THE CONSTITUTION AND THE ROLE OF GOVERNMENT

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I. INTRODUCTION

When Dean Andy Abrams asked me to come to Charleston and talk about “The Role of Government,” I thought he had in mind a thirteen-week course. I would call it, “From Aristotle to the Tea Party.” But, no! He wanted one lecture, a keynote address for a symposium on “The Role of Government.”

To give the topic some focus, one suited to a speaker who spends a lot of time thinking about constitutions, I decided to frame the question in terms of constitutional debate—how developments in recent years shape the way we talk about the role of government. I had in mind, in particular, how the constitutional terrain has changed as a reaction to, and since the days of, the Warren Court. To do that, let me take you back to the 1960s, to the heyday of the Warren Court.

Soon after graduating from law school, I found myself blessed with the opportunity to serve as a law clerk to Supreme Court Justice Hugo L. Black. I learned many things from Justice Black. Among them was a better sense of the Founding Era and the framers’ Constitution. Another was how important an understanding of politics and the political process can be to a Justice.

When Hugo Black, reared in rural Alabama, arrived at the United States Senate, he felt he lacked the classical education his Senate colleagues had acquired. Black set out to read what we might call the “great books”—the books most of us have heard of, would like to read, but typically do not get around to reading. Black’s library at his house in Alexandria, where I spent many hours as we worked on opinions, housed an extraordinary collection of books. They included the works of the ancient world,
such as Polybius and Tacitus, and the insights of a later era, books by Gibbon and Carlyle. Black liked to lend me these books, expecting that, between draft opinions and petitions for certiorari, I would drink of the kind of history Black himself loved so much. I decided that Black may well have been the last Justice on the Supreme Court whose worldview was shaped by the same books as those read by the founders’ generation, seeing the world through the lens of Whig history. Black’s understanding of history—reinforced by his command of language and his powers of analysis—explains much of the power of his opinions.

Before his appointment to the Supreme Court, Black himself had been a major player in American politics. As a member of the Senate, he was a key figure in the New Deal coalition that transformed American politics and society. He believed in the ability of government to bring national power to bear on national problems. He thought that government should be able to get on with the business of solving those problems, unhindered by the kinds of decisions that the Court was handing down in the early days of the New Deal. He understood politics, was good at it, and had a vision about the proper role of government. It is hardly surprising that Black was President Roosevelt’s first appointment to the Supreme Court.

By the time I reported for work as Black’s law clerk in 1962, Felix Frankfurter—his health broken—had left the Court and had been replaced by Arthur Goldberg. Frankfurter had been the field marshal of the Court’s more conservative wing. Goldberg,

2. See generally GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 23 (1977) (Justice Black provided “the single-handed and tactically decisive thrust that shifted the center of gravity of the New Deal itself from relief toward more fundamental reform.”).
3. Id. at 165.
4. Id. at 23.
5. Id. at 172–73.
6. Id.
by contrast, having been the AFL-CIO's general counsel and having served as Secretary of Labor in President Kennedy's Cabinet, came from a liberal, activist tradition. The balance on the Court tipped. After twenty-five years of hammering out dissents, Black was now writing majority opinions. Although the Warren Court technically began in 1953, with Earl Warren's appointment as Chief Justice, it was in the 1960s that the Warren Court hit its stride.

I found myself at the hem of history. Among the opinions Hugo Black wrote during the time I was his law clerk were *Gideon v. Wainwright*, requiring states to appoint counsel in felony cases for defendants unable to afford a lawyer, and *Griffin v. County School Board*, ordering Prince Edward County to reopen its schools and to raise tax revenue to support their operation. Symbolic in so many ways of the jurisprudence of the Warren Court, these cases were grounded in two of the great themes of that Court: fairness and equality.

II. THE WARREN COURT AND BEYOND

A. The Warren Court

In a few short years, the Warren Court compiled a record of action unmatched by any Court before or since. Landmark cases included deciding that reapportionment would no longer be a political question and that "one-person, one-vote" would be the law of the land in state and federal elections. The drive for racial equality included, most obviously, *Brown v. Board of Education*, but also a string of decisions in which the Court overturned convictions of civil rights demonstrators, thus

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affording shelter to the Civil Rights Movement. The Warren Court nationalized criminal procedure in state courts, requiring, in a series of cases, that the procedural protections of the Bill of Rights, already applicable in federal courts, would be enforced in state courts as well. The Court laid the groundwork, however tentatively, for an expansive right of privacy and personal autonomy.

The Warren Court was bold in going about its work. It painted with a broad brush, and the themes of its day may readily be summarized. First, the Warren Court exuded self-confidence; the Justices relished identifying problems and providing solutions, and they genuinely felt that they were doing the “right thing.” Second, it embraced the idea of the “living Constitution,” in that its members did not feel particularly bound by original meaning or precedent when interpreting our founding document. Third, the Court exhibited a special concern for race; the Justices generally assumed that, where race was involved (especially in the South), the political process was likely to work badly. Fourth, the Warren Court was largely distrustful of the states, including state courts; state governments were seen as part of the social problems confronting the Court, not part of the solution. Fifth is the flip side of

20. See Horwitz, supra note 18, at 9.
distrusting the states: a strong nationalist sentiment that the people should look to national power, both legislative and judicial, to achieve national purposes or remedy national problems. Sixth and finally, the previous themes of the Warren Court combined to produce a strong liberal agenda; the Court’s values and doctrines often intersected with the agenda of the political left in the 1960s, making the Justices, in a sense, political actors.

B. The Burger Court

Not everyone was a fan of the Warren Court. Conservative columnist Jack Kilpatrick, writing in the *National Review*, denounced the Warren Court for leaving behind it “a trail of abuses [and] usurpations.” It was, he said, “a littered road of fallen landmarks and abandoned precedents . . . . It is as if gypsies had passed through, leaving a bad picnic behind.” The University of Chicago’s Philip Kurland was equally acerbic: “[I]f . . . the road to hell is paved with good intentions, the Warren Court has been among the great roadbuilders of all time.”

On the political circuit, no one was more critical of the Warren Court than was Richard Nixon. Accepting the Republican nomination for the presidency in 1968, Nixon complained that the Justices were weakening the country’s “peace forces” and giving too much ground to the “criminal forces.” In his first term as President, Nixon was presented with the rare opportunity to fill four vacancies on the Court. He was determined to make the most of the moment. When he nominated Lewis F. Powell, Jr. and William H. Rehnquist to fill

21. See id.
22. See Tushnet, supra note 17, at 3.
24. Id.

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the third and fourth vacancies, Nixon recalled his campaign pledge to nominate individuals "who share[] my judicial philosophy, which is basically a conservative philosophy."\textsuperscript{27}

Pundits expected the Court to veer to the right.\textsuperscript{28} In fact, \textit{U.S. News and World Report} predicted "a Nixon Court,' dominated by 'conservatives.'\textsuperscript{29} Reviewing the 1971 Term, \textit{The New Republic} lamented that the "single-mindedness of the Nixon team threatens the image of the Court as an independent institution."\textsuperscript{30}

By the time Warren Burger—Nixon's choice to become Chief Justice—stepped down in 1986, it would be difficult for anyone to say that Burger had presided over a "Nixon Court."\textsuperscript{31} To be sure, the Burger Court drifted to the right in criminal justice cases—an area of central concern to Nixon.\textsuperscript{32} But in a range of other areas, the Court's decisions rejected Nixon policies regarding abortion,\textsuperscript{33} aid to church schools,\textsuperscript{34} presidential efforts to impound

\textsuperscript{27} Address to the Nation Announcing Intention To Nominate Lewis F. Powell, Jr., and William H. Rehnquist to be Associate Justices of the Supreme Court of the United 1 PUB. PAPERS 1055 (Oct. 21, 1971), available at http://www.presidency.ucsb.edu/ws/index.php?pid=3196&st=&st1=#axzz1s3iB48dQ.

\textsuperscript{28} See Remaking the Supreme Court: Nixon Sets a Pattern, U.S. NEWS & WORLD REP., Nov. 1, 1971, at 15.

\textsuperscript{29} Id.

\textsuperscript{30} Mixed Reviews, NEW REPUBLIC, July 15, 1972, at 8.


funds appropriated by Congress, and, most notably, by requiring the President to hand over the Watergate tapes, a decision that resulted ultimately in Nixon's resigning the presidency.

If the country expected the Burger Court to be a wrecking crew, dismantling the Warren Court's legacy, that didn't happen, either. The landmarks of the Warren Era remained, by and large, securely in place. One person-one vote remained the law of the land; federal district courts were given wide discretion in fashioning remedies to counter de jure segregation in public schools; and there was no rolling back of the "incorporation" doctrine in criminal cases.

The Burger Court proved no stranger to judicial activism, though some cases of that era do show a preference for leaving tough issues to the political process. An example is the Court's decision in San Antonio Independent School District v. Rodriguez, rebuffing efforts to have the Court allow lower courts to use the Equal Protection Clause to require more equitable distribution of funds between rich and poor school districts. In capital punishment cases, the more conservative Justices argued that, in a democratic society, courts should be slow to strike down abortions); Maher v. Roe, 432 U.S. 464, 480 (1977) (holding that Congress or each individual state could decide whether to provide Medicaid for abortion); Poelker v. Doe, 432 U.S. 519, 521 (1977) ("[T]he Constitution does not forbid a State or city, pursuant to democratic process, for expressing a preference for normal childbirth.")


But evidence of activism on the Burger Court is ample. The paradigm example is the flourishing of substantive due process. The Justices of the Warren Court—remembering how the Due Process Clause had been used to invalidate social and economic legislation in the days before 1937—were reluctant to embrace substantive due process. This explains the contorted reasoning of the Justices’ opinions in *Griswold v. Connecticut* (what law student will ever forget Justice Douglas’s ruminations on “emanations” and “penumbras”?). In 1973, when the Burger Court, by a seven-to-two vote, decided *Roe v. Wade*, it was unmistakably grounded in substantive due process.

If judicial activism (always hard to define) may be measured by finding more work for judges to do, then the Burger Court was an activist tribunal. It is true that one can readily find examples of areas in which the Burger Court was unwilling to break new ground—for example, in the school financing cases. But one is more struck by areas—rare or untouched in the Warren years—into which the Burger Court strode. In the sixties, Justice Goldberg sought in vain to have the Court address the troubling issue of capital punishment. It was the Burger Court, in 1972, that held that the death penalty, as then administered by the states, was unconstitutional. Judicial turf was further expanded to bring yet other issues to the Court’s

42. 381 U.S. 479, 484 (1965).
44. *Id.* at 152–55.
docket—abortion, gender discrimination, commercial speech, prison reform, and busing, among them. This is hardly the domain of judicial restraint.

Imagine the frustration of conservatives who, having seen Nixon take office, thought that a new era would dawn. Far from repudiating the legacy of the Warren years, the Burger Court seemed in some important respects to build on what it had inherited.

