constitution. See Levinson, supra note 142, at 2235.

[144] United States v. Lopez, 514 U.S. 549 (1995).

[145] Seminole Tribe v. Florida, 517 U.S. 44 (1996).

[146] 527 U.S. 706 (1999).

[147] United States v. Morrison, 529 U.S. 598 (2000).

[148] See supra notes 29–39 and accompanying text.

regime.[149] Contrary decisions from the pre-1987 past will have the same status as *Adkins v. Children's Hospital*[150] had after *West Coast Hotel v. Parrish*,[151] or *Carter v. Carter Coal*[152] had after *United States v. Darby*[153] and *Wickard v. Filburn*.[154]

Indeed, even *Bush v. Gore* might be justified in the long run under Ackerman's theory. Perhaps it counts as one of the quasi-illegal acts of "unconventional adaptation" that Ackerman is prone to celebrate as a signal that a new constitutional age is dawning.[155] If "We the People" keep returning the Republicans to office following this purported judicial usurpation, then the Court will have gambled and won in guessing the direction of history and constitutional change. Better still: It will have actively participated in making the new constitutional regime a reality.

By contrast, our theory that constitutional change is produced through cumulative acts of partisan entrenchment avoids these problems. It does not require that judges read the future in order to know what they should do. Political parties appoint judges or Justices who reflect the vector sum of political forces at the time. Each judge or Justice then simply does his or her best given his or her beliefs. The result is unpredictable in precisely the way that coalitions in multimember legislatures are often unpredictable.

Fourth, our theory does not have to assume that change occurs quickly, or through constitutional revolutions that operate over a relatively short period of time. It rejects the idea that there must be constitutional "moments" spanning a relatively short period of time as opposed to more gradual forms of constitutional change.[156] In our view, constitutional change can happen quickly or slowly, depending on how the forces of politics operate.

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[149] See Ackerman, Revolution, supra note 137, at 2288–90 (suggesting a scenario in which a strong conservative wins the Presidency in 2000 and the Republicans dominate the political landscape for the next two election cycles.)

[150] 261 U.S. 525 (1923).

[151] 300 U.S. 379 (1937).

[152] 298 U.S. 238 (1936).

[153] 312 U.S. 100 (1941).

[154] 317 U.S. 111 (1942).

[155] 2 Ackerman, We The People, supra note 136, at 9, 119, 384; cf. id. at 209–10 (noting use of unconventional threats in higher lawmaking).

[156] Cf. Ackerman, Revolution, supra note 137, at 2287 (proposing a "ten-year" test for constitutional revolution).

Fifth, Ackerman offers us a theory of constitutional revolution but no corresponding theory of constitutional retrenchment. He cannot easily explain the changes in constitutional doctrine that occurred (for example) after the Compromise of 1877 or the election of 1968. He can describe these as not real changes in the constitutional regime (his interpretation of 1877)[157] or "failed constitutional moments" (his interpretation of 1968).[158] By contrast, when one views constitutional change through the lens of partisan entrenchment, nothing is more natural than periods of constitutional retrenchment following periods of constitutional upheaval and innovation, like the post-1877 period or the Burger Court of the 1970s and early 1980s. When the dominant party starts losing Presidential elections, it gradually loses its grip on control of the judiciary. The result is slow and steady retrenchment rather than quick and decisive change.[159] But the changes to constitutional meaning are no less real even thought they do not fit easily into the model of a constitutional moment.

III. *BUSH V. GORE* AND PARTISAN ENTRENCHMENT

Our model of constitutional change through partisan entrenchment, we believe, puts *Bush v. Gore* in an especially interesting light. *Bush v. Gore* does not involve members of the political branches entrenching their party and its views in the judiciary. Rather, in *Bush v. Gore*, we have the totally unprecedented spectacle of five members of the Court using their powers of judicial review to entrench their party in the Presidency, and thus, in effect, in the judiciary as well, because of the President's appointments power. It is perfectly normal for Presidents to entrench members of their party in the judiciary as a means of shaping constitutional interpretation. That is the way most constitutional change occurs. It is quite another matter for members of the federal judiciary to select a president who will entrench like-minded colleagues in the

[157] 2 Ackerman, We the People, supra note 136, at 471 n.126 (criticizing Michael McConnell's view of the events leading up to the Compromise of 1877).

[158] Ackerman, A Generation of Betrayal, supra note 134, at 1528 (noting failure of the New Left in the 1960s); cf. id. at 1521 (noting partial success of political reform in the 1960s but the ultimate defeat of George McGovern and the liberal wing of the Democratic Party in 1972).

[159] The Democratic Party lost the White House in 1968 but still retained control of Congress for many years. It is therefore not surprising that it exerted a moderating influence on Republican judicial appointments until Ronald Reagan's election in 1980, when the Republicans gained the Senate for the first time in decades.

judiciary. In our system of divided powers, the appointments process gives the political branches a check on the actions of the judiciary. The judiciary is not permitted to pick its own members, either directly or indirectly.

Thus, *Bush v. Gore* offers a bizarre variation on the problem of self-perpetuating majorities discussed in *United States v. Carolene Products*[160] and its famous footnote four.[161] In *Carolene Products*, Justice Harlan Fiske Stone cautioned that courts should be particularly suspicious of attempts by political insiders to pass laws that hobble their political opponents and prevent them from serving as effective participants in the political process. The theory of footnote four is predicated on an elemental fear of political parties or other factions using legislative power to further entrench themselves in legislatures. In *Bush v. Gore*, however, the danger of entrenchment comes not from the legislature but from the Supreme Court itself. The five Justice majority used the power of judicial review to short circuit the processes of democratic representation, install a president of their choice, and help keep their constitutional revolution going.

We hasten to add that this is normally not how judicial review works, even when ideologically driven. Sometimes the work of a majority of Justices does help their party's fortunes. By lowering barriers to the exercise of the franchise—particularly by blacks and the poor—the Warren Court's decision in *Harper v. Virginia Board of Elections*[162] probably worked to the benefit of Democrats.[163] But the danger of judicial self-entrenchment is considerably more indirect and attenuated than we see in *Bush v. Gore*, where the five conservatives stopped an ongoing election contest and all but handed George W. Bush the keys to the White House front door. Unlike the scenario in *Bush v. Gore*, the Warren Court's liberal majority in *Harper* was not intervening in an ongoing presidential election and effectively determining its outcome. Second, its decision in *Harper* seems entirely consistent with its larger ideological agenda of promoting racial equality and open access to the political process. By contrast, in *Bush v. Gore* we do not see a bold

[160] United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

[161] Id. at 152 n.4 (1938). For a discussion of the theory of *Carolene Products*, see J.M. Balkin, The Footnote, 83 Nw. U. L. Rev. 275 (1989).

[162] 383 U.S. 663 (1966).

