

Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time

Jack M. Balkin*

INTRODUCTION.....	215
I. POLITICAL REGIMES IN POLITICAL TIME.....	220
A. The Idea of a Constitutional Regime	220
B. Judicial Time.....	224
II. HOW THE RISE AND FALL OF REGIMES AFFECTS JUDICIAL REVIEW .	227
III. THE ROLE OF CONSTITUTIONAL THEORY IN THE CYCLE OF REGIMES	243
A. The Cycle of Regimes and Living Constitutionalism	246
B. The Cycle of Regimes and Originalism	251
C. The Return of Liberal Skepticism About Judicial Review	261
CONCLUSION	264

Introduction

Over the course of a little more than a century, American liberals (or, in an earlier period, progressives) and conservatives have switched positions on judicial review, judicial restraint, and the role of the federal courts—not once, but twice.¹

At the beginning of the twentieth century, progressives grew increasingly skeptical of judicial review, while conservatives embraced judicial review to limit federal and state regulation and protect property rights.² After the New Deal, these positions gradually flipped. By midcentury, liberals in both parties had begun to defend strong courts and

* Knight Professor of Constitutional Law and the First Amendment, Yale Law School. My thanks to Sandy Levinson for his comments on a previous draft of this Article.

1. See Barry Friedman, *The Cycles of Constitutional Theory*, 67 LAW & CONTEMP. PROBS., Summer 2004, at 149, 157–64 (2004) (detailing the shifts); see also Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 604 n.27 (2004) (“Constitutional theory regarding judicial activism and restraint, and relative authority of the various branches of government, is linked to long partisan cycles of reconstruction and affiliation with dominant constitutional norms and institutions.”).

2. Davison M. Douglas, *The Rhetorical Uses of Marbury v. Madison: The Emergence of a “Great Case,”* 38 WAKE FOREST L. REV. 375, 386–402 (2003) (explaining how turn-of-the-century conservatives looked to strong judicial review to resist popular demands for economic regulation); Friedman, *supra* note 1, at 157 (“From 1890 until 1937 . . . [p]rogressives were troubled by [judicial review]; conservatives admired its preservationist and anti-democratic character.”); see *infra* notes 93–100 and accompanying text.

judicial review, while conservatives began to denounce judicial activism and preach judicial restraint.³

But this arrangement, too, slowly reversed itself. By the first decade of the twenty-first century, liberals—who were now almost all Democrats—had become deeply concerned about how conservative majorities on the Rehnquist and Roberts Courts used judicial review. They attacked judicial supremacy and increasingly argued for judicial restraint.⁴ Conversely, conservatives—who were by now almost all Republicans—emphasized the importance of courts in protecting federalism, religious liberty, and other important conservative constitutional values.⁵ Some conservatives, in fact, have recently called for “judicial engagement” to protect important constitutional structures and rights, including economic rights.⁶

There are many reasons for these long-term shifts.⁷ One is the composition of the Supreme Court’s docket.⁸ The relatively small number of cases the Supreme Court takes and decides each year are the most salient—and among the most important—exercises of judicial review in American politics. Even though the vast majority of cases are decided by the lower

3. Friedman, *supra* note 1, at 157–58; J. Patrick White, *The Warren Court Under Attack: The Role of the Judiciary in a Democratic Society*, 19 MD. L. REV. 181, 196 (1959) (“[O]ne is struck by the irony that liberals and conservatives have today adopted views completely the reverse of those each held in the constitutional crisis of the 1930’s.”); *see infra* notes 107–43 and accompanying text.

4. *See infra* notes 184–92 and accompanying text.

5. *See infra* notes 144–51 and accompanying text.

6. *See infra* notes 152–56 and accompanying text.

7. In his 2004 article on cycles of constitutional theory, Barry Friedman did not purport to offer a general explanation for the cycles, but suggested that conservatives or liberals supported judicial review or judicial restraint depending on whether the political branches or the courts were more progressive or conservative in a particular period. *See* Friedman, *supra* note 1, at 157–58, 164–65. This was not intended to be a complete account because the President and Congress might be held by different parties, the federal and state governments might have a different political valence, and so too might different state and local governments. In addition, political control of legislatures can change from year to year, while views about judicial review tend to be more durable. By contrast, this Article tries to offer a more general structural explanation of the cycles based on the nature of the American party system.