49. Roe, 410 U.S. at 113.

50. See Caban v. Mohammed, 441 U.S. 380 (1979) (striking down a New York statute allowing unwed mothers, but not unwed fathers, to block adoption of illegitimate children); Califano v. Westcott, 443 U.S. 76 (1979) (striking down a section of federal law providing benefits to children only when fathers, but not mothers, were unemployed); Cannon v. Univ. of Chi., 441 U.S. 677 (1979) (implying private right of action for violations of Title IX of the Education Amendments of 1972); Davis v. Passman, 442 U.S. 228 (1979) (granting a cause of action for violations of due process rights by congressman-employer); Duren v. Missouri, 439 U.S. 357 (1979) (striking down a Missouri law allowing women a special “optional” exemption from jury service); Orr v. Orr, 440 U.S. 268 (1979) (striking down an Alabama law allowing courts to impose alimony on husbands but not wives). But see Parham v. Hughes, 441 U.S. 347 (1979) (upholding a Georgia statute precluding an illegitimate father from bringing a wrongful death suit on behalf of the child, but allowing such suit by the mother); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (upholding veterans preference law).


52. Hutto v. Finney, 437 U.S. 678 (1978) (holding that punitive isolation for longer than thirty days in state prisons constituted cruel and unusual punishment); Estelle v. Gamble, 429 U.S. 97 (1976) (finding that deliberate indifference by prison personnel to a prisoner's services injury or illness constitutes cruel and unusual punishment).

53. See, e.g., Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979) (upholding the lower court's decision to reinstate the school board's affirmative duty to desegregate); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (finding the school board under a continuing duty to eradicate the effects of segregation); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (holding that, once violations of previous mandates directed at desegregating schools had occurred, the scope of district court's equitable powers to remedy past wrongs were broad).
C. The Rehnquist and Roberts Courts

Ronald Reagan's election as President in 1980 brought renewed hope to conservatives wanting to see fundamental change in the Supreme Court. Indeed, Reagan began the process of laying the foundation for an authentic conservative bloc on the Court. Having put the first woman, Sandra Day O'Connor, on the Court, 54 in 1986 Reagan nominated William H. Rehnquist, so often the stalwart—and often lonely—defender of conservative values during the Burger years, to be Chief Justice. 55 Rehnquist also gained an assertive and vocal ally in Antonin Scalia.56 Rebuffed in his effort to put a prominent conservative intellectual, Robert Bork, on the Court, Reagan then nominated Anthony Kennedy to that seat.57 Important changes took place during the presidency of George H. W. Bush. Two of the Warren Court's warhorses, William Brennan and Thurgood Marshall, retired.58 One of their replacements, David H. Souter, proved to be less conservative than his backers had hoped for, but the other nominee, Clarence Thomas, quickly took his place


55. Remarks on the Resignation of Supreme Court Chief Justice Warren E. Burger and the Nomination of William H. Rehnquist to be Chief Justice and Antonin Scalia to be an Associate Justice, 1 PUB. PAPERS 781 (June 17, 1986); [hereinafter Rehnquist and Scalia Nominations]; see also 137 CONG. REC. 23803 (1986) (confirming Rehnquist as Chief Justice).

56. On Rehnquist's record on the eve of his nomination as Chief Justice, see A. E. Dick Howard, A Key Fighter in Major Battles, 72 A.B.A. J. 47 (1986).

57. Rehnquist and Scalia Nominations, supra note 55; see also 137 CONG. REC. 23813 (1986) (confirming Scalia as an Associate Justice).

58. Remarks Announcing the Nomination of Anthony M. Kennedy to be an Associate Justice of the Supreme Court of the United States, 2 PUB. PAPERS 1321 (Nov. 11, 1987); see also 134 CONG. REC. 739 (1988) (confirming Kennedy as an Associate Justice).


alongside Scalia at the Court's far right. President Clinton placed two Justices on the Court—Ruth Bader Ginsburg and Stephen Breyer. In 2005 the era of the Rehnquist Court came to an end with Rehnquist's death (and O'Connor's retirement).

Now we have the Roberts Court. Four Justices have taken their seats since 2005, two—John Roberts and Samuel Alito—appointed by George W. Bush, and two—Sonia Sotomayor and Elena Kagan—named by Barack Obama. No Justice remains who served on the Warren Court. Nor are there any survivors of the Burger Court. In important ways, the Roberts Court is a far different place from the Court of Earl Warren's day. Whereas there were Justices in the 1960s who had extensive political experience (Warren as governor, Black as U.S. senator), no Justice on the present Court has ever held elective office. None (unlike Souter and O'Connor) has ever served on a state court.

All but one of today's nine Justices came to the Supreme Court

62. Remarks Announcing the Nomination of Ruth Bader Ginsburg to be a Supreme Court Associate Justice, 1 Pub. Papers 842 (June 14, 1993); see also 139 Cong. Rec. 18, 414 (1993) (confirming Ginsburg as an Associate Justice).
67. Id.
68. Id.
69. Id.
70. Id.
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from the federal appellate bench. The face of the Court has changed. Three of the Justices are women, and the Court has its first Hispanic. Long dominated by Episcopalians and Presbyterians, the Court for the first time has not a single Protestant member.

If one looks at the Court’s decisions, how do the Rehnquist/Roberts years compare with the Warren/Burger Era? Much has changed. Jack Balkin and Sanford Levinson have commented that, beginning with the Rehnquist Court, there has been a “veritable revolution in constitutional doctrine . . . a paradigm shift that has changed the way that people write, think, and teach about American constitutional law.”

Two examples may give some flavor of the new era—federalism and the separation of church and state.

1. Federalism

In the era of the Warren Court, the Tenth Amendment was moribund. In those days, as an earlier Court had said in United States v. Darby, the Tenth Amendment was but a “truism”—that which was not delegated, was retained. The Warren Court was quite content to sit back and let Congress use national powers to solve what it perceived to be national problems. There was no meaningful limit to Congress’ commerce power. From deference of the kind found in Wickard v. Filburn, the Warren Court essentially abdicated meaningful Commerce Clause review in the 1964 Civil Rights cases. For the Warren Court, the states were part of the problem. State courts were entitled to little deference, hence the atrophy of the adequate and independent state

71. Id.
72. Id.
73. Id.
75. 312 U.S. 100, 124 (1941).
76. 317 U.S. 111 (1942).
grounds doctrine in cases like *Fay v. Noia*.78

Federalism, as a constitutional matter, began to reemerge in the 1970s, thanks to the efforts of Justices like Rehnquist, Powell, and O'Connor. Rehnquist chalked up a victory in *National League of Cities v. Usery*, carving out a zone of autonomy for state power,79 but that win proved short-lived when *Usery* was overruled in 1985.80 Justices concerned about the states' constitutional prerogatives found other paths, for example, when the Court, in *New York v. United States*, held that the federal government could not “commandeer” the states to carry out federal mandates.81 The most striking manifestation of federalism's revival came in *United States v. Lopez*, when, for the first time in sixty years, the Court overturned an act of Congress on the grounds that Congress had exceeded its commerce powers.82 *Lopez* had a notable sequel in *United States v. Morrison*, striking down portions of the Violence Against Women Act.83 In a series of Eleventh Amendment decisions, the Court protected state sovereign immunity against federal legislation in important areas such as fair labor standards,84 age discrimination,85 disability,86 patents,87 and Indian law.88

In the years since *Lopez* and *Morrison*, it seems that the blow struck for federalism, for all its symbolism, has not proved to be a pervasive restraint on federal power. Jeffery Toobin suggests that the talk of a “federalism revolution . . . now seems an

80. *Garcia*, 469 U.S. at 528.
83. 529 U.S. 598, 602 (2000).
exaggeration.”89 He sees the real world limitations on federal power resulting from the Court’s decisions as being, “on the whole, rather modest.”90

Whatever their practical effect, the Court’s federalism decisions have breathed life into a debate thought for decades to have been stilled. With the enactment of President Obama’s Affordable Care Act91 came emboldened conservative challenges. There was a time when Congress could pretty well decide what affected commerce, when it was difficult to imagine such attacks being realistic. That time is gone. Six cases challenging the Act have been heard in four courts of appeal.92 Plaintiffs have included Republican attorneys general and conservative groups.93 Three circuits have ruled on the constitutionality of the Act’s individual mandate to buy health insurance, and one dismissed suits challenging the mandate on jurisdictional grounds.94 Only the Eleventh Circuit held that government cannot require individuals to purchase a product from a private company.95 The Eleventh Circuit, finding no precedent for such a mandate, reckoned that there was no limiting principle.96 How would one distinguish this mandate from those that might require other kinds of purchases (such as elder care, life insurance, etc.)? And

89. TOOBIN, supra note 60, at 101.
90. Id.
95. Florida v. Dep’t of Health & Human Servs., 648 F.3d at 1241.
96. Id. at 1298.
the court worried that the mandate undermined areas of traditional state concern. By contrast, the Sixth Circuit’s Judge Jeffrey Sutton (a Scalia protégé) voted to uphold the mandate. Thus, the contest was placed before the Supreme Court, which granted certiorari and set aside a remarkable six hours for oral argument. How far we have come from the Warren Court!

2. Church and State

How to interpret the First Amendment’s Establishment Clause offers another example of how doctrine has changed since the era of the Warren Court. After it had been decided that the Establishment Clause applies to the states by way of the Fourteenth Amendment, the Warren Court began enforcing the wall of separation between church and state by ruling against teacher-led prayer and striking down laws forbidding the teaching of evolution in schools. The Court also loosened the rules on standing, making it possible for taxpayers to bring Establishment Clause cases. The Justices of that era seemed to view religion as “a private matter, best left to the homes and the churches.” The Burger Court stayed on the separationist course, notably in a series of decisions preventing states from channeling various kinds of financial aid to religious schools.

97. Id. at 1306.
98. Thomas More Law Ctr., 651 F.3d at 565 (Sutton, J., concurring).
99. As arguments got underway in the Supreme Court, one report credited a passionate libertarian, Randy Barnett, a law professor at Georgetown University, with having helped drive the question of the health care law’s constitutionality “from the fringes of academia into the mainstream of American legal debate and right onto the agenda of the United States Supreme Court.” Sheryl Gay Stolberg & Charlie Savage, Vindication for Challenger of Health Care Law, N.Y. TIMES, Mar. 26, 2012, http://www.nytimes.com/2012/03/27/us RANDY-BARNETTS-PET-CAUSE-END-OF-HEALTH-LAW-HITS-SUPREME-COURT.html. Douglas Laycock, calling the law “obviously constitutional,” said that Barnett had “gotten an amazing amount of attention for an argument that he created out of whole cloth.” Id.
103. Powe, supra note 16, at 358.
104. See Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S.
Perhaps the most famous Establishment Clause decision in the 1970s was *Lemon v. Kurtzman*, laying down the now familiar three-part test—purpose, effect, and entanglement. The high water mark of separation came in 1985 in a pair of decisions, *Aguilar v. Felton* and *School District of Grand Rapids v. Ball*, in which Justice Brennan painted the case for separation in bold colors in ruling against programs sending public employees into church schools to teach selected subjects.