[163] Id. (invalidating Virginia's poll tax, which kept many poor, and particularly African-American, voters away from the polls).

attempt to further the conservative revolution's ideological principles. Rather we see the narrowest possible holding moving in the opposite direction from which the conservatives usually innovate, a holding that is designed primarily to stop the election.

Moreover, precisely because the Court's constitutional innovations tend to enforce larger ideological principles rather than offer direct political assistance to one party or another, the constitutional changes often work to the disadvantage of the political party of the innovating Justices. A good example is the series of cases starting with *Shaw v. Reno*,[164] which made majority-minority voting districts constitutionally suspect. The five conservative Republicans joined those opinions even though majority-minority districts tend to increase Republican representation, particularly in the South.[165] A second example concerns the Warren Court's race relations and criminal procedure innovations, which gave both George Wallace and Richard Nixon ample ammunition to run against the Democrats and thus eventually put in place the forces that established a new conservative Republican majority.[166] A third example is *Roe v. Wade*.[167] The most conservative Justices oppose *Roe*. But if the U.S. Supreme Court ever does overturn *Roe*, they will have handed the Democratic Party the best issue to run on since Social Security.

By contrast, *Bush v. Gore* tends to strengthen partisan entrenchment in the judicial and political branches simultaneously. Because of the Supreme Court's decision in *Bush v. Gore*, Republicans controlled all three branches of government for a period of several months.[168] And even after Senator Jeffords's defection, they control two and a half branches of the federal government. This self-reinforcing aspect of *Bush v. Gore* is a particularly worrisome aspect of the case, for it severs the already amorphous connections between constitutional interpretation by judges and popular will. If Jeffords had not become an independent, the Republicans would have had a free hand in stocking the federal judiciary

[164] 509 U.S. 630 (1993); see also supra notes 45–47 and accompanying text.

[165] See, e.g., Charles S. Bullock, III, Winners and Losers in the Latest Round of Redistricting, 44 Emory L.J. 943, 952–57 (1995).

[166] See, e.g., Miranda v. Arizona, 384 U.S. 436 (1966); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[167] 410 U.S. 113 (1973).

[168] One of us has referred to this as winning the "constitutional trifecta." Balkin, supra note 93, at 1455.

without winning a majority of the popular vote.[169] His switch—caused in part by his sense that the leadership of the Republican party was moving dangerously out of the mainstream—may well prove to be one of the most important events in recent constitutional history.

The danger that *Bush v. Gore* presents is that of members of an unelected branch using the power of judicial review to further entrench themselves and their ideological allies without popular support. This—and not the changes in constitutional interpretation that accompany the rise and fall of political parties—is the true countermajoritarian difficulty.

It is important to understand that the problem of judicial self-entrenchment does not depend on whether the actual motives of the conservative five were partisan. One cannot know for certain what the actual motivations of the judiciary are when they engage in self-entrenching behavior any more than one can know the actual motivations of legislatures when they pass laws that help keep the powerful in power. That is why the theory of *Carolene Products* counsels higher scrutiny of legislative action that might tend to self-reinforcement and why we should be equally suspicious of what the Court has done in *Bush v. Gore*.

IV. CRITICIZING CONSTITUTIONAL REVOLUTIONS

A. The Importance of Constitutional Politics

Understanding how constitutional revolutions occur allows us to understand the proper response to them. The most common and obvious way that people object to constitutional revolutions is to make arguments about the judicial role: They argue that past precedents are not being respected or that lawyerly professional norms are not being obeyed.[170] They argue for judicial caution and judicial restraint. We

[169] We should note in passing that not only did George W. Bush lack majority support, but the malapportionment of the Senate gives increased weight to senators from states with low populations in the West, many of whom are represented by conservative Republicans. Thus, as Suzanna Sherry points out, "the senators voting in favor of Judge [Clarence] Thomas represented 48 percent of the population, and the Senators who voted against him represented 52 percent." Suzanna Sherry, Our Unconstitutional Senate, *in* Constitutional Stupidities, Constitutional Tragedies 96 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

[170] See, e.g., Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court 4–8 (1999); Erwin Chemerinsky, The Supreme Court 1988 Term, Foreword: The

understand many of the objections to the Court's contemporary jurisprudence in precisely this way. From Cass Sunstein's embrace of judicial minimalism[171] to Mark Tushnet's call to take the Constitution away from the courts,[172] liberal and left-wing scholars have embraced procedural arguments about the court's proper role as a way of combating changes in constitutional doctrine.

But in an important sense these procedural or process-based objections are beside the point. As Mao Tse-tung succinctly put it, a revolution is not a dinner party.[173] One would hardly expect that in times of great constitutional change courts would observe all the niceties that cautious jurists would espouse. That is not the point of a revolution. And in hindsight, the quality of a constitutional revolution will not be judged by how well older precedents were respected or how minimally or moderately courts acted during revolutionary times. It will be judged by the political justice of the substantive principles that the courts expound in their new doctrines. No one thinks that the Warren Court was good because of its cautious respect for precedents or that the *Lochner* Court was bad because it failed to avoid constitutional questions through artful statutory interpretation. Chief Justice Roger Taney's poor reputation is not based on his embrace or rejection of minimalism, but on his support for slavery. Justice William Brennan's towering reputation rests not on his treatment of precedents or his embrace of judicial restraint but on the fact that he was on the politically progressive side of most controversies concerning civil liberties and civil equality. Stated more correctly, he was on the right side as judged by subsequent history (at least so far), whereas Taney was not.[174] Judicial revolutions, like political revolutions, are judged in terms of their results and what they say about

Vanishing Constitution, 103 Harv. L. Rev. 43, 45–54 (1989); Larry Kramer, Judicial Exclusivity: The Transformation of Judicial Review (2001) (unpublished manuscript on file with authors).

[171] See Sunstein, supra note 170, at 4.

[172] Mark Tushnet, Taking the Constitution Away from the Courts (1999).

[173] "A revolution is not the same as inviting people to dinner, or writing an essay, or painting a picture . . . A revolution is an insurrection, an act of violence by which one class overthrows another." Mao Tse-tung, 1 Selected Works of Mao Tse-Tung 28 (1965), quoted in Bartlett's Familiar Quotations 686 (Justin Kaplan ed., 16th ed. 1992) (omissions in original).

[174] Just as Felix Frankfurter's star dimmed during and after the heyday of the Warren Court, it is entirely possible that Justice Brennan's reputation may also diminish, particularly among younger conservative academics and those who are trained by them in future years. On the vagaries of judicial reputation, see Richard A. Posner, Cardozo: A Study in Reputation 58–73 (1990).

the meaning of America. We know the quality of a constitutional revolution by the politics that it keeps.