8. There is a large literature on how the Justices create their own agendas for decision. VANESSA BAIRD, ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA (2007); RICHARD L. PACELLE, JR., THE TRANSFORMATION OF THE SUPREME COURT’S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION (1991); H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991); Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824 (1995); Gregory A. Caldeira & John R. Wright, *The Discuss List: Agenda Building in the Supreme Court*, 24 LAW & SOC’Y REV. 807 (1990); Lee Epstein et al., *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395 (2002); Joseph Tanenhaus et al., *The Supreme Court’s Certiorari Jurisdiction: Cue Theory*, in JUDICIAL DECISION-MAKING 111 (Glendon Schubert ed., 1963).

federal courts, the Supreme Court's work has a disproportionate impact on how politicians and legal intellectuals think about judicial review.⁹

Much of what people think of as activism and restraint—and which Justices are doing which—is driven by the composition of the Supreme Court's docket. If the Supreme Court accepted nothing but abortion and gay-rights cases, liberals and Democrats would appear to be firm advocates of judicial engagement, and conservatives would appear to be defenders of judicial restraint. Conversely, if the Court accepted nothing but commercial-speech, campaign-finance, and federalism cases, conservatives and Republicans would appear to be aggressive judicial activists, and liberals defenders of a modest, deferential judiciary. There are many other issues in which the Justices might strike down or uphold laws, but if those cases never come before the Court, people are less likely to consider them in their positions on judicial review.

The identity of the litigants also matters. In the heyday of the Warren and early Burger Courts, the Supreme Court took race cases in which the petitioners who complained of racial discrimination were mostly black or Latino. In the Rehnquist and Roberts Courts, the Court took more and more cases in which the plaintiffs complaining of racial discrimination were white.¹⁰ In the Warren and early Burger Courts, the Justices were primarily interested in the religious claims of relatively smaller religious sects with little political power;¹¹ in the Rehnquist and Roberts Courts, the Justices' docket has expanded to include the religious claims of Evangelicals, Catholics, and other conservative Christians.¹²

Behind the composition of the Supreme Court's docket lies a deeper explanation for the shift in attitudes about judicial review: the judicial appointments process. Because the Supreme Court mostly controls its own

9. See *infra* notes 86–88 and accompanying text.

10. See generally Reva B. Siegel, *The Supreme Court 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013) (describing long-term shifts in the Supreme Court's docket from cases vindicating the equality claims by minority litigants to cases vindicating equality claims by white litigants).

11. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972) (holding for Old Order Amish plaintiff); *Sherbert v. Verner*, 374 U.S. 398, 399, 402 (1963) (holding for Seventh-Day Adventist plaintiff).

12. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (reversing, on grounds of religious discrimination, decision against religious objector to same-sex marriage); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (upholding right of church-run religious school to participate in state-funded playground resurfacing program); *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014) (upholding a Religious Freedom Restoration Act (RFRA) challenge to employer contraceptive mandate by conservative Christian corporate owner who objected to subsidizing use of certain contraceptives by employees); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102–03 (2001) (upholding right of Christian group to use public school after hours for religious meetings).

docket,¹³ the kinds of cases the Court takes depend on who enjoys a working majority on the Supreme Court. All other things being equal, a working majority of liberal Justices will choose a different set of cases to hear than a working majority of conservative Justices. Who sits on the Court affects the kinds of cases in which the Court exercises judicial review, and thus the way that the public understands the political valence of judicial review and judicial restraint. The Roberts Court has taken a series of cases protecting commercial advertisers and challenging public-sector unions largely because the conservative Justices on the Court have wanted to hear those kinds of cases.

Liberals have not had a working majority on the Supreme Court since 1969. For this reason, and although there are important exceptions, the long-term development of constitutional doctrine, and the use of judicial review in a wide range of areas, has tended to reflect and promote conservative values more than liberal ones.

Thus, an important reason why liberals and conservatives have switched sides on judicial restraint and judicial engagement is what Sanford Levinson and I call “partisan entrenchment” in the judiciary.¹⁴ From the earliest days of the Republic, the political parties have used the judicial appointments process to stock the courts with ideological allies. And from the earliest days of the Republic, political parties have understood that judicial review can be a useful tool for defending and advancing a party’s commitments of ideology and interest.

For much of the twentieth century and into the twenty-first, the Republican Party, as a whole, has been more conservative than the Democratic Party as a whole. When politics was less polarized, both parties had liberal and conservative wings. As a result, Republican presidents sometimes nominated moderate and progressive Justices, while Democrats sometimes nominated moderate and conservative Justices. Ideological differentiation between the two parties became stronger with the rise of the modern conservative movement and the departure of conservative Democrats

13. This feature, too, has changed over time, especially since the Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936. See generally Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 391–94 (2004) (offering a brief history of the Justices’ increasing control over their own docket).

14. Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 489 (2006); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066 (2001); see also Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 515–17 (2002) (showing how late nineteenth-century Republicans expanded federal court jurisdiction to promote their policy goals and entrench their party); cf. RAN HIRSCHL, *TOWARDS JURISTOCRACY* 39 (2004) (noting how politicians in many different countries “profit from an expansion of judicial power”).

into the Republican Party. At least since the 1980s, the Republican Party has been a movement party driven by the policy agendas of movement conservatives. This has affected the composition of the federal judiciary. Republican politicians have sought to control the federal courts and the Supreme Court in order to change constitutional doctrine and restore what conservatives believe to be the correct interpretation of the Constitution. Since 1980, Republican presidents have successfully appointed nine new Justices, Democratic presidents only four.¹⁵ Since 1991, when Justice Thomas joined the Court, the Supreme Court has had a strong conservative majority with three movement conservatives. Since 2006, four of the Court's five conservatives were movement conservatives, and since 2018, all of the members of the Court's conservative majority are movement conservatives.