As the Rehnquist Court took shape, an emerging conservative majority began to take down the wall of separation. In 1997, in *Agostini v. Felton*, the Court overruled in whole or part its 1985 decisions. In 2000, the Court upheld a voucher program in Cleveland, even though ninety-six percent of students receiving the vouchers were enrolled in religious schools. By and large, the Establishment Clause decisions of recent years are more permissive toward state efforts to send aid in the direction of church schools. The opinions are marked by formalism, with nondiscrimination, neutrality, and the relevance of private decisions (typically those of parents) as touchstones. The Court is also making it increasingly difficult for taxpayers to challenge programs aiding religion.

Erwin Chemerinsky says that extent of the shift in the Court's Establishment Clause jurisprudence "cannot be overstated . . . . The wish of conservatives to eliminate the notion of a wall separating church and state, articulated by President

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105. 403 U.S. 602 (1971).
110. See *Zelman*, 536 U.S. at 649 (describing the voucher programs as involving "true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals").
Ronald Reagan, seems almost certain to be realized.112 Just how far the Court will go remains to be seen, but we will surely see more religion in the public square than would have been countenanced in the days of the Warren and Burger Courts.

D. Continuity and the Importance of the Court’s Center

The trend to the right is by no means uniform. Decisions of recent years include those revealing continuity with the Warren Court.113 The First Amendment remains a core value. The Court has ruled that the First Amendment protects protesters using highly offensive speech near the site of private funerals.114 Similarly, the Court has used the First Amendment to strike down Congress’ efforts to ban violent video games.115

In measuring where the Court has moved in recent decades, there is no escaping the importance of the Court’s center. Just as Lewis Powell often determined where the Burger Court would come out, so it has been centrist Justices, especially Sandra Day O’Connor, who have been the key to whether the Court would move sharply to the right or not.116 The right to an abortion has been under constant attack in the years since Roe v. Wade, and Justice Blackmun’s trimester formula has given way to a more modulated test, that of “undue burden.” But when a major test came in Planned Parenthood of Southeastern Pennsylvania v. Casey, it was a centrist concurring opinion (O’Connor, Kennedy, 112. ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION 128 (2010).
and Souter) that kept the basic right in place.118

Since Brennan's and Marshall's departure from the Court in the early 1990s, there has been increasing evidence of a conservative majority on the Court. But it does not march in lockstep. We are reminded that the Court's conservatives are not all of the same temperament. There are those whom one might label "movement" conservatives (such as Scalia and Thomas), who wear their ideology on their sleeves. Then there are conservatives of a more traditional bent (O'Connor being the most obvious example), whose common law, fact oriented, practical judging recalls earlier Justices like the second Harlan and Powell.

III. HOW HAS THE LANDSCAPE CHANGED SINCE THE WARREN COURT?

It has been more than forty years since Earl Warren stepped down as Chief Justice. I have briefly suggested ways in which the Court itself has changed in the decades since the Warren Court, including areas of doctrinal change. My main interest in this Article is to consider the larger picture. In the wake of the often contentious legacy of the Warren Court, what developments have shaped the larger context in which the Court and the country look at the Constitution and the role of government? I will consider two main aspects of that question. One is to mull conservative efforts to move the Court and the Constitution in a new direction—to roll back the legacy of the Warren Court. The other is to think about certain broader developments in American society and politics in the post-Warren Era.

A. Conservative Efforts To Achieve Change

The era of activism spurred by the Warren Court has raised the stakes of the constitutional game. Areas that used to be outside the concern of federal judges have been "constitutionalized." Libel law,119 school discipline,120 prison

119. See, e.g., N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (holding that the First Amendment requires a public official suing for
administration, divorce decisions to have or not have a child, commercial speech—these and countless other areas now have constitutional dimensions. Frustrated with the failure of earlier efforts, such as those in the Nixon Era, to move the Court in a manifestly different direction, conservatives have redoubled their efforts. The results show in diverse areas, including the process of nomination and confirmation of new Justices, arguments over the use of originalism in

defamation to prove that alleged tortious statements were made with "actual malice"; see also, Harry Kalven, Jr., The New York Times Case: A Note on "The Central Meaning of the First Amendment", 1964 SUP. CT. REV. 191 (1964).

120. See, e.g., Goss v. Lopez, 419 U.S. 565, 579 (1975) (holding that students facing temporary suspension from public school were entitled to protection under the Due Process Clause, including notice and an opportunity to be heard); see also Edith H. Jones, The Nature of Man According to the Supreme Court, 4 TX. REV. L. & POL. 237, 256 (1999).


126. See, e.g., Carrington, supra note 125, at 1172.


128. See infra Part A.1.
constitutional interpretation, the rise of conservative public interest law firms, and the networking and other opportunities provided by conservative organizations like the Federalist Society.

1. Nominations and Confirmations

Nominations have always been political. Republican presidents have tended to appoint Republicans to the Court, and Democrats have tended to appoint Democrats. But the old politics of nomination was often personal, as in the instance of President Truman’s appointment of his friend and fellow senator, Harold Burton, to the Court. What marked the nomination process from the Reagan years onward was that old-fashioned politics gave way to ideology—a more focused effort to foresee the likely voting pattern of the prospective nominee.

The Reagan Administration has been widely recognized as the first presidential regime to emphasize a judicial nominee’s political ideology as the most important criterion to be considered during the judicial selection process. Reagan campaigned on a pledge to appoint judges “whose judicial philosophy . . . is consistent with the belief in the decentralization of the federal system and . . . who respect traditional family values and the

129. See infra Part A.2.
130. See infra Part A.3.
131. See infra Part A.4.
134. See David A. Strauss & Cass R. Sunstein, The Senate, the Constitution, and the Confirmation Process, 101 Yale L.J. 1491, 1507 (1992) (commenting that statements of Reagan and Bush confirmed that judicial nominees “were chosen because of their conceptions of the appropriate judicial role”).
sanctity of innocent human life."136 During his presidency, Reagan was able to cite this campaign promise and his subsequent election as a public mandate to populate the federal courts with individuals that shared his political views.137 Reagan committed much of the vetting of a candidate's ideology, a task formerly conducted by the Justice Department, to the White House,138 entrusting the selection of candidates to his newly-formed President's Committee on Federal Judicial Selection, a high-level group of his most trusted advisors.139 During the selection process, Reagan avoided the temptation to nominate individuals he knew personally, maintaining ideology as a candidate's most important qualification.140 There is debate over the question whether the White House went so far as to test potential nominees' political views on specific legal issues, for example, requiring them to pass a *Roe v. Wade* "litmus test."141 Some commentators believe that Reagan looked to a slate of younger judicial nominees in an effort to create a more lasting conservative judicial legacy.142

It is conventional wisdom to talk about how Justices, once seated, often drift away from the expectations of the presidents who put them on the Court.143 Thus, we think of Harry Blackmun and David Souter, each of whom proved a sore disappointment to conservatives.144 I would venture, however, that because of more careful vetting, surprises are going to be far more rare in the


137. See David S. Law, *supra* note 135, at 507.

138. *Id.* at 485–86, 489.


future. It is difficult to think of a “surprise” Justice since David Souter, and it has been more than twenty years since his nomination, with seven Justices having joined the Court.\footnote{145. See David A. Strauss, It’s Time to Deal with Reality: The Myth of the Unpredictable Supreme Court Justice Debunked, CHI. TRIB., Aug. 7, 2005, at 9, available at http://articles.chicagotribune.com/2005-08-07/news/0508070326_1_ justices_antonin_scalia_supreme_sourt_soosevelt_appointees.}

The confirmation process has certainly changed in recent decades. Confirmations in the New Deal Era were often perfunctory (hardly surprising, in that the same party was securely in charge of the White House and the Senate).\footnote{146. See Geoffrey R. Stone, Understanding Supreme Court Confirmations, 2010 SUP. CT. REV. 381, 393.} Indeed, only since 1939, when Felix Frankfurter was nominated, have nominees to the Court regularly appeared before the Senate Judiciary Committee.\footnote{147. See Ronald D. Rotunda, Innovations Disguised as Traditions: A Historical Review of the Supreme Court Nominations Process, 1995 U. ILL. L. REV. 123, 128.} The conventional assumption for many years in the post-war Era was that a president was entitled to choose a nominee who shared the president’s political outlook.\footnote{148. See generally John Massaro, Supremely Political: The Role of Ideology and Presidential Management in Unsuccessful Supreme Court Nominations 105–34 (1990) (noting a presidential preference for candidates with ideologies similar to the President).} Objection to the nominees’ views was not taken to be, at least overtly, sufficient reason to object to a nominee.\footnote{149. Id. at 8 (“[S]enators will tend to avoid stating that their opposition is based upon party and ideological considerations when other grounds are present.”).} When the Senate rejected Clement Haynsworth in 1969, the stated ground of opposition was his ethics, not his conservative politics.\footnote{150. See Jeffrey K. Tulis, Constitutional Abdication: The Senate, the President, and Appointments to the Supreme Court, 47 CASE W. RES. L. REV. 1331, 1344 (1997).} Similarly, senators who voted against G. Harrold Carswell in 1970 acted, or least said they did, because of his incompetence, rather than his reputation as a white supremacist.\footnote{151. Id. at 1345.}
Court of Appeals for the District of Columbia Circuit, to fill the seat of retiring Justice Lewis Powell. Bork was widely known as a devotee of originalism, and the liberal Senate feared the restrictive impact that Bork’s adherence to this doctrine would have on “the right to privacy, civil rights, gender discrimination, criminal procedure, separation of powers, antitrust law, and labor relations.” Following a politically charged speech by Senator Ted Kennedy, made moments after Bork’s nomination was announced, Senate Democrats stalled the momentum of his confirmation, allowing liberal opposition to Bork, led by Judiciary Committee Chairman Senator Joseph Biden, to research thoroughly the ideological footprints Bork had left as an academic, Solicitor General, and judge. Focusing on Bork’s law review articles and his endorsement of originalism and its application to some of the most politically controversial issues of the day, Democratic senators raised serious concerns that Bork’s confirmation would threaten the advancement of constitutionally unenumerated rights that were gaining traction in the Supreme Court. This highly ideological inquiry led to Bork’s rejection by a partisan vote of forty-two to fifty-eight, with fifty-two of the Senate’s fifty-six Democrats voting against Bork’s confirmation and forty of the Senate’s forty-six Republicans voting in his favor.

The highly charged Bork hearings were a watershed. Since then, the process of nomination and confirmation has been

152. See Stone, supra note 146, at 389.
153. Tulis, supra note 150, at 1355 (citation omitted).
155. Id.; see also Nina Totenberg, The Confirmation Process and the Public: To Know or Not To Know, 101 Harv. L. Rev. 1213, 1220 (1988) (“[T]he Senate, for a change, gave itself enough time, and the [S]enators prepared themselves.”).
156. See Tulis, supra note 150, at 1353–55.
157. See Boyte, supra note 154, at 528.
158. See 133 Cong. Rec. 29,121–22 (1987); Stone, supra note 146, at 389.
increasingly politicized. There is extensive political activity, both in support of and against a nominee. Frequently there is an intersection between hearings and the agendas of interest groups.