If this is so, it suggests that the proper way to criticize a constitutional revolution, whether one still in the making or in the full flower of its audacity, is in terms of the constitutional principles that it espouses and the vision of the country that it summons. That is not the same thing as saying that one should attack it "politically" in the sense of "low politics." Rather, one should consider and criticize it from the standpoint of "high politics," from the standpoint of the larger political principles that one believes animate and should animate the Constitution.

Those political principles are hardly foreign to law. Indeed, they are what constitutional law is made of. Debating the political principles that one believes underlie America's higher law means that one must debate the meaning of the country and what it stands for. To participate in this sort of debate involves summoning a conception of "We the People" and a conception of the principles that our country and our Constitution should be devoted to. This criticism is "political," but it is a criticism from *constitutional politics*. And a debate about constitutional politics, we think, is the only kind of debate worth having in moments of profound constitutional change.

B. A Flash from the Past

Philip B. Kurland's 1964 *Harvard Law Review* Foreword to the annual review of the Supreme Court's work is almost certainly the most vituperative such essay published by that journal.[175] Kurland, then a professor at the University of Chicago Law School, had graduated from the Harvard Law School in 1944 and then clerked, as did so many of Harvard's best and brightest, for former Harvard law professor Felix Frankfurter. Frankfurter, who left the Court in 1962 following a stroke, had been the intellectual leader of the opposition to the Warren Court, both on the Court and through former academic associates and clerks like Kurland himself.[176] By 1964, that Court was in full flower, its

[175] Philip B. Kurland, The Supreme Court 1963 Term, Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government," 78 Harv. L. Rev. 143 (1964).

[176] Indeed, for several years during the late 1950s and early 1960s, the annual *Harvard Law Review* Forewords became synonymous with missives from Frankfurter-land bewailing the most recent missteps of the Court headed by what, to well-educated Harvardians, were the basically uneducated politicos Earl Warren and Hugo Black, with the collaboration of the

liberal majority rewriting one basic constitutional norm after another, much to the delight of the liberal wing of the Democratic Party that had supported John F. Kennedy and his calls for change.[177]

Kurland was not sparing in his criticisms of the Warren Court:

> The Court's product has shown an increasing incidence of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree.
>
> Because of a recent tendency to add disingenuousness and misrepresentation to this list, the problem has been exacerbated. . . .
>
> . . . .
>
> Certainly it is easier to criticize the work of the Court than to perform it . . . . It behooves any critic of the Court's performance to close on a note reminiscent of the wall plaque of frontier times: 'Don't shoot the piano player. He's doing his best.' It is still possible, however, to wish that he would stick to the piano and not try to be a one-man band. It is too much to ask that he take piano lessons.[178]

When Kurland wrote these words, Levinson was a graduate student in the Harvard government department. He well recalls his response to

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brilliant but altogether unsound former denizen of the Yale Law School William O. Douglas. See, e.g., Ernest J. Brown, The Supreme Court 1957 Term, Foreword: Process of Law, 72 Harv. L. Rev. 77 (1958); Henry M. Hart, Jr., The Supreme Court 1958 Term, Forward: The Time Chart of the Justices, 73 Harv. L. Rev 84 (1959); see also L.A. Powe, Jr., The Supreme Court, Social Change and Legal Scholarship, 44 Stan. L. Rev. 1615, 1640 (1992) (noting Frankfurter's influence on *Harvard Law Review* Forewords critical of the Warren Court).

[177] See Powe, supra note 22, at 217–71. Powe argues convincingly that the Warren Court was not at all "countermajoritarian" with regard to the national political mood and that its primary role was to enforce against outliers what appeared to be the thrust of general public opinion. And, of course, Lyndon Johnson would win a smashing victory in 1964, bringing with him an overwhelmingly liberal Democratic Congress.

[178] Kurland, supra note 175, at 145 (quoting Alexander Bickel and Harry Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 Harv. L. Rev. 1, 3 (1957)); id. at 176.

Kurland's intemperate critique: Kurland exemplified everything that was wrong with the intellectually backward, anti-legal-realist Harvard Law School. He was still mired in the debates over the legitimacy of the New Deal and the illegitimacy of the "Old Court" that had opposed it. In the 1930s, political progressives had issued equally vituperative attacks on the "Old Court" and called for a new jurisprudence of judicial restraint. The anthem of that generation was penned by then-Justice Harlan Fiske Stone: "Courts are not the only agency of government that must be assumed to have capacity to govern."[179] The implication, of course, was that the Court should simply get out of the way of those who *did* have the capacity to govern.

This was not wholly inaccurate, merely incomplete. Only two years later, in *United States v. Carolene Products Co.*,[180] Stone would offer justifications for a decidedly more aggressive form of judicial review than that defended by Frankfurter and his disciples—to protect fundamental rights and discrete and insular minorities.[181] By 1964, scholars of roughly the same age as Kurland had been in 1944—their mid-twenties—no longer worried about the legitimacy of the New Deal, which appeared settled. Instead, the issue on their minds was how to confront America's sorry history of racism. The philosophy of judicial restraint now seemed to justify the Court's decades-long collaboration with Jim Crow.

Racism was only one task the Warren Court had taken on in its effort to clean up the Augean stables of American constitutional law. There was gross injustice in how political districts were drawn and elections conducted,[182] not to mention the excesses of McCarthyism in the 1950s,[183] and the arbitrary denials of many basic procedural rights to the accused.[184] By 1964, touting "judicial restraint" no longer seemed a

[179] United States v. Butler, 297 U.S. 1, 87 (1936) (Stone, J., dissenting).

[180] 304 U.S. 144 (1938).

[181] See 304 U.S. at 152 n.4; Balkin, supra note 161.

[182] See, e.g., Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Baker v. Carr, 369 U.S. 185 (1962).

[183] As Powe has pointed out, however, the Warren Court was not particularly steadfast in its protection of free speech rights, largely abandoning its earlier decisions protecting communists by the end of the 1950s. Only later on did the Court reassert constitutional protections. Powe, supra note 22, at 135.

[184] See, e.g., Gideon v. Wainwright, 372 U.S. 335 (1963) (establishing general right of accused to free assistance of counsel).

progressive response to the country's ills; indeed it seemed to indicate that one was satisfied to continue collaborating with manifest injustice.