Partisan entrenchment in the judiciary offers a deeper explanation for liberal and conservative shifts concerning the role of the courts. Partisan entrenchment affects the kinds of cases the Supreme Court takes, the kinds of litigants the Justices are most interested in vindicating and protecting, and hence how judicial review is deployed.

In fact, there is an even deeper explanation for the long-term change in attitudes about judicial review. Behind both the composition of the Court's docket and the judicial appointments process is the slowly changing structure of national party competition in the United States.

Throughout American history, national politics has been organized around a series of *political regimes* in which one party is dominant and sets the agenda for political contest.¹⁶ Eventually the dominant party's coalition falls apart and a new regime begins, led by a different party. The rise and fall of political regimes and their successive displacement by new regimes—and new dominant parties—is the progress of *political time*, a term coined by the political scientist Stephen Skowronek.¹⁷

Generational shifts in views about judicial activism and judicial restraint mirror the rise and fall of political regimes. The kinds of issues Justices select, and how the Justices exercise their powers of judicial review, reflect where the country is in political time—whether it is early in the regime, in its middle

15. If we go back to 1969, the numbers are fourteen and four. However, the Republican party was not a movement party until the 1980s, and so several of the older Republican appointments turned out to be moderate or liberal. Since 1980, all but one Republican appointees have been conservative, and since 1991, all have been movement conservatives who are unlikely to become moderates, much less liberals.

16. Jack M. Balkin, *The Recent Unpleasantness: Understanding the Cycles of Constitutional Time*, 94 IND. L.J. 253, 259–60 (2019); see *infra* text accompanying notes 18–23.

17. STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* 30 (1993) [hereinafter SKOWRONEK, *THE POLITICS PRESIDENTS MAKE*]; STEPHEN SKOWRONEK, *PRESIDENTIAL LEADERSHIP IN POLITICAL TIME: REPRISAL AND REAPPRAISAL* (1st ed. 2008) [hereinafter SKOWRONEK, *PRESIDENTIAL LEADERSHIP IN POLITICAL TIME*].

years, or in its later days. For this reason, the rise and fall of regimes shapes partisan (and ideological) attitudes about the exercise of judicial review.

Early in a regime, the newly dominant party faces opposition from judges appointed by the old regime and obstacles from the constitutional jurisprudence those judges created. Hence its supporters tend to be more skeptical of judicial review. As the dominant party gains control of the courts, however, its followers increasingly recognize the importance of judicial review to promote and protect the party's commitments of ideology and interest.

The positions of the two parties are symmetrical: as time goes on, one party relies ever more heavily on judicial review to further its goals, while the other party increasingly preaches judicial restraint—although neither party entirely gives up on using the courts to promote its favored policies. As the political regime moves from its beginning to its conclusion, the positions of the two parties gradually switch, and so too do the views of legal intellectuals associated with the parties. The effect, however, is generational, and not everyone changes sides: older legal intellectuals may cling to their long-held beliefs about judicial review, while younger thinkers adopt a different perspective.

Constitutional theories—such as originalism and living constitutionalism—also evolve to reflect changing views about judicial review and judicial restraint. For example, while conservative originalism began as a justification for judicial restraint, it soon evolved to justify strong judicial review; the same thing happened to living constitutionalism earlier in the twentieth century.

Part I of this Article introduces the idea of political regimes and political time. Part II explains how the rise and fall of regimes affects attitudes about judicial review. Part III shows how the constitutional theories of legal intellectuals also reflect the rise and fall of political regimes. A brief conclusion describes how debates about judicial review are likely to play out in the coming years.

I. Political Regimes in Political Time

A. *The Idea of a Constitutional Regime*

American political history has featured a series of successive governing regimes in which political parties compete.¹⁸ During each regime, one of the parties tends to dominate politics practically and ideologically.¹⁹ This does

18. The next five paragraphs draw on Balkin, *supra* note 16, at 259–61.

19. See SKOWRONEK, PRESIDENTIAL LEADERSHIP IN POLITICAL TIME, *supra* note 17, at 21 (identifying different regimes in American political history); Andrew J. Polsky, *Partisan Regimes*

not mean that the party wins all of the elections. But it wins more elections than the other parties, and more importantly, its ideals and interests construct the basic agenda for national politics, setting the baseline for what people consider politically possible. The dominant party is dominant because it constructs the basic ideological assumptions of its time.