It may well be that the infusion of politics into the process of nominating and confirming Supreme Court Justices is simply a reversion to what had been a historical norm. Early presidents—Washington, Jefferson, Jackson, and Lincoln—certainly took politics into account in making nominations to the Court. In more modern times, both Roosevelts vowed to use their appointments to change a conservative Court into one more sympathetic to their policies on government and the economy. On the Senate side, politics was in the air as early as the Senate’s rejection in 1795 of George Washington’s nomination of John Rutledge, who had alienated Federalists by his outspoken views on the controversial Jay Treaty.

Whatever their precedents, partisanship and ideology are manifestly the norm in the post-Bork Era. The two most recent nominees, Sonia Sotomayor and Elena Kagan, were confirmed by surprisingly close margins given that each was nominated when the White House and the Senate were both in the hands of the same party. Sotomayor, confirmed by a vote of sixty-eight to thirty-one, received only nine Republican votes, and Kagan, confirmed by a vote of sixty-three to thirty-seven, garnered only five.

161. See id.
164. Ringhand, supra note 163, at 167.
165. Id.
166. See Stone, supra note 146, at 391.
167. See McConkie, supra note 160, at 183 & 183 n.49.
168. See Amy Goldstein & Paul Kane, Senate Votes 68 to 31 To Confirm Sonia Sotomayor to Supreme Court, WASH. POST (Aug. 7, 2009),
2. Originalism

As an approach to constitutional interpretation, the doctrine of originalism has more than one strand, and it has gone through various iterations. Originalism insists on discovering the meaning of the Constitution at the time of its adoption. Changes, if they are to come about, should be accomplished through the amendment process laid out in Article V.169 Early debate over original intent may be found in such Supreme Court opinions as John Marshall’s dissent in Ogden v. Saunders170 and Samuel Miller’s opinion in Ex Parte Bain.171

In its early form, originalism emphasized original intent—what the framers of the Constitution intended.172 In this form, originalism draws the riposte that it is simply not possible to attribute a coherent single intent to a document with multiple drafters working through an evolving process, especially at a convention whose meetings were not open to the public, of whose proceedings there was no transcript, and much of whose important work was done in committee.173

The modern debate over originalism was sparked by conservative complaints about what they saw as the elasticity of Warren and Burger Court opinions, the perceived ability to bend the Constitution to suit whatever outcome seemed desirable to the Court’s majority.174 Originalism was offered in response to the idea of the “living Constitution.” In 1971, Robert Bork wrote a seminal article, Neutral Principles and Some First Amendment
Problems, in the Indiana Law Journal. The article attracted considerable attention, and it is often thought to have been the genesis of the modern originalist movement. The doctrine gained more general publicity when Attorney General Edwin Meese, speaking to the American Bar Association in 1985, offered originalism as a way to curb activist judges.

Since the Bork article and the Meese speech, orginalism has evolved from a search for original intent to an emphasis on ascertaining original meaning. This shift in paradigm is meant to avoid the criticism that it is not possible to ascertain the framers' collective intent. Better, it is argued, to determine a single objective meaning of the Constitution than to sift through subjective thoughts of the various founders. Scholars see the goal of the revised version of originalism as ascertaining the objective meaning of the text through which the drafters conveyed their intentions to their audience. Thus, it is public meaning that governs, on the theory that the people, through the ratifying conventions, approved the Constitution. The document must therefore be taken to have a meaning which was publicly understood at the time.

On today's Supreme Court, Justice Antonin Scalia has been the most vocal proponent of a jurisprudence of originalism. Scalia has been a leading catalyst of the shift from a search for original intent to an emphasis on original meaning. Just as he is no fan of

179. Id.
legislative history, Scalia rejects the idea of original intent as being inconsistent with the rule of law. Partly through Scalia's insistence, originalism figures prominently in modern Supreme Court opinions. A good example is District of Columbia v. Heller, in which a sharply divided Court held that the Second Amendment creates an individual right to bear arms. Writing for the majority, Scalia said that the Court should be guided by the principle that the Constitution was written to be understood by voters in its ordinary meaning. Examining each word and phrase in the Second Amendment in exacting detail, Scalia combed through dictionaries, historical materials, and treatises as evidence of usage of those terms when the Second Amendment was adopted. Justice Stevens, who dissented, also indulged in a brand of originalism, although his opinion has the language of original intent, rather than original meaning. Searching the historical record, Stevens said, "Specifically, there is no indication that the Framers of the [Second] Amendment intended to enshrine the common-law right of self-defense in the Constitution." Lawrence Solum has declared, "Collectively, the opinions in Heller represent the most important and extensive debate on the role of original meaning in constitutional interpretation among the members of the contemporary Supreme Court."

Another leading example of originalism's place in modern Supreme Court debate is Justice Scalia's opinion in Crawford v.
Washington.190 The question there was the meaning of the Sixth Amendment’s Confrontation Clause.191 An extensive review of the Clause’s history led Scalia to conclude that the Clause was primarily aimed at negating the evils of ex parte proceedings and that it should not be understood to allow admission of the testimonial statement of a witness who did not appear at trial unless that witness was unavailable to testify and the defendant had a prior opportunity for cross-examination.192 Crawford thus changed the focus of Confrontation Clause analysis from the testimony’s reliability to whether the statement was “testimonial.”193 As a reminder of how tides rise and fall, Scalia’s approach in Crawford seems to have held sway until recently, in Michigan v. Bryant, where the Court, over Scalia’s dissent, crafted an ongoing emergency exception to the Confrontation Clause.194

3. Conservative Public Interest Law Firms

Public interest law firms advancing progressive causes have existed since the early 1900s.195 The National Consumers’ League began using litigation to improve the working conditions of women and children, bringing test cases and employing the now familiar “Brandeis brief.”196 In 1920, the American Civil Liberties Union was formed.197 Having participated sporadically in litigation since 1915, the National Association for the Advancement of Colored People (NAACP), in 1940, formed its

191. Id. at 36 (The Confrontation Clause provides a defendant the “right... to be confronted with the witnesses against him.”).
192. Id. at 50–54.
193. Id.
Legal Defense Fund.\textsuperscript{198} A principal objective of the Fund was to use litigation to end segregation in housing and public schools.\textsuperscript{199}

The 1960s, an era of activism on many fronts, saw public interest law gather force.\textsuperscript{200} A key figure was Ralph Nader, whose “Nader’s Raiders” went to court to seek social change, especially the reform of corporate practices.\textsuperscript{201} Environmentalists began to look to the courts,\textsuperscript{202} and in 1967 the Ford Foundation began channeling millions of dollars to various groups litigating in the public interest.\textsuperscript{203} By 1976, over ninety public interest law firms employed over 600 attorneys—many of them recruited from elite law schools.\textsuperscript{204}

Public interest litigation achieved substantial impact on public policy.\textsuperscript{205} Among these were welfare reform,\textsuperscript{206} a suspension (albeit temporary) of executions,\textsuperscript{207} prison reform,\textsuperscript{208} and, in \textit{Roe v. Wade}, abortion rights.\textsuperscript{209} When the proposed Equal Rights Amendment faltered, groups such as the ACLU’s Women’s


\textsuperscript{200} Southworth, supra note 195, at 1224; Trubek, supra note 195, at 417.

\textsuperscript{201} See John A. Jenkins, Nader’s Raiders Ten Years After, 7 Student Law. 36 (Nov. 1978); see also Patricia Cronin Marcello, Ralph Nader: A Biography (2004); Kevin Graham, Ralph Nader: Battling for Democracy (2000).


\textsuperscript{204} Southworth, supra note 195, at 1239.

\textsuperscript{205} Id. at 1224 n.2.


\textsuperscript{207} Michael Meltsner, Cruel and Unusual: The Supreme Court and Capital Punishment 5–19 (1973).


Rights Project were able to use the Equal Protection Clause to constitutionalize claims of sex discrimination.\textsuperscript{210} Public schools, whose administrators once exercised largely untrammeled discretion in such matters as student discipline and school newspapers, became the common target of litigation.\textsuperscript{211} Thus were vast areas of American life brought under the sway of the courts.

The successes of liberal public interest law firms alarmed business interests.\textsuperscript{212} In California, members of Governor Reagan’s administration were angry at the lack of conservative groups to counter liberal public interest firms, which were challenging welfare reforms in that state.\textsuperscript{213} On the other coast, Lewis F. Powell, Jr., former president of the American Bar Association (and soon to sit on the Supreme Court of the United States), in 1971 wrote a now-famous memorandum to the United States Chamber of Commerce proposing the creation of an activist conservative legal movement.\textsuperscript{214} The time had come, he said, “for the wisdom, ingenuity, and resources of American business to be marshaled against those who would destroy it.”\textsuperscript{215}

Conservatives soon responded to Powell’s call. In California, individuals and businesses associated with the Reagan administration and the Chamber of Commerce created the Pacific Legal Foundation.\textsuperscript{216} Similar firms soon appeared elsewhere, headed by prominent conservatives and usually based


\textsuperscript{211} See From Schoolhouse to Courthouse: The Judiciary’s Role in American Education (Joshua M. Dunn & Martin R. West eds., 2009).

\textsuperscript{212} O’Connor & Epstein, Rebalancing the Scales of Justice, supra note 196, at 494–95.

\textsuperscript{213} Id. at 493–94, 495 n.72.

\textsuperscript{214} Memorandum from Lewis F. Powell, Jr. to Eugene B. Snydor, Jr., Chairman of the Educ. Comm. of the U.S. Chamber of Commerce (Aug. 23, 1971).

\textsuperscript{215} Id.