To Levinson, then, Kurland seemed a pathetic figure from the past, raging to stop progressive tides of change that he could not understand. By contrast, William Brennan (a former Frankfurter student who rejected his teacher's views) and the Warren Court seemed to be leading the country to a brighter, more just, and more humane future. Within a relatively short time, a generation of former Warren Court clerks entered the legal academy and began writing scholarship of their own—symbolically slaying their Frankfurterian predecessors and celebrating rather than condemning the Warren Court's legacy.[185]

It was these fans of the Warren Court who taught Balkin during his own student days, signifying one important feature of intellectual paradigm shifts and constitutional revolutions: the takeover of those institutions charged with teaching the young by newcomers imbued with the new learning and inclined to dismiss, often quite rudely, the purported verities of their predecessors.[186] Now "judicial activism" was to be embraced rather than condemned; "judicial restraint" was criticized if not vilified outright. Of course the story is more complicated than this. The elders who fought for the New Deal were not *entirely* without wisdom. The Warren Court liberals accepted the New Dealers' view that that Congress could do basically whatever it wished in regulating the economy. They agreed that broad conceptions of federal power established the functional equivalent of a national police power that Congress could use to establish justice throughout the land. The key examples are the Civil Rights Acts of 1964 and 1968 and the Voting

[185] See, e.g., the Forewords written by former Brennan clerks Owen M. Fiss, The Supreme Court 1978 Term, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1 (1979), and Frank I. Michelman, The Supreme Court 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7 (1968); by former Stewart clerk, Laurence M. Tribe, The Supreme Court 1972 Term, Foreword: Toward a Model Of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1 (1973); by former Harlan clerk Paul Brest, The Supreme Court 1975 Term, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1 (1976); and by former Warren clerk John Hart Ely, The Supreme Court 1977 Term, Foreword: On Discovering Fundamental Values, 92 Harv. L. Rev. 5 (1978). All were decidedly different in tone from those written by their generational predecessors.

[186] Cf., e.g., Thomas S. Kuhn, The Structure of Scientific Revolutions 151–52, 158–59 (1962) (suggesting that change is often more the result of generational displacement than of an older generation actually being persuaded by the young that their ideas are mistaken).

Rights Act of 1965, which almost undoubtedly did more for the cause of racial justice than *Brown v. Board of Education* itself.[187]

Earl Warren has been dead for almost three decades, and "his" Court has disappeared into the increasingly dim recesses of history. His judicial activism has been replaced with one much harsher and more conservative, protecting state governments from civil rights plaintiffs, state officers from federal regulatory mandates, property owners from environmental regulation, and whites from affirmative action. Given our own feeling that we are in the midst of a profound paradigm shift at least as significant as the one facing Felix Frankfurter and Philip Kurland at the turn of the 1960s, both of us find ourselves in the position of feeling entirely unanticipated kinship with Kurland inasmuch as we, too, now perceive the Supreme Court of the United States as an institution run dangerously amok, heedless of sound legal standards, and determined, by hook or by crook, to impose its preferred political views upon a country that has in no way indicated through collective political decisionmaking a desire to embrace them.

Yet although our current situation allows us to see Kurland's polemic in a more sympathetic light, we cannot follow his method of criticism. We have three fundamental differences from Kurland. They stem from our view of how and why the Constitution's meanings change and what the role of courts is and should be.

Kurland thought that the appropriate way to criticize the Supreme Court was through an appeal to the norms of professional legal ideology. The Court, he argued, was not giving reasons (or good enough reasons) for its decisions. It was not hewing to prior precedents, it was stretching prior precedents out of their appropriate contexts, it was engaging in activism; it was not, in short, behaving very court-like and lawyer-like. By contrast, our understanding of how the Constitution changes means that we regard arguments from constitutional politics as more important than arguments from professional norms narrowly conceived. It is certainly permissible to criticize the Court for misreading past precedents and for giving unpersuasive reasons for its decisions. (And that form of criticism may even be the most appropriate in non-revolutionary periods.) But in the long run it is more important to criticize the Court for betraying important constitutional principles of

[187] See, e.g., Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 49–57 (1991).

high politics and to denounce the new principles that it wishes to place in their stead.

Second, Kurland apparently believed that by writing a very acerbic article in the *Harvard Law Review*, he might shame the Court to its senses. We harbor no such illusions. We have no doubt that nothing we say will turn the five conservatives from their path. Rather, given our understanding of how the Constitution changes, we must look beyond them in offering our criticisms. Our audience is, and must be, the larger audience of lawyers outside the Supreme Court, and beyond that, the audience of politicians and ordinary citizens who care about the American Constitution.[188] We should attempt to convince our fellow citizens that our constitutional principles better describe the hopes and aspirations of We the People of the United States. In this way, we help create a counter vision of constitutional politics that we hope someday will be vindicated through subsequent elections and judicial appointments.

Third, unlike Kurland, we do not think that those who disagree with us are benighted or stupid or less committed to the Constitution than we are. Instead, the opponents and supporters of the current Court are referring to dramatically different "constitutions," or visions of the Constitution, applying remarkably different criteria of recognition. The fight over the Constitution is a fight over contrasting political visions, a fight over contrasting narratives of American history, and a fight over contrasting conceptions of We the People and its deepest commitments.

During a time of constitutional revolution, it is not enough simply to argue that the Court has unwisely stepped into particular questions, that precedents have been mangled, and that legislative and constitutional history have been badly used, although this is certainly worth pointing out. Rather, one must speak to the basic political principles that underlie the Constitution and explain how they have been betrayed or submerged in the new jurisprudence. One must articulate the vision of the country

[188] Thus, we must offer our message both within law reviews like this one and outside them. See, e.g., Jack M. Balkin, Why I Still Haven't "Gotten Over" the Election of 2000, *in* Bush v. Gore: The Question of Legitimacy (Bruce Ackerman ed., forthcoming 2002); Jack M. Balkin, Bush's Negative Mandate Narrows His Nominees, L.A. Times, Jan. 12, 2001, at B9; Jack M. Balkin, The Supreme Court Compromises Its Legitimacy, Boston Globe, Dec. 12, 2000, at A23; Jack M. Balkin, "The Will of the People" is a Legal and Political Fiction, L.A. Times, Dec. 11, 2000, at B7; Levinson, supra note 91.

that our Constitution exists to redeem. For only those principles and that vision can defeat a revolution gone wrong.

C. A Choice of Constitutional Visions.

We close this Section, then, with highly truncated descriptions of two overarching visions of the American constitutional order. Although much more could obviously be said on behalf of each, our point is that it is contending visions, rather than judicial craft, that should be at the heart of the contemporary debate.

In the constitutional imagination of the five conservatives, the federal government is large, intrusive, and distant, constantly forgetting the fact that it is a government of limited and enumerated powers.[189] The people are well represented in state legislatures, which are closer to their interests, but they are not well represented in Congress.[190] The Congress is unruly and unthoughtful, always trying to aggrandize itself and interfere with more and more aspects of daily life.[191] Its work must be carefully scrutinized and narrowly construed to avoid usurping the role of the courts on the one hand, and the states on the other.[192] The states, by contrast, are the primary guarantors of liberty in the United States. Decentralization of decisionmaking authority increases human freedom.[193] Indeed, courts must protect the "dignity" of states as distinct sovereigns from suits for damages based on federal causes of action. Only by immunizing states when they violate federal rights can states serve their function as protectors of individual liberty.[194]

Ordinary politics is messy and unprincipled, often little more than the play of special interests.[195] Contemporary politics features selfish grabs for power and influence, not public-spirited aspiration toward larger

[189] See United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

[190] See Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

[191] See *Morrison*, 529 U.S. at 598; *Lopez*, 514 U.S. at 549.