The easiest way to see this point is by contrasting the last two regimes. Our present governing regime, which began around 1980, is the Reagan regime, in which the Republican Party has been dominant. American conservatism and neoliberal ideology have set the basic agendas of politics, even if the conservative movement has not won every battle. This is an era of deregulation, privatization, tax cuts, weak labor unions, increasing economic inequality, and racial retrenchment. The ideological assumptions of the Reagan regime differ from those of the previous regime—the New Deal/Civil Rights regime. It lasted from around 1932 to 1980, and the Democrats were the dominant party. This was an era of increasing government regulation, higher taxes, the creation of major social insurance programs, protection for organized labor, and the civil rights and civil liberties revolutions. American liberalism shaped the basic political assumptions of the period, even though liberals did not achieve everything they sought.

The idea of political regimes should not be confused with the theory of realignment elections—the theory that there are crucial elections in which large

in American Politics, 44 POLITY 51, 52–53 (2012) (describing the regimes of American politics in terms of dominant political parties); cf. KAREN ORREN & STEPHEN SKOWRONEK, THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT 61–63 (2004) (describing earlier literature based on partisan-realignment theory). I employ Skowronek’s model of political regimes in this Article. There is a broader “regime politics” literature in political science that argues that the Supreme Court is a majoritarian institution that reflects and/or cooperates with the values and commitments of the dominant national political coalition at any point in time. See TERRY JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 248 (1999) (arguing that the Court’s work obtains its legitimacy from the judiciary’s connection to the dominant forces in American politics); Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court’s Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1391 (2006) (“Rather than a check on majority power, the federal courts often function as arenas for extending, legitimizing, harmonizing, or protecting the policy agenda of political elites or groups within the dominant governing coalition.”); Howard Gillman, *Regime Politics, Jurisprudential Regimes, and Unenumerated Rights*, 9 U. PA. J. CONST. L. 107, 108 (2006) (“The influence of regime politics ensures that federal judges, especially at the top of the judicial hierarchy, will have concerns and preferences that are usually in sync with other national power holders.”); Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 LAW & SOC. INQUIRY 511, 511 (2007) (“For at least fifty years, prominent political scientists have traced the decisions of the U.S. Supreme Court to the policy and political commitments of governing partisan regimes.”). The classic account is Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 294–95 (1957). In this broader regime politics literature, the relevant “regime” need not correspond to a dominant party. The national political coalition might be bipartisan, as it was throughout much of the twentieth century. In addition, the national political regime does not have to follow the periodization presented in this Article.

numbers of voters suddenly shift from one party to the other, inaugurating a new political era.²⁰ Political coalitions may change slowly rather than through quick transitions in the way that realignment theory proposes. Perhaps more important, political regimes feature dominant parties that manage to set the terms of political debate for long periods of time, even as electoral alignments shift beneath them. They manage to maintain dominant electoral coalitions even though the coalitions themselves constantly change. For example, although electoral patterns changed greatly between 1860 and 1932,²¹ the Republican Party remained the dominant political party in the United States during this period. For this reason, Andrew Polsky has defined a partisan regime as “a political coalition organized under a common party label that challenges core tenets of the [previous] established political order, secures effective national governing power, defines broadly the terms of political debate, and maintains sufficient power to thwart opposition efforts to undo its principal policy, institutional, and ideological achievements.”²²

Political regimes rise and fall. A dominant party depends on a political coalition to keep it in power. In its early days, the regime may seem quite strong. It decisively rejects the politics that came before it. But as time goes on and the regime normalizes, its coalition evolves and fractures. Circumstances change. The country faces new problems and threats. Demographic, social, economic, and technological changes test the coalition’s dominance. Moreover, successful coalitions are often the victims of their own past successes. They change the world, but in so doing, they create new problems for themselves.

Over time, opposition parties regroup and reorganize, appealing to new constituencies and finding new issues that threaten to split the winning coalition. The dominant party’s positions, agendas, and standard policy solutions begin to seem stale, irrelevant, and out of touch with current problems. More and more people reject the party’s basic assumptions, interests, and values. Different factions within the dominant party grow

20. Polsky, *supra* note 19, at 65. The idea of political regimes emerged from earlier political science models that focused on electoral realignments and critical elections, but scholars have shown that these earlier approaches have serious shortcomings. *See, e.g.*, DAVID R. MAYHEW, *ELECTORAL REALIGNMENTS: A CRITIQUE OF AN AMERICAN GENRE* 165 (2002) (criticizing realignment theory). As a result, regime theories no longer rest on a particular theory of realigning elections.

21. *See* JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES* 7 (1973) (noting three fundamental shifts in party politics during the Civil War, the 1890s, and the 1930s).