\textsuperscript{216} O’Connor & Epstein, Rebalancing the Scales of Justice, supra note 196, at 495.
in the interests of a particular region.\textsuperscript{217} Perhaps the most conspicuous was the Mountain States Legal Foundation, funded by beer baron Joseph Coors.\textsuperscript{218} These new firms spoke mainly for business—framing their arguments in terms of free enterprise and property rights.\textsuperscript{219}

Religious conservatives also entered the fray.\textsuperscript{220} At first somewhat reluctant to involve themselves in secular legal disputes, they moved in the 1970s to create such groups as the Catholic League for Religious and Civil Rights, Americans United for Life, and the Christian Legal Society.\textsuperscript{221} The pace picked up as religious conservatives mobilized to fight abortion and to push for greater religious expression in the public sphere, especially in public schools.\textsuperscript{222}

The early conservative public interest law firms were largely reactive.\textsuperscript{223} They were more inclined to participate in the adversarial process through the medium of amicus briefs.\textsuperscript{224} Because of their regional base, conservative firms tended to be more geographically diffused than their liberal counterparts, which were more often based in Washington, D.C. and were less specialized.\textsuperscript{225} Conservative public interest law firms, again unlike the liberal firms, had weak relationships with law schools.\textsuperscript{226} The conservative firms were heavily dependent upon business interests for their funding, leading some critics to question their independence and their integrity.\textsuperscript{227} In 1980,

\textsuperscript{217} Id. at 496–97.
\textsuperscript{219} See The Unregulated Offensive, supra note 218; O’Connor & Epstein, Rebalancing the Scales of Justice, supra note 196, at 1243.
\textsuperscript{220} Southworth, supra note 195, at 1243.
\textsuperscript{221} Id. at 1243, 1247–48.
\textsuperscript{222} Id. at 1226–27.
\textsuperscript{223} Id.
\textsuperscript{224} Id. at 1250.
\textsuperscript{225} Id. at 1251.
\textsuperscript{227} See id. at 58–66, 88 (discussing the rise of the conservative public
Michael Horowitz, a conservative activist, wrote a scathing report for the Scaife Foundation, which funded conservative public interest law firms (just as the Rockefeller and Ford Foundations funded liberal groups). Horowitz declared that the conservative public interest movement “will make no substantial mark on the American legal profession or American life so long as it is seen as and in fact is the adjunct of a business community possessed of sufficient resources to afford its own legal representation.”

Conservative trends since the 1980s have nurtured a more favorable climate for conservative public interest law firms. At the level of theory, conservative developments in the intellectual realm, such as Robert Bork’s originalism and Richard Epstein’s libertarian constitutional theories, have provided conservative firms with what Jeffrey Rosen called a “sophisticated jurisprudential framework” within which to build their arguments. Republican victories at the polls have brought judges to the bench who are more receptive to conservative arguments. Those same victories have opened government jobs to ambitious young conservatives, who are able to acquire experience and credentials. This cadre creates a more “elite pool” of attorneys for conservative public interest law firms.

The newer conservative public interest law firms have learned lessons from the most successful liberal firms.

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228. ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION 19 (2008); see also TELES, supra note 226, at 67, 71.
231. The Unregulated Offensive, supra note 218, at 5.
232. See YALOF, supra note 140, at 133–35 (summarizing President Reagan’s plan to put conservative on the Supreme Court).
233. Southworth, supra note 195, at 1273; See John P. Heinz et al., Lawyers for Conservative Causes: Clients, Ideology, and Social Distance, 37 LAW & SOCY REV. 5 (2003), for a more detailed analysis of the credentials and other qualities of conservative public interest attorneys.
Mimicking their opponents' experience, conservative firms have fashioned long-term strategies, including detailed litigation campaigns.234 Moving beyond the agendas of their conservative predecessors, these firms wish to advance more plausible claims to represent underrepresented constituencies. Thus, rather than simply filing amicus briefs, conservative public interest law firms are now more likely to represent real clients. Moreover, they shape arguments grounded in a larger conservative ideology, not just in the interests of big business.235 As Clint Bolick, a cofounder of the Institute for Justice, one of the "second generation" conservative law firms, has said, he and his colleagues discovered that "there is a world of difference between an organization that is pro-business and an organization that is pro-free enterprise."

For conservatives to use the courts to bring about social change, they had to abandon their adherence to "judicial restraint."237 When the Justices of the Warren Court set about "doing the right thing"238—reforming criminal justice, advancing civil rights, nurturing social justice—conservatives decried "judicial activism."239 To those critics, judicial activism was inconsistent with democratic principles.240 But a philosophy of judicial restraint came to be less attractive,241 and conservatives rediscovered what their predecessors had understood in the early decades of the twentieth century—that courts could be seen as

234. See Teles, supra note 226, at 220–21.
235. See id. at 220–64.
236. The Unregulated Offensive, supra note 218, at 5.
bulwarks against progressive legislation.242 Conservatives began to look to the courts to protect private property and individual enterprise and to contest centralized power.243

One can see the new strategy at work in the activities of the Institute for Justice. Founded in 1991, the Institute focuses, above all, on litigation.244 Through lawsuits, the Institute seeks to influence not only what the courts do, but also politics and public opinion.245 A good example is the Institute’s invocation of the Fifth Amendment’s takings clause in the litigation that led to the Supreme Court’s decision in Kelo v. New London.246 Beset by the economic difficulties so common in older, declining industrial cities, New London sought to use its power of eminent domain to condemn private property, mostly residential, to make possible a research facility of the Pfizer Corporation.247 Thus, property would be taken from one private party for the ultimate use of another private party.

The Institute’s strategy—highlighting the plight of mostly modest homeowners—paid early dividends when groups hardly thought to be conservative, such as the NAACP and the Southern Christian Leadership Conference, filed amicus briefs in Kelo, as did the American Association of Retired Persons.248 In the technical legal sense, the Institute lost the case.249 By a five-to-four vote, the Supreme Court rejected the argument that the taking violated the Fifth Amendment.250 But Kelo proved to be the “sleeper” of the Court’s Term, provoking the kind of public outcry one usually associates with decisions concerning abortion or school prayer.251 The Institute launched a “Hands Off My

244. See TELES, supra note 226, at 241.
245. Id.
247. Id. at 472.
248. TELES, supra note 226, at 242.
249. See Kelo, 545 U.S. 469.
250. Id. at 470, 484.
251. See Five Years After Kelo: The Sweeping Backlash Against One of the
Home" campaign, taking the fight to the state level.252 The Supreme Court’s decision does not preclude states from amending their constitutions or enacting statutes placing limits on eminent domain beyond those flowing from the Fifth Amendment. And, indeed, a number of states have taken steps, mostly in the form of legislation, to give property owners greater protection against condemnations.253

Thus do conservative lawsuits become part of public discourse. In bringing cases like Kelo, the Institute for Justice seeks to reach beyond the traditional conservative constituency254—certainly beyond business interests (it was, after all, a corporation that was the city’s partner in the redevelopment effort in New London).255 The filing of amicus briefs by liberal groups in Kelo suggests bridge-building to groups outside the conservative world. By coming to the aid of “little people,” including racial minorities, a conservative public interest law firm can stake out a moral case. In doing so, as the Institute did in Kelo, the conservative firm can engage in political mobilization, attracting public attention and forging a political and legislative agenda.256

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252. The Castle Coalition, INST. FOR JUST., http://www.castlecoalition.org/about/ (last visited Apr. 12, 2012). The changes have ranged from minor procedural requirements (such as more public hearings) to more substantive limitations on eminent domain (such as banning transfer of condemned property to another private owner). See Elaine B. Sharp & Donald Haider-Markel, At the Invitation of the Court: Eminent Domain Reform in State Legislatures in the Wake of the Kelo Decision, 38 PUBLIUs 556, 559 (2008).


254. 545 U.S. at 484.

255. Id. at 473.

4. The Federalist Society

Steven Calabresi, Lee Lieberman, and David McIntosh were friends as undergraduates at Yale University.257 As conservatives, the three felt isolated in what they saw as a predominantly liberal environment at their respective law schools (Yale and Chicago).258 They saw law schools and the legal profession in general as “strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society.”259 Wanting to create a student group that would promote discussion of conservative legal views on campus, they founded the Federalist Society—at Yale in 1981 and at Chicago in 1982.260

The Society quickly became a national network.261 Students at Yale and Chicago began planning a panel discussion on federalism at Yale featuring Robert Bork, Richard Posner, Ralph Winter, Antonin Scalia, and Walter Berns.262 A small advertisement in The National Review created significant interest, and the event was expanded into a two-day conference that attracted 200 students from more than twenty law schools.263 Incorporated as a non-profit in 1982, the Federalist Society set up shop in Washington, D.C., and hired its first full-time employee, Eugene Meyer (now the organization’s president).264 Three decades later, the Society now has chapters at every accredited law school in the country and counts over 10,000 law students as members.265 Its Lawyers Division

257. TELES, supra note 226, at 139.
258. Id. at 138–39.
259. Id. at 138 (quoting Proposal for a Symposium on the Legal Ramifications of the New Federalism 1 (1982) (on file with the Federalist Society Archives)).
261. Id.
262. Id. at 652.
263. Id. at 651–52.
264. Id. at 654–55.
includes more than 30,000 lawyers, with chapters in sixty cities.\textsuperscript{266}

The Federalist Society has proved itself to be an engine of thought and action in conservative circles.\textsuperscript{267} Ronald Reagan had brought conservatism to the White House with his victory in the 1980 presidential election, but the Society's founders felt that no one had yet successfully marshaled conservative and libertarian law students.\textsuperscript{268} Therefore, central to the Society's activities is the recruitment of law students and practicing lawyers who identify with the Society's aims and purposes.\textsuperscript{269} Reacting to what the Society's founders saw as a hostile liberal environment, it seeks to stimulate self-confidence among students and lawyers attracted to conservative ideas.\textsuperscript{270} Unlike conservative public interest law firms, the Federalist Society has rejected proposals that it undertake litigation.\textsuperscript{271} Instead, the Society has concentrated on influencing debate over public issues, fostering relations among conservative law students and lawyers, and creating a pro bono clearing house to connect lawyers with pro bono opportunities.\textsuperscript{272}

What evidence is there of the Federalist Society's influence on the executive and judicial branches of government? The Society found important allies and champions in the Reagan administration.\textsuperscript{273} Kenneth Cribb, who worked first in the

\textsuperscript{266} Id.

\textsuperscript{267} See Teles, supra note 226, at 138--142.

\textsuperscript{268} See id. at 139 ("Conservative law students alienated in their home institutions, desperate for a collective identity, and eager for collective activity provided a ripe opportunity for organizational entrepreneurship."). Hicks, supra note 260, at 653 ("By summer 1982, there were ten to fifteen chapters at other schools, with still others waiting in the wings. But there was no central body to coordinate efforts among them, and no funding mechanism in place to support the various chapters.").


\textsuperscript{270} See, e.g., Hicks, supra note 260. Hicks notes that the Federalist Society "has constituted both a reason for and a reinforcer of increasing conservatism among the student body" at the Harvard Law School. Id. at 705.

\textsuperscript{271} Teles, supra note 226, at 154--55.

\textsuperscript{272} Id. at 136, 155--56.