[192] See Alexander v. Sandoval, 121 S. Ct. 1511 (2001); Solid Waste Agency v. United States Army Corps of Eng'rs, 121 S. Ct. 675 (2001); *Morrison*, 529 U.S. at 598; City of Boerne v. Flores, 521 U.S. 507 (1997).

[193] See Gregory v. Ashcroft, 501 U.S. 452 (1991).

[194] See Bd. of Trs. v. Garrett, 121 S. Ct. 955 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Alden v. Maine, 527 U.S. 706 (1999).

[195] See the discussion of the Court's recent decisions in Richard H. Pildes, Democracy and Disorder, 68 U. Chi. L. Rev. 695 (2001).

ideals. Politicians, especially at the federal level, cannot restrain themselves from misbehaving and sacrificing public interest to private concerns. They cannot be trusted to save the public from a genuine national crisis.[196]

Congress has undoubted power to regulate the national economy. But it is not generally free to regulate noneconomic questions or inherently local subjects.[197] Congress has no general power to pass civil rights laws affecting private actors. Civil rights is a national subject of regulation only to the extent that it affects economic interests like employment or involves instrumentalities of interstate commerce or things or people that have moved across state lines. So-called civil rights statutes that concern noneconomic harms or invade "traditional" areas of state regulation are beyond the power of the federal government.[198]

All too often civil rights laws reflect congressional grandstanding and the influence of special interests rather than the public interest.[199] Courts must restrain Congress from creating ever new forms of interference with state autonomy under the guise of protecting civil rights.[200] "New" forms of asserted discrimination—like those against the disabled or the aged—are less important than older forms based on race or gender, which the Court has long recognized merit heightened scrutiny. Therefore states may rationally discriminate on the basis of these "new" categories.[201]

These days whites are just as likely to be victims of official discrimination as members of racial or ethnic minorities. Indeed, so-called affirmative action laws are really examples of special interest legislation trying to pass themselves off as civil rights laws. They are a sort of racial and ethnic spoils system and must be viewed with the highest level of scrutiny.[202] Any attempt to give racial minorities special treatment will only harm them because it will generate racial hostility by

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[196] See *Bush II*, 121 S. Ct. at 525; Elizabeth Garrett, Leaving the Decision to Congress, *in* The Vote: Bush, Gore & The Supreme Court (Cass R. Sunstein & Richard A. Epstein eds., forthcoming 2001).

[197] See *Lopez*, 514 U.S. at 549.

[198] See United States v. Morrison, 529 U.S. 598 (2000).

[199] See id.; City of Boerne v. Flores, 521 U.S. 507 (1997).

[200] See Alexander v. Sandoval, 121 S. Ct. 1511 (2001); *Morrison*, 529 U.S. at 598.

[201] See Bd. of Trs. v. Garrett, 121 S. Ct. 955 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

[202] See Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

whites and reinforce stereotypes of inferiority. It will generate racial polarization and reinforce the notion that we are not a unified nation and that race matters in everything that people do. This can only heighten racial tensions and cause unhappiness for everyone.[203]

Last but not least, in the new conservative constitutional vision, courts are the final authority on the meaning of the Constitution. The Congress has no authority to interpret the Constitution differently from the Courts. It may only remedy demonstrated violations of constitutional rights by states, and the Court will carefully scrutinize Congress's work to determine whether it is really enforcing rights in the same way that the Court interprets them. Congress is not the Supreme Court's partner in interpreting the Constitution. It is its subordinate. Pushed and pulled as it is by special interests, Congress cannot be trusted to respect the separation of powers or the inherent sovereignty and dignity of the states.[204]

In many ways, the constitutional vision of the conservative five resembles the interpretation of the Civil War of the Northern Democrats who were hostile to Reconstruction.[205] Once slavery was abolished by the Thirteenth Amendment in 1865, they argued that there was literally nothing left to reconstruct.[206] The states should be welcomed back into the Union with no further changes in the constitutional fabric. By contrast, the Radical Republicans, led by such stalwarts as Thaddeus Stevens and Charles Sumner, believed that the war had been fought over the denial of civil rights by oppressive state governments, of which slavery was only the most egregious example. The Reconstruction Amendments were designed to create a new constitutional order in which state sovereignty would be limited by federal civil rights protections.[207]

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[203] See *Adarand*, 515 U.S. at 200; Shaw v. Reno, 509 U.S. 630 (1993); *Croson*, 488 U.S. at 469.

[204] See *Garrett*, 121 S. Ct. at 955; *Morrison*, 529 U.S. at 598; *Kimel*, 528 U.S. at 62; Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); *Boerne*, 521 U.S. at 507.

[205] Our analysis in the following paragraphs owes a great deal to Pamela Brandwein, Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth (1999).

[206] Some moderate Republicans shared this view, although the contours of the moderate Republican position are imprecise. Moderates eventually came to accept the necessity for a Fourteenth Amendment in order to protect basic civil rights. See id. at 27–28.

[207] Id. at 48–49.

Nevertheless, the Northern Democrat view was quickly adopted by the Supreme Court itself in the *Slaughter-House Cases*,[208] where Justice Samuel Miller's majority opinion expressed great concern that the new amendments might be used to trench upon state sovereignty.[209] He rejected the dissenters' arguments that protecting basic rights from being trampled on by state governments was a central reason why the war—and the Reconstruction Amendments—had been necessary.[210] The Compromise of 1877 further reinforced the Northern Democrat view, producing an interpretation of the Civil War that owed less to the framers of the Reconstruction Amendments than to their opponents.[211] According to this view, Reconstruction was a mistake and its attempt to foist racial equality on whites went too far. The Civil War ended slavery but did not fundamentally change the relationship between the states and the federal government. Civil rights laws that trenched upon state prerogatives like the Civil Rights Act of 1875, held unconstitutional in the *Civil Rights Cases*,[212] were special interest legislation that made blacks "the special favorite of the laws."[213] Similarly, in 1882, *United States v. Harris*[214] struck down parts of the Ku Klux Klan Act of 1871 as needlessly interfering with state sovereignty.[215] The Court refused to punish a lynch mob in Tennessee on the ground that by definition private parties could not interfere with federal civil rights.[216]

Over a century later, a similar spirit pervades the *Morrison* Court's rejection of the Violence Against Women Act as a needless interference with state criminal law and domestic relations law. Reaffirming the *Civil Rights Cases* and *Harris*, Chief Justice Rehnquist argued the Violence

[208] 83 U.S. (16 Wall.) 36 (1873).