22. Polsky, *supra* note 19, at 57. In the alternative, one can define a regime in terms of how it replaces older government arrangements with new and lasting ones. The New Deal’s reconstruction of American governance is a good example. *See, e.g.*, Karen Orren & Stephen Skowronek, *Regimes and Regime Building in American Government: A Review of Literature on the 1940s*, 113 *POL. SCI. Q.* 689, 693 (1998–1999) (describing regime building as “a form of elite engineering . . . [that] stabilize[s] . . . governmental operations around a new set of political assumptions”).

restless and more demanding. Parts of the coalition radicalize. Factional differences become harder to manage. The coalition shrinks and fragments, becoming weaker and less resilient. Existing voters leave the party or new generations of voters reject it, so that the party cannot reproduce its majority over time. This creates an opening for a new party to create a new regime with a new winning coalition, and a new set of commitments and assumptions. The cycle of political time begins again.

*Table 1: The Cycle of Regimes in American Constitutional History*²³

Name	Years	Dominant Party	Opposition Party
Federalist	1789–1800	Federalists	Jeffersonians
Jeffersonian	1800–1828	Democratic-Republicans	Federalists (until mid-1810s)
Jacksonian	1828–1860	Democrats	National Republicans; Whigs (after 1834); Republicans (after 1854)
Republican	1860–1932	Republicans	Democrats
New Deal/Civil Rights	1932–1980	Democrats	Republicans
Reagan (Second Republican)	1980–?	Republicans	Democrats

As Table 1 indicates, this cycle has happened about six times in American history, as soon as political parties organized in the early Republic.²⁴ In other work, I have argued that our current political regime—the Reagan regime—is in marked decline.²⁵ Put in terms of Skowronek’s terminology, we are fairly late in political time—nearing the end of the regime’s cycle of rise and fall. Donald Trump’s improbable rise to power is a symptom of an exhausted political regime.²⁶ Although Republicans seem momentarily united around Trump’s brand of populist nativism, there are

23. Balkin, *supra* note 16, at 261 tbl.1.

24. See SKOWRONEK, PRESIDENTIAL LEADERSHIP IN POLITICAL TIME, *supra* note 17, at 21, 83–84 (tracing the cycle of regimes from the founding to present); Polsky, *supra* note 19, at 52 (same). Some scholars treat the realigning election of 1896 as the beginning of a new Republican regime, while others, like Skowronek, do not. See SKOWRONEK, THE POLITICS PRESIDENTS MAKE, *supra* note 17, at 228–30 (arguing that Theodore Roosevelt was still working within the Republican regime created in 1860).

25. Balkin, *supra* note 16, at 269–70, 295.

26. SANFORD LEVINSON & JACK M. BALKIN, DEMOCRACY AND DYSFUNCTION 2, 17–18, 55–56, 78, 137, 193 (2019); Balkin, *supra* note 16, at 269–70, 295.

deep tensions in the party;²⁷ its coalition has been shrinking, and the party seems ripe for an electoral reckoning in the next decade.

It is possible that Trump will give the coalition a second lease on life that will extend the Reagan regime for many years to come. The best analogy would be the election of 1896, in which William McKinley successfully fought off a populist insurgency by the Democrats. This gave the Republican regime a new coalition and a new set of issues, which kept the regime going until the New Deal. But for reasons I have argued elsewhere at length, the most likely result in the next decade is a new regime dominated by the current opposition party, the Democrats.²⁸

B. *Judicial Time*

Within each regime, dominant parties have also tended to control the Supreme Court. Table 2 shows that the dominant party in a regime tends to have many more opportunities to appoint new Justices.

*Table 2: Opportunities for Supreme Court Appointments*²⁹

Name	Years	Appointments by Dominant Party	Appointments by Opposition Parties
Federalist	1789–1800	Federalists (14)	Jeffersonians (0)
Jeffersonian	1800–1828	Democratic-Republicans (7)	Federalists (0)
Jacksonian	1828–1860	Democrats (12)	National Republicans; Whigs; Republicans (2)
Republican	1860–1932	Republicans (36)	Democrats (7)
New Deal/Civil Rights	1932–1980	Democrats (16)	Republicans (10)
Reagan (Second Republican)	1980–?	Republicans (9)	Democrats (4)

27. See generally TIM ALBERTA, *AMERICAN CARNAGE: ON THE FRONT LINES OF THE REPUBLICAN CIVIL WAR AND THE RISE OF PRESIDENT TRUMP* (2019) (explaining how divisions and factional warfare in the Republican Party led to Trump's ascension); see also Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, 94 B.U. L. REV. 1159, 1170 (2014) (“[D]epending on how you look at it, the GOP is either in the middle of a civil war or a nervous breakdown. Neither is a good situation for a party that wishes to preserve its political dominance.”).

28. LEVINSON & BALKIN, *supra* note 26, at 198; Balkin, *supra* note 16, at 295–96.

29. These numbers are taken from PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1895–915* (6th ed. 2015) (table of Justices). I do not count the elevation of Justices Harlan F. Stone and William Rehnquist to Chief Justice.