\textsuperscript{273} Id. at 141.
Attorney General’s Office and then in the White House, says that he was always looking for people loyal to Reagan’s philosophical principles, “and that describes these Federalists.”274 Hiring lawyers with Federalist Society credentials, he said, sent a signal that what the Society’s members were doing “is important, and worthy, and we’re going to give them good jobs.”275 As Steven Teles has observed, “In its early years Federalist Society membership carried a stigma within legal academia, but it was precisely the willingness to bear this stigma that made Society membership a valuable signal of true-believership for conservatives in government.”276

The Federalist Society’s network has helped open the doors to judicial clerkships, at least in some chambers. At the University of Virginia, for example, the network’s existence was helpful when a member sought an internship with Judge Alex Kozinski and then a clerkship with Judge Jerry Smith.277 In Kozinski’s words, membership in the Federalist Society “tells me you’re of a particular philosophy, and I tend to give an edge to people I agree with philosophically.”278 Liberals have taken note of the Society’s influence. Ralph Neas, of People for the America Way, thinks that “membership in the Federalist Society is probably a prerequisite for any law student who hopes to clerk for Supreme Court Justices Antonin Scalia or Clarence Thomas.”279

What of the selection of nominees to the federal bench? Many conservatives have long been critical of the American Bar Association’s role in rating judicial nominees.280 An early

274. Id.
275. Id.
276. Id. at 142.
278. SOUTHWORTH, supra note 228, at 139.
proposal to have the Federalist Society do its own ratings was rejected. But in the process of choosing prospective judges, as with appointments to the executive branch, there is evidence that the Society’s network has been influential. Steven Markman, as assistant attorney general, was responsible for judicial nominations in Reagan’s second term. Markman observed that “the Federalist Society helped to identify, to track” promising candidates with conservative views to fill judicial vacancies. Lee Lieberman Otis, who handled judicial nominations for the White House in the first Bush administration, said that the Society’s members made it possible to have more reliable information about prospective nominees.

Networking does more than create job opportunities. Steven Calabresi says that by having an organization like the Federalist Society, “you bring all these people together, they form friendships, they start working together, they start collaborating on things, and before you know it you have a powerful network of people who are working on programs of social change.” Steven Teles, an astute student of the conservative legal movement, concludes that the Federalist Society “represents, without a doubt, the most vigorous, durable, and well-ordered organization to emerge from this rethinking of modern conservatism’s political strategy.” The Society, he says, “has been a critical component in the larger conservative mission of scaling back liberal successes in the courts.”

B. The Larger Political and Social Context

Developments in American politics and society since the 1960s have reinforced the efforts of conservatives to dismantle the legacy of the Warren Court era. A few prominent examples will give some sense of how these developments relate to how

282. See id. at 139–41.
283. Id. at 158.
284. Id.
285. Id. at 165.
286. Id. at 179.
287. Id.
debate over the Constitution and the role of government is framed in our own time. They include a manifest polarization of American politics,288 the outbreak of hyperpartisanship in Congress and in the most recent presidential contest,289 the birth of the Tea Party,290 the return of anti-Federalism,291 and a surge in popular constitutionalism.292

1. The Polarization of Politics and Society

As we hear the daily gibes and taunts tossed across party lines (especially in the run-up to a presidential contest), it is easy to forget that modern American politics have not always been so polarized. It is possible to characterize politics in the mid-twentieth century—from the culmination of the New Deal to the American withdrawal from Vietnam—as having been nonpolar. Government operated under something like a consensus on many major issues. For most Americans, the obvious lesson of the Great Depression was that a modern, industrialized society requires a modern, administrative state. Then came the Second World War, uniting Americans against a common enemy. Soon after that war ended, Stalin and communism replaced Hitler and fascism in sustaining a sense of shared purpose.

That air of consensus in American public life rested on an ideology that, viewed through today’s politics, might be characterized as left of center.293 Sociologist Nicole Mellow comments: “Simply put, Democrats prevailed at home by using government activism to promote economic security at home and national security abroad.”294 The list of major legislation enacted during the era of consensus is quite impressive. By and large, those statutes expanded the administrative state. They include the Glass-Steagall Banking Act of 1933 (establishing the Federal

288. See infra Part B.1.
289. See infra Part B.2.
290. See infra Part B.3.
291. See infra Part B.4.
292. See infra Part B.5.
293. TELES, supra note 226, at 23–24.
Deposit Insurance Corporation), the Social Security Act of 1935, the Fair Labor Standards Act of 1938 (establishing a minimum wage, the forty-hour workweek, and limitations on employing minors), the Federal-Aid Highway Act of 1956 (creating the interstate highway system), the Civil Rights Act of 1964, and the Occupational Safety and Health Act of 1970. Even after the post-New Deal coalition began to falter in the 1960s, there was still sufficient impetus to enact foundational laws for federal environmental regulation in the late 1960s and in the 1970s—and under a Republican president, at that. These included the National Environmental Protection Act, major amendments to the Clean Water Act and the Clean Air Act, and the Endangered Species Act.

No one, save a Rip Van Winkle, would describe today’s politics as nonpolar or public life in America as reflecting much of a consensus on anything. What has happened in recent decades to bring us to a state of slash-and-burn partisan politics? Any searching answer to this question would fill a library, but some factors can be noted here. Among them are shifts in the political alignments in America’s regions. Regional, hence factional, interests have coalesced and intensified since the years of

consensus. Another factor is the emergence of a robust conservative legal movement, whose ideology and strategy reinforce partisanship.

Consensus politics in the 1960s depended on support from leaders in both major political parties. But the turmoil of the sixties—unrest on the campuses, arson in the cities, antiwar protests, unsettling new lifestyles, civil rights activism, concern about “law and order”—drove political realignment. Richard Nixon’s 1968 campaign for the presidency, invoking the need for the “peace forces” to stand against the forces of disorder, was a harbinger of things to come. Republicans began to see attacks on liberalism as a strategy for realigning the parties. Laws and court decisions imposing environmental, health, and safety requirements on businesses led to rising calls for deregulation. Supreme Court decisions such as Roe v. Wade and Regents of the University of California v. Bakke and a host of lower court decisions requiring school busing to achieve desegregation in public education lent themselves to Republican efforts to use abortion, affirmative action, and busing as wedge issues to drive working class Americans from the Democratic Party. No longer could one talk about the “solid South,” as white southerners, offended by judicial decisions on such matters as desegregation and school prayer, looked for a new political home. Indeed, the

306. Id. at 140–49.
308. For example, in his 1972 campaign, Nixon called McGovern the “AAA candidate,” standing for amnesty, acid, and abortion. JOHN KENNETH WHITE, STILL SEEING RED: HOW THE COLD WAR SHAPES THE NEW AMERICAN POLITICS 221–22 (1997).
311. In Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28–29 (1971), the Court gave wide discretion to district courts to use remedies such as mandating busing, altering attendance zones, and using other devices to achieve desegregation in public schools.
312. MELLOW, supra note 294, at 96 (“[S]outhern support for the national [Democratic] party continued to erode as members from the region blocked much of what they considered to be [President Kennedy’s] liberal northern
Democratic Party itself changed, as its traditional base in economic issues, such as the interests of unions, saw newer liberal causes—among them, the rights of blacks, women, and the environment—added to its portfolio.\footnote{313}

Regional realignment is an important aspect of increased polarization.\footnote{314} Regional economic interests and race have been key factors in this realignment.\footnote{315} The country’s economic growth helped the Democrats until the 1960s.\footnote{316} Globalization and the heavy cost of Lyndon Johnson’s “guns and butter” decisions undermined much of this prosperity.\footnote{317} Organized labor lost much of its clout as manufacturing jobs were lost.\footnote{318} Industry, especially that geared to military procurement, began moving from states with tighter regulations and higher taxes to states where less regulation, right-to-work laws, and lower taxes were seen as friendlier to business.\footnote{319} This meant, in general, movement from the North and East to the South and West.\footnote{320}

Race played its part in regional realignment. As Lyndon Johnson predicted it would, the Democratic Party paid a high price for its support of civil rights.\footnote{321} Conservative Democrats, who had created the short-lived Dixiecrat movement in 1948, defected in the 1960 presidential election, causing John F. Kennedy to lose Florida, Kentucky, Tennessee, and Virginia.\footnote{322} As yet more civil rights laws went on the books, among them the

\footnotesize{agenda.

\footnote{313. See Hough, supra note 305, at 210–11.}
\footnote{314. See generally Mellow, supra note 294 (arguing that political polarization is affected by how the parties respond to regional demands).}
\footnote{315. See generally id. (discussing how regional opinions on issues of race and economics shape how the parties respond to regional constituents).}
\footnote{316. Id. at 38.}
\footnote{317. Id. at 46–70, 88, 100.}
\footnote{318. Id. at 38.}
\footnote{319. Id. at 38–41.}
\footnote{320. Id. at 41.}
\footnote{322. Theodore White noted that “the Southern white knows himself bound to a Democratic Party that, in the North, is increasingly responsive to Negro pressure for intervention in domestic Southern affairs.” Theodore White, The Making of the President 360 (1961). For the southern states carried by Nixon, see id. at 385–86 app. A.}
Civil Rights Act of 1964\textsuperscript{323} and the Voting Rights Act of 1965,\textsuperscript{324} conservative white southerners increasingly left the party of their fathers behind them and became Republicans.\textsuperscript{325} These trends were reinforced by the large numbers of evangelicals and other religionists in the South, offended by abortion and school prayer decisions.\textsuperscript{326}

The rise of the conservative legal movement has been a factor in the increased polarization of American politics.\textsuperscript{327} During the era of liberal consensus, conservatives did not yet have a fully developed legal ideology.\textsuperscript{328} Legal traditions inherited from the nineteenth century had lost much of their purchase during the era of the New Deal and beyond.\textsuperscript{329} The notion of the “living Constitution” was well seated at the Supreme Court, and legal culture reflected essentially liberal values.\textsuperscript{330} Conservatives, as I have described, set out to develop a competing legal narrative. Building on this legal ideology, conservative public interest law firms moved past the days of merely opposing the extension of existing (typically liberal) constitutional rights, and they began to make a positive case for recognizing rights in line with their ideology.\textsuperscript{331}

Moreover, insofar as conservatives champion originalism, they stand on ground that seems to offer no room for negotiation or compromise.\textsuperscript{332} Originalism also appeals to fundamentalists of


\textsuperscript{325} TELES, supra note 226, at 57.

\textsuperscript{326} Id. at 2.

\textsuperscript{327} See NOLAN M. McCARTY ET AL., POLARIZED AMERICA (2006).

\textsuperscript{328} TELES, supra note 226, at 88–89.

\textsuperscript{329} Id.

\textsuperscript{330} Liberals enjoyed “a dominance so complete that every casebook, treatise, and handbook used to teach constitutional law in American schools [was] the product of Democrats writing from Democratic perspectives.” Martin Shapiro, Interest Groups and Supreme Court Appointments, 84 NW. U. L. REV. 935, 955 (1990).

\textsuperscript{331} TELES, supra note 226, at 231–32.

the religious right. If one’s religion looks to an inerrant and unchanging text for guidance, then it is easy to assume that the Constitution must have one correct meaning. Especially is this true when so many people of faith see America as a Christian nation, inhabited by a chosen people, steered by a Constitution which was divinely inspired.