[209] Id. at 78; Brandwein, supra note 205, at 62–68; see also United States v. Cruikshank, 92 U.S. 542, 559 (1876) (limiting rights protected by the Civil Rights Act of 1870).

[210] See *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 111–24 (Bradley, J., dissenting); id. at 124–30 (Swayne, J., dissenting).

[211] C. Vann Woodward, The Strange Career Of Jim Crow 70–71 (3d ed. 1974) (noting that the Compromise of 1877 brought northern and southern whites together at the expense of blacks).

[212] 109 U.S. 3 (1883).

[213] Id. at 25. As C. Vann Woodward put it, the *Civil Rights Cases* were the "judicial fulfillment of the Compromise of 1877." C. Vann Woodward, Origins of the New South 216 (1971); see also C. Vann Woodward, Reunion And Reaction: The Compromise of 1877 and the End Of Reconstruction 245 (1951) (describing the *Civil Rights Cases* as "a sort of validation of the Compromise of 1877").

[214] 106 U.S. 629 (1882).

[215] Id. at 639.

[216] Id. at 639–40.

Against Women Act unconstitutionally disrupted state prerogatives.[217] Violence against women was no more an interference with civil rights than were the lynchings by private parties in *Harris*.[218] Rehnquist claimed fidelity to original intention: He argued that the *Civil Rights Cases* and *Harris* were decided by Justices who lived through Reconstruction and obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment. in 1868.[219] He neglected to mention that by the 1880s their understandings reflected less the vision of the Radical Republicans of 1868—many of whom also passed the Klan Act of 1871 and the Civil Rights Act of 1875—than the rapprochement between northern and southern whites that followed the Compromise of 1877.[220] The more radical vision of the years immediately following the Civil War was soon forgotten, and a more racially conservative one, jealous of white privilege, and hostile to the expansion of federal civil rights, took its place. As Justice Harlan complained, dissenting in the *Civil Rights Cases*: "I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism."[221] Reading *Morrison* and *Garrett* today, one is tempted to say the same thing.

There is a better way to interpret the Constitution, one that is more consistent with the meaning of our history as a people. As a result of the Civil War and the Civil Rights Movement, the movement for woman suffrage and the women's movement of the 1960s and 1970s, it should be abundantly clear that the creation and protection of civil rights is a national commitment. It is as central to Congress's work as the regulation of the national economy. In our view Congress has the power to pass laws that protect the equal citizenship of Americans. The opening sentence of the Fourteenth Amendment says that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[222] The Citizenship Clause was designed to overrule the *Dred*

[217] *Morrison*, 529 U.S. at 621–25.
[218] Id. at 621.
[219] Id. at 622.
[220] See supra notes 205–213 and accompanying text.
[221] *The Civil Rights Cases*, 109 U.S. at 26 (Harlan, J., dissenting).
[222] U.S. Const. amend. XIV, § 1, cl. 1.

Scott[223] decision, which held that blacks could not be citizens and "had no rights which the white man was bound to respect."[224] It establishes a principle of equal citizenship: The United States cannot create first- and second-class citizens. Equally importantly, it contains no state action requirement.

When Congress passes regulations of private conduct under its power to enforce the Citizenship Clause, courts should uphold them—not as economic regulations but as civil rights laws. When Congress specifically extends those laws to state governments, states should not be allowed to violate them. The proper question for courts should be whether Congress has reasonably concluded that legislation promotes equal citizenship or prevents or forestalls the maintenance of second-class citizenship. Unless the Court can plausibly believe that Congress was unreasonable, the legislation should be upheld. This is, of course, the basic test of national legislation established by Chief Justice John Marshall in *McCulloch v. Maryland*.[225]

The idea of equal citizenship and equal rights has evolved over the years, shaped by the many social movements that followed the Civil War. Today few people think that blacks would truly be equal before the law if they were not protected from private discrimination. After all, the Civil Rights Movement of the 1960s was not just about constitutional violations by states; it was about private discriminations at lunch counters. Just as the reach of Congress's commerce power has grown in response to our developing economy, the reach of its civil rights power grows as our nation gradually comes to terms with old outmoded prejudices and inequalities. Understanding what it means to be a free and equal citizen in a democracy is an ongoing project.

This approach has three distinct advantages. First, it obviates the need to tie civil rights legislation to a story about cumulative effects on interstate commerce. Second, it locates civil rights law under the Fourteenth Amendment, which was intended to be and should be its natural home. Third, when Congress acts to protect the ideal of equal citizenship, it is not necessarily enforcing judicially recognized constitutional rights, any more than when it clears the channels of interstate commerce through economic regulations under its commerce power. Rather, it is doing what it reasonably believes is necessary and

[223] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).
[224] Id. at 407.
[225] 17 U.S. (4 Wheat.) 316 (1819).

appropriate to protect equal citizenship. Thus, legislation under the Citizenship Clause does not require that Congress remedy prior violations of rights by states. Like Congress's authority under the Commerce Clause, its authority to enforce the Citizenship Clause is positive, not remedial.

Our theory of congressional civil rights power is not new. It was, in large measure, the one proposed by Justice Harlan a century ago in his dissent in the *Civil Rights Cases*.[226] We have only updated it to take into account the constitutional meaning of the New Deal and the Civil Rights Movement. In our view, *Garrett* and *Morrison* should be easy cases. If Congress reasonably believes that protecting disabled people from discrimination will help guarantee their equal citizenship, then state governments should not be able to disregard these rights with impunity. If Congress reasonably believes that violence against women harms their ability to enjoy rights of equal citizenship, the Supreme Court should uphold the Violence Against Women Act as a civil rights statute.

Taken together, Congress's civil rights power and its commerce power give the national government the effective equivalent of a general police power. Probably very few things will fall outside the scope of these two powers.[227] But by the beginning of the twenty-first century, it is not clear why this should matter. We are, after all, one nation, declared to be "indivisible, with liberty and justice for all."

The choice between the theory we offer here and the theories that the Court offers in *Boerne*, *Morrison*, and *Garrett* can be played out through the traditional modalities of text, intentions, structure, consequences, and precedent. There is obviously much more that both sides could say. But at the end of the day the choice between them is really a choice between two visions of constitutional politics, two narratives about the American experiment. It is a choice about who we are and what it means to be an American.

V. *BUSH V. GORE* AND THE CONSTITUTIONAL REVOLUTION

According to our theory of partisan entrenchment, each party has the political "right" to entrench its vision of the Constitution in the judiciary if it wins a sufficient number of elections. If others don't like the

[226] See *The Civil Rights Cases*, 109 U.S. at 46–48 (Harlan, J., dissenting).