One must take these numbers with a grain of salt. Justices have remained on the Court for varying lengths of time; for example, several of the early Federalist Justices stayed on the Court only briefly. Even so, the numbers suggest that the dominant party has considerably more influence over the composition and direction of the Supreme Court than the opposition party does.

Moreover, opposition presidents have tended not to appoint strongly ideological representatives of their parties' positions. This has made the dominant party's influence even greater than the numbers might otherwise suggest. During the New Deal/Civil Rights era, for example, many of the Republicans' ten Supreme Court appointments—by Eisenhower, Nixon, and Ford—turned out to be quite moderate or even liberal. Earl Warren and William Brennan were key members of the Warren Court's liberal coalition; Harry Blackmun and John Paul Stevens were moderates who ended their careers as liberals. During the first Republican regime, several of Grover Cleveland's appointments (Melville Fuller, Edward White, and Rufus Peckham) were from the business-friendly wing of the party. One of Woodrow Wilson's appointments, James Clark McReynolds, turned out to be more conservative than several of his Republican colleagues.³⁰

Because judges have lifetime tenure, the partisan composition of the federal judiciary and the Supreme Court is a lagging indicator of where we are in political time. Therefore we can speak of the gap between *political time* and *judicial time*. Judicial time is the change, over time, of the partisan composition of the federal judiciary, and how it harmonizes with or fails to harmonize with the dominant political party in a regime.³¹ If judicial time lined up perfectly with political time, then the dominant party would always dominate the composition of the federal judiciary, and it would always maintain majority support on the U.S. Supreme Court. As politics got more or less polarized, we would also see a matching polarization or depolarization among federal judges. But judicial time rarely matches political time because federal judges have life tenure. So there can be a time lag or a mismatch between where we are in political time and the composition of the federal courts and the Supreme Court.

30. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 1069 (Kermit L. Hall ed., 2d ed. 2005) (Chief Justice Warren); *id.* at 102–03 (Justice Brennan); *id.* at 89 (Justice Blackmun); *id.* at 977 (Justice Stevens); *id.* at 372 (Justice Fuller); *id.* at 1086 (Justice White); *id.* at 725–26 (Justice Peckham); *id.* at 629–30 (Justice McReynolds).

31. Mark A. Graber, *Kahn and the Glorious Long State of Courts and Parties*, 4 CONST. STUD. 1, 2, 21 (2019); see Ronald Kahn, *Social Constructions, Supreme Court Reversals, and American Political Development: Lochner, Plessy, Bowers, but Not Roe*, in THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 67, 102–03 (Ronald Kahn & Ken I. Kersch eds., 2006) (noting the lag between political time and the “‘legal’ time of the Supreme Court”).

Here are two examples: When the New Deal/Civil Rights regime began in 1932, most of the federal judges and Supreme Court Justices had been appointed by Republicans, and many of them were hostile to Franklin Roosevelt's New Deal reforms. The time lag between the ascendance of a new dominant party and control over the federal judiciary led to the famous constitutional struggle over the New Deal. It was only fully resolved after Supreme Court vacancies began to open up near the end of 1937. Within five years, Roosevelt was able to replace almost everyone on the Supreme Court and also stock the lower federal courts with judges who supported the New Deal.³²

The opposite effect occurred in the transition between the New Deal/Civil Rights regime and the Reagan regime. The Burger Court, which began in 1969, had begun to move the Supreme Court to the right over a decade before the end of the New Deal/Civil Rights regime.³³ This happened because President Lyndon Baines Johnson made crucial errors in his appointments strategy. He attempted to nominate a political ally, Justice Abe Fortas, to succeed Earl Warren as Chief Justice. Fortas was soon embroiled in scandal and had to resign; this gave Richard Nixon two Supreme Court appointments to replace Fortas and Warren. Two years later, in 1971, John Marshall Harlan and Hugo Black retired, giving Nixon a third and fourth appointment. In 1975, Nixon's successor, Gerald Ford, obtained a fifth Republican appointment following the retirement of William O. Douglas. The last Democratic president in the New Deal/Civil Rights regime, Jimmy Carter, did not get a chance to appoint anyone to the Supreme Court. The result was that Republican presidents got all of the Supreme Court appointments from 1969 to 1992, thus beginning the Court's shift to the right earlier than the change in political regimes.

Polarization in the judiciary and polarization in electoral politics also may not line up. A key feature of the Reagan regime has been asymmetric polarization; the Republican Party became increasingly very conservative, while Democrats became a bit more liberal.³⁴ Because judges are appointed

32. See BREST, LEVINSON, BALKIN, AMAR & SIEGEL, *supra* note 29, at 1909–10 (listing Roosevelt's nine appointments).

33. See MICHAEL J. GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* 344 (2016) ("Warren Burger's Court played a crucial role in establishing the conservative legal foundation for the even more conservative Courts that followed.").