2. Hyper-Partisanship in Congress and the Presidential Contest

In August 2011, a bitter partisan struggle over debt reduction engulfed the United States Congress. Faced with the prospect of default on the nation’s debt, Congress created the Joint Select Committee on Deficit Reduction. The Supercommittee, as it quickly came to be called, had sweeping powers. It could cut programs and raise taxes. The Supercommittee failed. Its six Democrats and six Republicans could not come to an agreement, and in November the committee gave up. Its failure mirrored the partisanship which had come

338. Id.
to prevail in Congress. As William Galston said, the current Congress “is the most ideologically polarized in modern history. In both the House and the Senate, the most conservative Democrat is more liberal than is the most liberal Republican. If one defines the congressional ‘center’ as the overlap between the two parties, the center has disappeared.”341 As evidence that Galston got it right, in February 2012 Maine’s Olympia Snowe, one of a dwindling band of moderates in the Senate, announced that she would not seek reelection.342 Having become something of an icon in her thirty-three years in Congress for her willingness to build bridges between the parties, Snowe said, “Unfortunately, I do not realistically expect the partisanship of recent years in the Senate to change over the short term . . . . I have concluded that I am not prepared to commit myself to an additional six years in the Senate.”343

The campaign for the Republican nomination for President in 2012 tells a similar story. Every major candidate except Huntsman pledged not to raise taxes. Every candidate favored rolling back environmental regulation, repealing “Obamacare,” and reducing federal involvement in education.344 It has not been too many years since many of these issues, such as the environment, invited support from both sides of the aisle, but that pattern is by and large now history.

3. The Birth of the Tea Party

The Tea Party movement, now a familiar fixture of the American political landscape, was born on February 19, 2009.345

4531404577052240098105190.html.
343. Id.
Rick Santelli, a CNBC correspondent, addressed the Chicago Board of Trade. Complaining about the injustice of being asked to pay off other people’s mortgages, he declared, “We’re thinking about having a Chicago tea party in July.” Within a week, YouTube, Facebook, and online social networking had fueled a sea change in Republican politics. The Tea Party was not a party in the conventional sense. It found its nerve center, not in some office, but instead in the homes and laptops of activists.

If there is a central Tea Party premise, it is the need to return to the founders’ principles and to reclaim the Constitution for the people. In the ideology of Tea Party adherents, the founders gave us a Constitution embodying a set of sacred and eternal principles for American government—a mooring in religious principles, limited government, a market economy, personal property, and individualism. Embodied in this perspective is a belief in American exceptionalism—that ours is a City on a Hill, “a model to the world.” The Constitution is seen not simply as a text to be interpreted and shaped to contemporary needs, but a repository for fundamental and enduring principles.

The Tea Party’s members could call themselves the “Constitutionalist Party.” Many of their arguments are, of course, about public policy and legislation. But their push for limited government rests on constitutional claims widely shared by the

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BOOKS, Spring 2010, at 12.
346. Id.
347. Id.
party's chapters around the country. Some of their beliefs seek greater primacy for existing constitutional provisions. Thus, they proclaim the importance of the Tenth Amendment and the need to limit federal power in the interest of the prerogatives of the states. They are ardent in their support of the Second Amendment and the right to bear arms.

Other aims include organic changes to the existing Constitution. Tea Partiers seek repeal of the Seventeenth Amendment, on the grounds that it stripped state legislatures of their ability to influence federal policies by selecting United States Senators. Amendments backed by the Tea Party include the Repeal Amendment, which (breathing new life into the old notion of nullification) would allow two-thirds of the states to vote to repeal any federal statute or regulations. Tea Party members also support the Balanced Budget Amendment, which would severely limit the federal government's ability to engage in deficit spending and would put restrictions on the government's

354. See id. at 194.
power to tax and spend.360

There is little doubt that the emergence of the Tea Party has markedly influenced political and constitutional debate in America.361 Its push for an ultra-conservative, strikingly strict interpretation of constitutional constraints on government has been a factor in shifting the middle ground of the interpretive continuum further to the right.362 Certainly the Tea Party has revived constitutional issues long thought dormant.363 A few years ago, who would have imagined a move to turn back the clock on the popular election of United States senators? The activities of the Tea Party also stimulate interest in the question, hardly a new one, on how popular movements might or should influence constitutional interpretation. Public opinion polls taken in 2012 by Fox News and by the Washington Post/ABC News suggest that the number of Americans viewing the Tea Party negatively has risen.364

It is likely that the Tea Party helped inspire the reading of the entire Constitution on the floor of the House of


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Representatives, the first time in that body's history. The reading, individual members taking turns, occurred when members took their oath of office in January 2011. Representative Robert W. Goodlatte, a Republican from Virginia, proposed the reading. Explaining his purpose, he said, "Throughout the last year there has been a great debate about the expansion of the federal government, and lots of my constituents have said that Congress has gone beyond its powers granted in the Constitution"—unmistakably a Tea Party sentiment.

4. The Return of Anti-Federalism

Suspicion of centralized authority did not end with the American Revolution. It has been a leitmotif of American history from the earliest days of the Republic to our own time. From the founding period onward, American politics has tended to flow from the bottom up, not from the top down. Local and state government has always been more prominent as a feature of American life than in European nations. Even so, because they won the ratification contest, the Federalists have loomed larger in our historical imagination than have the Anti-Federalists. Nevertheless, the struggle continues. The legacy of Anti-Federalist beliefs is as much a part of modern American politics

365. Jennifer Steinhauer, Constitution Has Its Day (More or Less) in House, N.Y. TIMES, Jan. 6, 2011, at A15, available at http://www.nytimes.com/2011/01/07/us/politics/07constitution.html. Actually, the members read an edited version of the Constitution, omitting those portions, such as Article I, Section 2's Three-Fifths Clause, that have been superseded by later amendments. Id.
366. Id.
367. Id.
368. Id.
as that of their Federalist adversaries.  

Sorting out the views of the Anti-Federalists, who were far from being a monolith, is not easy. But it is possible to suggest some themes that characterize Anti-Federalist thought. It takes little imagination to see how these ideas are still with us. First, Anti-Federalists maintained a distrust of centralized and remote government, and they therefore believed that the powers of the federal government should be strictly limited. Instead, they preferred government at the state and local level, better to keep power in the hands of the populace. Second, the Anti-Federalists feared judicial power, especially in the hands of unelected federal judges. Third, they particularly objected to the federal government’s taxing power, which they extended from the traditional cries of “no taxation without representation” to taxing by the national legislature. Fourth, the Anti-Federalists were averse to latitudinarian constitutional interpretation associated with phrases like “necessary and proper.” Fifth, they wished to see America continue on its course as a nation grounded in religious convictions. Sixth and finally, Anti-Federalists strongly believed that government power is inherently dangerous and that those who value freedom must be constantly alert to its subversion.


372. See Gordon S. Wood, The Fundamentalists and the Constitution, N.Y. Rev. Books, Feb. 18, 1988, at 33, 36 (describing the Anti-Federalists as “a loose coalition—so loose and disparate that generalizations about them have always been risky”).


374. Id.
375. Id. at 31.
376. Id.
377. See id. at 11 (Anti-Federalists insisted the Constitution be written in precise terms).
378. Id. at 57.
379. On Anti-Federalist thought, see Cornell, supra note 373; Storing,
The design for the new federal government fashioned by James Madison and his fellow delegates at Philadelphia relies upon internal checks, such as separation of powers and checks and balances, to strike a balance between effective government and individual liberty. The Anti-Federalists were not able to prevent that government’s coming into being. Even so, they are the spiritual ancestors to strands of populism that, at later moments in American history, have reshaped the nation’s politics. In the early decades of the nineteenth century, populism took the form of lashing out against business and other elites. Andrew Jackson, who nurtured an image of a president with humble roots, vetoed the rechartering of the National Bank—a blow at the commercial and financial elites of his era.

Toward the end of the nineteenth century, populists looked to government to limit the emerging eastern aristocracy of the Gilded Age. Populism took on a more radical face, calling for redistribution of wealth and the curbing of corporate power. William Jennings Bryan spoke for populists of his time when he said that mankind would not be crucified on a “cross of gold.” Drafters of state constitutions sought greater regulations of railroads and other corporations. In Virginia, Carter Glass and other members of the constitutional convention of 1901–1902 created the State Corporation Commission, a powerful agency meant to bypass the state legislature, where railroad lobbyists were seen as having legislators in their pockets.

supra note 369.


381. See Jon Meacham, American Lion: Andrew Jackson in the White House 208–12 (2008).

382. See, e.g., Michael J. Klarman, Rethinking the History of American Freedom, 42 WM. & MARY L. REV. 265, 267 (2000) (“Populists and Progressives argued contemporaneously that genuine freedom was impossible without government regulation of unaccountable corporations, support for labor unions, and some mild redistribution of wealth.”).

383. Id.


386. Id. at 967–69. Allen Caperton Braxton, who chaired the convention’s
In our age, Wall Street has replaced yesterday’s “robber barons” as a target of popular ire (listen to the complaints about bailouts). But even more often, the targets are liberal political and cultural elites.\textsuperscript{387} Populism in current political discourse defines the aristocracy as being Washington insiders and the liberal media in addition to wealthy businessmen.\textsuperscript{388} The 2012 Republican presidential trail is rich in examples. Mitt Romney sought to label primary opponents Newt Gingrich and Rick Santorum as “Washington insiders.”\textsuperscript{389} Newt Gingrich, in turn, won a standing ovation at a presidential debate in South Carolina when, attacking the evening’s moderator (CNN’s John King) for a question about accusations leveled against Gingrich by his ex-wife, Gingrich declared, “I am tired of the elite media protecting Barack Obama by attacking Republicans.”\textsuperscript{390}

\textsuperscript{387} Committee on Corporations, declared that “we have joined issue on this question once for all, whether the people or the railroads will run the State of Virginia.” 2 REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION 2171 (1906).


The Role of Government

5. Popular Constitutionalism

In many parts of the world, the idea of the “nation” rests on shared ethnic, religious, or other kinds of consanguinity. Poland survived the long years after partition because Poles kept alive the notion, as prescribed by Rousseau, that they should be taught to remember that they are Polish.391 The 1937 Constitution of a largely Catholic Ireland declares that it was promulgated in the “name of the Most Holy Trinity, from Whom is all authority . . . .”392 The preamble written for Croatia’s Constitution after the dissolution of Yugoslavia proclaims Croatia embodies the “millen[nial] national identity of the Croatian nation.”393

When Americans began their national adventure, they did have some shared ethnic and religious roots. Most were of British stock, and most were Protestant. But the United States does not rest, as do so many countries, on an ethnic or religious identity.394 Constitutional culture in America, for all the debate over the Constitution’s adoption, flows from a sense of common commitment to fundamental principles.395 “We the People” implies as much.396 Constitutions may come and go in many

question with a profanity, Rick Santorum boasted on Fox News that, “If you haven’t cursed out a New York Times reporter during the campaign, you’re not really a real Republican.” Jeremy W. Peters, Turning a Confrontation into a Fund-Raising Pitch, N.Y. TIMES, Mar. 27, 2012, at A14, available at http://thecaucus.blogs.nytimes.com/2012/03/26/santorum-seeks-donations-off-exchange-with-reporter/. Santorum used the exchange as the basis for an e-mail appeal for donations from supporters. Id.