[227] We can think of one example: a statute that made it a federal crime to bury a privately owned American flag.

constitutional vision that results, they have the equal right to go out and win some elections of their own. Thus, our criticism of *Garrett* and the cases that led up to it is not that the Court lacked the political authority to push its ideological agenda through its interpretation of the Constitution, but that the agenda it is pushing is the wrong one for our country. It is false to the Constitution understood in its best sense. And we should not hesitate to criticize in those terms.

Bush v. Gore, however, is a different matter. It undermines the very mechanisms that keep judicial interpretations of the Constitution roughly in sync with the broad understandings of the American public. By seizing control of the election, the five conservatives severed the connections between their constitutional revolution and popular will. They insulated themselves from the normal checks and balances between the political branches and the judiciary. Their self-entrenching behavior created a real danger that their constitutional revolution would be propelled forward into the future without sustained and continuing popular support.

Bush v. Gore is also different because it cannot easily be resisted in the same way that one might oppose *Morrison* or *Printz* (or, for that matter, liberal decisions like *Miranda* or *Roe*). Those who oppose *Morrison* or *Roe*—and the constitutional visions they represent—not only can call for overruling these decisions but also can support (or oppose) nominees to the Supreme Court based on their adherence to one vision or the other. What would it mean, though, to call for the appointment of Justices who would "overrule" *Bush v. Gore*? The special circumstances of the case make it very difficult to overrule it or limit it. No one expects that the Supreme Court will decide many presidential elections in the future. Moreover, the most objectionable portions of the opinion were fact-specific applications of procedural doctrines—granting a stay of all recounts in order to avoid a cloud on George W. Bush's future legitimacy as President,[228] and remedying an equal protection violation by refusing to order new recounts under a constitutional standard.[229] It is hard to see what future cases critics of the Court could bring that would lead to the rejection of these views about remedies, or what such a rejection would gain.

[228] *Bush I*, 125 S. Ct. at 512 (Scalia, J., concurring in the grant of a stay).
[229] *Bush II*, 125 S. Ct. at 529.

To be sure, one could try to limit or overrule the Court's new equal protection doctrine that tabulation of manual recounts must be based on standards more determinate than the "intent of the voter."[230] However, this would do nothing to alleviate what the Court did in *Bush v. Gore*. More importantly, it misses the point that, if anything, it will be the liberal *opponents* of the decision who will be most likely to exploit and expand the new doctrine, whereas conservative supporters will be more likely to resist its expansion beyond its facts.[231]

Instead, the remedy for *Bush v. Gore* lies in electoral politics. The only way to oppose *Bush v. Gore* is to oppose the constitutional revolution it furthers. The great irony of Justice Thomas's sanctimonious insistence that the decision in *Bush v. Gore* had nothing to do with politics[232] is that politics is the only means by which the American people can discipline the misbehavior of its highest court. The battle over the fate of *Bush v. Gore* and indeed, over the fate of the constitutional revolution itself, will not be decided in the courts. It will be decided through the next several election cycles and through the fight over judicial appointments during the administration of George W. Bush. Politics, and not legal reasoning, will determine what becomes of the constitutional revolution.

If the Democrats win both houses of Congress in 2002 and then regain the Presidency in 2004 (and 2008) they will have delivered as solid a rebuff to Bush's legitimacy and *Bush v. Gore* as is possible in the American system of government. We the People will have rejected the Supreme Court's imperious decision to hand Bush the White House. *Bush v. Gore* and black disenfranchisement will be viewed as blemishes on the American system of justice that were corrected by a wise citizenry. The constitutional revolution will be stopped dead in its tracks, and the reputation of the five conservatives will be forever tarnished.

On the other hand, if George W. Bush wins a second term in office by a decisive margin, this will both bestow legitimacy on his first term retrospectively and tend to confirm the wisdom of the Supreme Court's intervention, if not the precise reasoning of *Bush v. Gore*. The Election of 2000 will be considered at most a tie, which gave Bush the opportunity to establish that he truly did represent the will of the People.

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[230] Id. at 530.

[231] See id. at 532 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

[232] See supra note 97.

Because there was no political harm, there was no constitutional foul. The jurisprudential flaws of *Bush v. Gore* will be seen as irrelevant, and black disenfranchisement in Florida will be excused or forgotten by most people in the country, if not by African-Americans. Bush will appoint more conservatives to the federal bench, and the constitutional revolution will proceed apace. The history books will remember William Rehnquist and Antonin Scalia as great visionaries who crafted the foundations of constitutional doctrine for many generations to come. The 2000 Election is, in one sense, long since over. But both sides can still win the fight over its meaning, and in the process, the fight over the constitutional revolution itself. The Supreme Court has cast the dice. Now the forces of politics will decide whether its gamble pays off.

It makes little sense for professional politicians of either party to place the procedural legitimacy of the 2000 Election at the center of public debate. The Republicans do not want to call attention to the question, which they regard as settled. The Democrats cannot remove Bush in any event, and they must not appear to be "obstructionist." Otherwise they will meet the same fate as the Gingrich-led Republicans who shut down the federal government in 1995 and were rewarded with defeat in the presidential and congressional elections of 1996. Hence, the political battles of the next four years may not focus overtly on who really won the election. Instead, the two parties will do what they normally do—try to gain the greater trust and confidence of the American people.

The case of judicial appointments, however, is special. Because the President himself was installed by judicial fiat, opposing judicial nominations—particularly Supreme Court nominations—offers Democrats the most appropriate platform through which to discuss the legitimacy of *Bush v. Gore* and the procedural irregularities of the 2000 Election. Too often Senators, particularly in the Democratic Party, have refused directly to address questions of judicial ideology in judicial appointments. They have only been willing publicly to oppose nominees to the federal bench if they can find something wrong with their character or their past behavior.[233] It is time to put such bad habits aside.

[233] Their Republican counterparts were more energetic in enforcing ideological conformity. During the Clinton Presidency, Republicans in the Senate Judiciary Committee simply refused to hold hearings on nominations if they thought the candidates were too liberal. See John H. Cushman, Jr., Senate Imperils Judicial System, Rehnquist Says, N.Y. Times, Jan. 1, 1998, at A6; Robert Kuttner, Partisan payback for judicial picks?, San Diego

The politics of personal destruction are wholly inappropriate to the seriousness of the times. They are unjust to candidates who must suffer repeated attacks on their character when the real issues lie elsewhere. And they are beneath the great constitutional issues that confront the country as a result of the 2000 Election. Senators must face forthrightly the question of whether the constitutional revolution begun a decade ago will be permitted to go forward full steam ahead, or whether its principles are false to the Nation's past and wrong for the Nation's future.

Senators might offer two different kinds of arguments for scrutinizing candidates on ideological grounds. One argument would be the need to preserve ideological diversity: George W. Bush should not be permitted to appoint judges who are too far out of the mainstream because this will throw the federal judiciary and the United States Supreme Court too far out of balance. Under this theory, the Court is currently tilted too far to the right. It should always have an appropriate mixture of conservatives, moderates, and liberals. It is the duty of the Senate not to allow a President to stray too far from that happy combination.