34. See ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* 139–42 (2010) (comparing polarization between 95th and 108th Congresses); THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 51–52, 56–58 (2012) (describing relatively sharp movement of Republicans to the right since the late 1970s); Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in *AM. POLITICAL SCI. ASS'N, NEGOTIATING AGREEMENT IN POLITICS* 19, 21 (Jane Mansbridge & Cathie Jo Martin eds., 2013) ("In the past 40 years, the most discernable trend has

for life, and there are very few Supreme Court appointments in this era, the process of polarization occurred much more slowly in the federal judiciary. Many of the earlier Republican appointees (e.g., Blackmun, Stevens, Souter) came from the moderate wing of the party. They appeared increasingly liberal as the party became more ideologically coherent and shifted increasingly to the right.³⁵ George H.W. Bush's 1990 appointment of David Souter—part of a moderate Northeastern wing of the party that was rapidly growing extinct—further delayed the Court's polarization.

Only when John Paul Stevens retired in 2010, replaced by Elena Kagan, was the Court fully polarized. The liberal appointees were all appointed by Democrats and the conservative appointees were all appointed by Republicans.³⁶ However, one of the Republican appointees, Anthony Kennedy, occasionally voted with the liberals. With Kennedy's retirement and replacement by Brett Kavanaugh in 2018, the Supreme Court is strongly polarized like the rest of the country.

II. How the Rise and Fall of Regimes Affects Judicial Review

To understand how the cycle of regimes affects judicial review, consider the following three questions about the judicial role:

(1) Do you currently support how the courts are using their power to interpret the Constitution and strike down laws, or do you think that there should be greater judicial restraint? (This is a question about *judicial restraint*.)

(2) Do you think that Supreme Court Justices are deciding cases according to the Constitution and the law, or do you think that they are just making things up and imposing their own political preferences under the guise of following the law? (This is a question about the proper methods of *judicial reasoning*.)

been the marked movement of the Republican Party to the right . . ."); see also Nolan McCarty et al., *Polarization Is Real (and Asymmetric)*, WASH. POST: MONKEY CAGE (May 15, 2012), <http://themonkeycage.org/2012/05/15/polarization-is-real-and-asymmetric/> [<http://perma.cc/36M5-VWDR>] (“[T]he data are clear that [contemporary political polarization] is a Republican-led phenomenon where very conservative Republicans have replaced moderate Republicans and Southern Democrats.”); Nolan McCarty, *What We Know and Don't Know About Our Polarized Politics*, WASH. POST: MONKEY CAGE (Jan. 8, 2014), <http://wapo.st/1ifmRzK> [<http://perma.cc/3N3B-JKB2>] (“The evidence points to a major partisan asymmetry in polarization. Despite the widespread belief that both parties have moved to the extremes, the movement of the Republican Party to the right accounts for most of the divergence between the two parties [since the 1970s].”).

35. Jeffrey Toobin, *After Stevens*, NEW YORKER (Mar. 15, 2010), http://www.newyorker.com/reporting/2010/03/22/100322fa_fact_toobin [<https://perma.cc/S9SQ-JTDS>] (“For many decades, there have been moderate Republicans on the Court—John M. Harlan II and Potter Stewart (appointed by Eisenhower), Lewis F. Powell and Harry Blackmun (Nixon), David H. Souter (Bush I). Stevens is the last of them, and his departure will mark a cultural milestone.”).

36. NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* 4 (2019).

(3) Do you think that it is important for the Court to uphold constitutional principles in order to check overreaching by the political branches, or do you think that the courts have become elitist and undemocratic, and that they should stop interfering with democratic decision-making and let the political branches do their jobs and represent the people? (This is a question about *majority rule*.)

How people feel about these three questions—judicial restraint, judicial reasoning, and majority rule—is often affected by which party they most identify with. Perhaps even more interestingly, it is affected by where that party is in political time. The rise and fall of political regimes has important effects on how the dominant and opposition parties think about judicial restraint, about the legitimacy of methods of judicial reasoning, and about majority rule.

At any point in time, supporters of the dominant party and the opposition party will tend to take mirror-image positions on these questions. However, these positions will change as political time moves forward and the regime rises and falls, so that by the end of the regime, the parties will have effectively switched positions on judicial review and judicial restraint.

Not everyone will change their positions, of course. As the regime proceeds, some members of the coalition and some legal intellectuals will change their minds, while others will not.³⁷ Those least likely to change their minds about the courts will be older generations; they will regard younger people's views about judicial power as foolhardy, forgetting important lessons learned the hard way. The younger generation of partisans and legal intellectuals, however, will not feel bound to agree with the views of older members of the coalition. And most elected politicians, who focus on the short to medium term, may shift positions with little concern about consistency. Their flip-flops on judicial review and judicial restraint may be amusing or outright hypocritical, but most people will not notice them.