392. IR. CONST., 1937, pmbl.


395. Id.

396. During the time of the Founders, individuals would form community organizations devoted to a variety of purposes. The associations drafted
countries (France has had seventeen constitutions), but in the United States the Constitution has come to be the premise on which so much American life is based. More specifically, one can trace from the country’s early years the emergence of a national ideology marked by such concepts as individualism, egalitarianism, nationalism, and diversity. Belief in such principles and in the Constitution’s centrality buttress the notion of “American exceptionalism.” A Gallup poll, taken in 2010, found that eighty percent of Americans think that the United States “has a unique character that makes it the greatest country in the world.”

The idea that constitutional norms are shaped by popular constitutionalism has come to share the space occupied by attention to constitutional law as flowing from the courts and other formal sources. According to ideas of popular constitutionalism, national culture and identity is developed organically by and for the people. This theory argues that the “ultimate meaning of the Constitution should be determined by the people, acting through political processes, rather than by the courts.” Social movements are often the vehicle for adding to the nation’s constitutional conversation, mobilizing individuals,


397. For example, in one survey seventy-two percent of respondents had read the entire Constitution, and eighty-six percent felt that the document had “an impact on their daily lives.” Lepore, supra note 363.


399. Id. at 364 n.393.

400. Jeffrey M. Jones, Americans See U.S. as Exceptional; 37% Doubt Obama Does, GALLUP (Dec. 22, 2010), http://www.gallup.com/poll/145358/


403. See id. at 1808.
and etching arguments that can take on constitutional dimensions.\textsuperscript{404} Movements like the Tea Party manifest this tradition.\textsuperscript{405} That particular movement, to be sure, often uses fear and emotion as weapons.\textsuperscript{406} In that respect, it hardly contributes to rational debate over national issues. But to the extent that it stirs Americans to think about the Constitution, it is not altogether outside traditions in which the people themselves are obliged to take a direct part in shaping American constitutionalism.\textsuperscript{407}

No discussion of the place of the popular voice in constitutional debate would be complete without at least a mention of constitutionalism at the state level.\textsuperscript{408} State constitutions are much more easily amended than is the Federal Constitution.\textsuperscript{409} Indeed, they are periodically revised and replaced.\textsuperscript{410} Thomas Jefferson recommended that each generation take a close look at its constitution and see whether it needed updating (he reckoned nineteen years to be a generation).\textsuperscript{411} The Progressive Era brought direct democracy—the initiative, the


\textsuperscript{405} The Tea Party is based on the idea of returning to the principles of the Founders and reclaiming the Constitution for the people. The Tea Party's Constitution, supra note 349, at 559.

\textsuperscript{406} See \textit{Perils of Popular Originalism}, supra note 351, at 849. Doomsday speak is a common rhetorical tool for Tea Partiers. For example, Glenn Beck often declares that "our Republic is at stake." \textit{Id.}


\textsuperscript{408} See JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION (2006), for a discussion of state constitutions.

\textsuperscript{409} E.g., ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, A-113, STATE CONSTITUTIONS IN THE FEDERAL SYSTEM: SELECTED ISSUES AND OPPORTUNITIES FOR STATE INITIATIVES 1–2 (1989).

\textsuperscript{410} \textit{Id.} at 2.

referendum, and recall. Through these devices the people could bypass legislatures and enact laws or even amend constitutions for themselves.\textsuperscript{412} Progressives like Woodrow Wilson believed that direct democracy could be a useful check on representative institutions that too often were in thrall to special interests.\textsuperscript{413} William Howard Taft, in contrast, worried that direct democracy carried the potential to undermine Madisonian constitutionalism and representative government.\textsuperscript{414} Notwithstanding such worries, between 1898 and 1918, the heyday of the Progressive movement, twenty states adopted some form of direct democracy.\textsuperscript{415}

Opponents of direct democracy sought to challenge initiative, referendum, and recall measures by invoking the Constitution’s Guarantee Clause—the injunction that the United States “shall guarantee to every state in this Union, a Republican Form of Government . . . .”\textsuperscript{416} In 1849, however, the Supreme Court declared the Guarantee Clause to be non-justiciable, a “political question[].”\textsuperscript{417} In 1912, when a telephone company refused to comply with an Oregon law enacted through referendum, the Supreme Court held that challenges to direct democracy presented a “purely political” question.\textsuperscript{418} A state law or constitutional amendment adopted through initiative and referendum is, of course, subject to review on its merits, just like any other state law,\textsuperscript{419} but there is no indication that the Supreme Court is inclined to change its mind about the process as such being a political question. So the people in states having forms of direct democracy remain free to use those devices as a

\textsuperscript{413} KENNETH P. MILLER, \textit{DIRECT DEMOCRACY AND THE COURTS} 27 (2009).
\textsuperscript{414} See WILLIAM HOWARD TAFT, \textit{POPULAR GOVERNMENT: ITS ESSENCE, ITS PERMANENCE AND ITS PERILS} 17–19 (1913).
\textsuperscript{415} MILLER, supra note 413, at 36.
\textsuperscript{416} U.S. CONST. art. IV, § 4.
\textsuperscript{417} Luther v. Borden, 48 U.S. (7 How.) 1, 46–47 (1849).
\textsuperscript{418} Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 149–50 (1912).
way of laying their own hands on the controls of government. Direct democracy may have been an attractive idea in the Progressive Era, but its uses in our own time reveal its dangers and excesses. Consider how the initiative has been used in California. In 1978, California’s voters agreed to Proposition 13, prohibiting the increase of the base rate for the assessment of property taxes (except for a two percent annual maximum for inflation) and requiring super-majorities in both state and local legislatures for tax increases. Then, having thus severely limited the government’s power to raise revenue, the voters, a decade later, passed Proposition 98, requiring the state to dedicate a minimum of forty percent of the general fund revenues to public schools and community colleges. Bifurcating state policy on revenue and expenditures, limiting one while mandating the other, is the very picture of incoherence in public policy. Anyone who has watched legislatures in action may well sympathize with the Progressives. But, seeing government being hobbled in states where direct democracy runs amok, one can understand why James Madison, noting that men are not angels, designed a system that allowed for the “total exclusion of the people in their collective capacity, from any share” in government.

420. See, e.g., CAL. CONST. art. 2, §§ 8–11 (providing for direct democracy in California).
422. People’s Initiative to Limit Property Taxation, Proposition 13, adding CAL. CONST. art. 13A, §1.
423. Classroom Instructional Improvement and Accountability Act, Proposition 98, amending CAL. CONST. art. 16, §8.
424. Since the adoption of Proposition 13, there have been 426 statewide issues on the ballot in California. See List of California Ballot Proposition, BALLOTPEDIA, http://ballotpedia.org/wiki/index.php/California_ballot_propositions, (last visited Apr. 10., 2012), for more information on California’s ballot propositions.
425. THE FEDERALIST No. 51, at 257 (James Madison) (Lawrence Goldman ed., Oxford Univ. Press 2008) (“If men were angels, no government would be necessary.”).
426. THE FEDERALIST No. 63, at 313 (James Madison) (Lawrence Goldman ed.) (emphasis omitted).
IV. CONCLUSION

When England’s barons confronted King John at Runnymede in 1215, they brought grievances against the abuse of royal power. The result was Magna Carta. The nearly 800 years of Anglo-American constitutional history since that time have seen repeated efforts to define where power ends and freedom begins. Parliament’s struggles with the Stuart kings over royal prerogative in the seventeenth century brought the Bill of Rights, many of whose provisions echo in our own Constitution and Bill of Rights. In the same century, when English colonies were planted in the New World, Virginia’s 1606 Charter and the charters of other colonies assured colonists of the “Liberties, Franchises, and Immunities” they were entitled to in the mother country. Americans believed those guarantees. In the years before declaring independence, American assemblies drew upon the language of the colonial charters in objecting to British policies, such as those seen as extracting revenues from Americans who had no seats in Parliament.

In fashioning the first American state constitutions, drafters sought to ensure self-government while protecting liberty. Remembering the heavy hand of royal governors and judges, the drafters made the legislative branch dominant. The defects in those early documents soon became apparent. Even more obvious were the flaws in the Articles of Confederation, whose central government was given powers far too inadequate to the needs of

428. See id.
429. See An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M. (Eng.).
433. Id.
the new nation. At Philadelphia in 1787, James Madison and his fellow delegates crafted a Constitution that not only gave the federal government more power but also rested upon a more balanced scheme of government. Among the new Constitution’s principles were federalism, separation of powers, checks and balances, and constitutional supremacy.

The Constitution’s Supremacy Clause declares that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .” But the document does not explicitly confer on the courts the power to declare state or federal laws unconstitutional. It was John Marshall who, in Marbury v. Madison, reasoned that the whole idea of the Constitution’s supremacy necessarily implied that judicial power.

The ensuing years have seen the Supreme Court, and the courts generally, caught up in the great controversies of succeeding generations. The road from Dred Scott led to the battlefields of the Civil War. The coming of the industrial age saw the Supreme Court, in an era remembered by the Court’s decision in Lochner v. New York, protecting business enterprise against progressive social and economic legislation. It took the Thirteenth Amendment, abolishing slavery, to disavow the legacy of Dred Scott, and it required the “constitutional revolution” of 1937 for the Supreme Court to step aside and let government deal with the nation’s pressing problems.

From the beginning, Americans have debated the meaning of the Constitution, the role of government, and the place of the

434. See ARTICLES OF CONFEDERATION of 1781.
436. U.S. CONST. art. VI, cl. 2.
437. Id.
438. 5 U.S. (1 Cranch) 137 (1803).
441. See, e.g., 198 U.S. 45 (1905).
courts in deciding about powers and boundaries. The present article has focused on a modern chapter in this ongoing national dialogue. The Warren Court stepped boldly to pursue racial equality, justice in criminal procedure, more representative government, and, in general, a more just and fair society. Critics complained that the Justices were confusing law and politics. The story then becomes, in good part, a concerted effort on the part of conservatives to roll back the judicial activism of the Warren Era. Thus, we have seen Republican presidents' efforts to change the Court's composition, the emergence of conservative public interest law firms, the birth of the Federalist Society, and the push to have the Constitution interpreted from an originalist perspective. Such efforts have markedly influenced how the Court goes about its business. The scene has been further shaped by forces in American politics and society. Polarization and partisanship have combined with new phenomena, such as the birth of the Tea Party, to stir ideas whose origins reach as far back as the Anti-Federalists of the early Republic.

Virginia's Declaration of Rights of 1776, largely the work of George Mason, declares that "no free government, nor the blessings of liberty, can be preserved to any people, but by . . . frequent recurrence to fundamental principles . . . ." Thomas Jefferson, who was in Philadelphia when Virginia's Declaration was framed, often advanced a different thought. The earth, he said, "belongs always to the living generation." In Mason's words and in those of Jefferson are two central themes—continuity and change. How to balance a respect for continuity, the wisdom of the ages, with the challenges of change, the need to adapt to new times—this is one of the great challenges of constitutional democracy.