Although this argument seems reasonable and fair-minded, we think it obscures the real issues at stake. The injunction to preserve balance would apply whether George W. Bush's legitimacy was doubtful or clear, whether or not a constitutional revolution was in progress, and whether or not the Supreme Court had decided *Bush v. Gore*. The real issue is not ideological balance. It is legitimacy—the legitimacy of the Bush Presidency, of *Bush v. Gore*, and of the Supreme Court's authority to continue its constitutional revolution.

Given our previous discussion, we have no difficulty in concluding that the present Court lacks ideological balance. One would hardly expect otherwise in the midst of a constitutional revolution. We agree that the current Supreme Court majority has been altogether too disrespectful of democratic processes, that their political values are badly skewed, and that their invocations of text and original intention are opportunistic, ideologically biased, and self-serving. But the issue is not preserving a natural balance on the Supreme Court or the federal judiciary. Indeed, we doubt that there *is* a natural ideological balance to the Court that must be preserved over the generations. We see no reason, for example, why Lyndon Johnson should have appointed a conservative

Union-Tribune, May 20, 2001, at G3; Jake Tapper, Dems to GOP: It's payback time!, Salon.com, May 10, 2001.

segregationist to replace Justice Tom Clark in 1967 rather than a liberal egalitarian like Justice Thurgood Marshall. It is true that the Warren Court was rather liberal by 1967, and adding Thurgood Marshall would predictably push it even further to the left, especially on issues of race. But this should not have been particularly troubling. In our view, Johnson's 1964 landslide victory gave him the political authority to appoint Thurgood Marshall.

The problem today is not that the current Court is unbalanced—it surely is. The problem is that George W. Bush lacks the political authority to appoint members of the federal judiciary to unbalance it further. As we have argued, a party's authority to stock the federal courts with its ideological allies stems from its repeated victories at the polls. The problem with judicial appointments by the present administration is that George W. Bush lacks just this sort of legitimacy. He may occupy the White House by the grace of his brother the Governor of Florida, Florida Secretary of State Katherine Harris, and five Justices of the Supreme Court. But he should not have the right to appoint life-tenured judges who further the constitutional revolution unless he won a mandate from We the People. He won no such mandate. Indeed, more people opposed his candidacy than favored it, and his victory in the electoral college is equally dubious given the disenfranchisement of thousands of African-American voters and the Supreme Court's hijacking of the national political process. That is why *Bush v. Gore* matters. George W. Bush is assuming a legitimate power to reshape the Constitution through judicial appointments that he simply does not possess. It is the obligation of the Democratic opposition in the Senate to resist his attempts.

The true countermajoritarian difficulty of the federal judiciary these days is the spectacle of a President rejected by a majority of the voters who is appointed by judges, and who then appoints more judges of the same stripe. Even if George W. Bush had won a clear electoral majority, he would still lack a mandate for his judicial politics because he lost the popular vote. After all, there is little evidence that a majority of the American public supported the far right wing agenda of either the five conservatives or the Republican leadership. But *Bush v. Gore* greatly exacerbates the problem of legitimacy. By delivering the Presidency to George W. Bush, the five conservatives entangled his fate with theirs. He should not be permitted to reshape the Constitution without a

legitimate mandate from the People. They should not be permitted to profit from their own misdeeds.

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Shortly after *Bush v. Gore*, the *New Yorker* ran a cartoon featuring a scruffy, thuggish-looking man sitting at a bar with a huge bag of money beside him. He is having a drink and speaking cheerfully to another customer. The caption reads: "Oh, sure, it's stolen, but now we have to get on with our lives."[234] The point of the joke, of course, is that if somebody does something very bad, we normally do not think that we should simply accept it and just move on. The wrong should be corrected and the wrongdoer punished. Yet the message from many quarters these days is that we should forget about it: The Supreme Court has spoken, Bush won the election, he is in the White House, and one should get over it. Let's move on.[235] We do not doubt the emotional conflict that many Americans now face. It is hard to admit that one lives in a country that has just suffered through a judicial coup. And many people will do almost anything to avoid recognizing that very unsettling fact. But the problem is that if the Supreme Court acted wrongfully, then to move on is to sanction something illegal and unjust. It is to turn what is illegitimate into something legitimate. And that may constitute its own form of injustice.

There is a moral obligation, if there is not a legal obligation, to name what is unjust as unjust, to say that people have done wrong even if there is nothing that one can do about it at present. Of course, to say such things may lead one to be thought unpleasant or a crank. But to refuse to name the unjust, and to move on for fear of being thought

[234] Charles Barsotti, New Yorker, Jan. 22, 2001, at 28 (cartoon).

[235] For example, in response to a New York Times report that Republicans pressed election officials in GOP-leaning counties to accept overseas absentee ballots that did not comply with state election laws, while seeking to have overseas ballots with identical deficiencies disqualified in counties won by Al Gore, President Bush's spokesman Ari Fleischer responded: "This election was decided by the voters of Florida a long time ago, and the nation, the president and all but the most partisan Americans have moved on." Barstow & Van Natta, Jr., supra note 18, at A1. Similarly, the President's brother, Gov. Jeb Bush, blamed the Civil Rights Commission's report on black disenfranchisement for "needlessly foster[ing] racial disharmony" and argued that "[t]he time for meaningless and divisive finger-pointing over last year's election is over. We need to move on." Larry Lipman, Elections Oversight Urged for Florida, Palm Beach Post, June 9, 2001, at 1A.

unreasonable may condemn one to a form of cravenness that is even worse.

The Rule of Law and constitutional government are worthy values, but we should not confuse either the Supreme Court or the flesh and blood members of that body with those values. Law schools in particular are well known for fawning over Supreme Court Justices and devoting their considerable resources to shoring up the Court's credibility. But when those Justices betray principles of constitutional government, their proper and just reward should not be even more fawning and flattery, even more bowing and scraping. We do not live in a monarchy. We overthrew that form of government long ago. Perhaps the King can do no wrong. But the Justices of the Supreme Court certainly can. In a democracy, they must be called to account when they do.

We well realize that the desire to reduce cognitive dissonance is strong. It is easy to understand why most lawyers and legal academics, like most people in the country more generally, do not want to accept the possibility that five Justices fundamentally betrayed their oaths of office and helped to place in the White House someone who does not deserve the title of President. But if one says nothing, and accepts the Court's actions and the Presidency as fully normal in all respects, then the injustices will be forgotten or, perhaps worse, accepted as simply the way "we" do things in America. One will end up bowing to authority not because it is honest or just, but simply because it is stronger. Submitting to power in this way is the most abject betrayal of the American constitutional tradition.