Put differently, these shifts in views about judicial review are often generational, they occur gradually, and they may create significant divisions within each party's coalition. And all of this will occur despite the fact that politicians from all parties generally support judicial review as a basic feature of the system.

Moreover, there is a long-term secular trend in which politicians of both parties rely more and more on judicial review as the judiciary becomes more

37. See Martin Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 218, 220–21 (Vincent Blasi ed., 1983) (arguing that criticisms of the Warren Court by an older generation that lived through the constitutional struggle over the New Deal gave way to support for Warren Court decisions in the next generation, which had lived through *Brown v. Board of Education* and the civil rights revolution).

powerful.³⁸ So when we talk about how the cycle of regimes affects partisan attitudes about judicial restraint, we can say only that one party is *relatively* more supportive of judicial restraint than the other party, and this attitude, in turn, depends a great deal on the Supreme Court's docket, which is mostly constructed by the Justices.

That's the big picture. Now let's see how the changes occur as we travel through the life cycle of a political regime. It's important to note that the effects I describe become most important in the twentieth century—the period of constitutional modernity. During the First Gilded Age at the turn of the twentieth century, the Supreme Court struck down the federal income tax,³⁹ limited the antitrust laws,⁴⁰ and began to develop the police power jurisprudence now associated with *Lochner v. New York*.⁴¹ Earlier in the Republic, the Supreme Court was less powerful and exercised judicial review in less politically salient ways, although more frequently than people generally assume.⁴²

Put another way, in the early Republic, politicians had not yet constructed judicial review in its modern form. That really began after the Fourteenth Amendment and the creation of federal question jurisdiction made a wide range of state and local laws vulnerable to constitutional challenges, and the federal government began to produce more economic regulation in the late nineteenth century.⁴³ For this reason, the beginnings of modern judicial review lie in the late nineteenth and early twentieth centuries. Alexander Bickel's notion that the federal courts faced a countermajoritarian difficulty⁴⁴ is also a twentieth century conception. Therefore, although I will

38. KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENT, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 232 (2007) (“[I]nstitutional and coalitional pressures that push political actors to turn to the Court for constitutional leadership have become more pervasive over the course of American history.”).

39. *Pollock v. Farmers' Loan & Tr. Co.*, 157 U.S. 429, *modified on reh'g*, 158 U.S. 601, 637 (1895), *superseded by constitutional amendment*, U.S. CONST. amend. XVI (striking down the 1894 Federal Income Tax).

40. *United States v. E.C. Knight Co.*, 156 U.S. 1, 16–17 (1895) (limiting the federal government's power to enforce the Sherman Act).

41. 198 U.S. 45, 64 (1905) (striking down state maximum-hours law for bakers).

42. Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1267 (2009) (“Judicial review did not occupy the same place in the constitutional system of the early nineteenth century as it does now, but the Court was busy laying the foundations for that practice and establishing its role as a forum for testing the limits of congressional powers.”); Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 VAND. L. REV. 73, 106–13 (2000) (explaining how the Supreme Court ban on naked land transfers helped establish judicial review in the antebellum era).

43. See Howard Gillman, *supra* note 14, at 515–19 (describing institutional changes designed to promote economic nationalism).

44. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (1962).

give a few examples of earlier regimes, the effects are less pronounced, and I will focus primarily on the twentieth century and afterward.

My two central examples will be the rise and fall of the New Deal/Civil Rights regime, in which the Democrats were the dominant party and the Republicans were in opposition, and the Reagan regime, in which the Republicans have been the dominant party and the Democrats have been in opposition.

Let's imagine that the previous regime has collapsed and a new regime is just beginning. This would be the years 1932 to 1940 in the case of the New Deal/Civil Rights regime and 1980 to 1988 in the case of the Reagan regime.

The previously dominant party has been cast into the political wilderness and is now the new opposition party, while a new dominant party and political coalition is ascending. But the new dominant coalition faces a problem. What is now the opposition party—precisely because it was dominant for so long—probably got to appoint most of the federal judges in the previous regime. It probably still controls the majority of the federal courts, and it may have a working majority on the Supreme Court. Perhaps more to the point, judges from the old regime may have produced a lot of constitutional jurisprudence that members of the newly dominant party oppose, either because that jurisprudence is inconsistent with their policy views or because it threatens to block needed reforms.

Because politicians in the newly dominant party don't yet control the federal courts, or because they must contend with lots of constitutional decisions that may take years to overturn, they are likely to be skeptical of the federal courts and of judicial review. Members of the new political coalition and their allies among legal intellectuals are likely to regard much of the previous jurisprudence as antimajoritarian and antidemocratic.

Moreover, they are likely to see that jurisprudence as stemming from improper forms of judicial reasoning that have mangled the meaning of the true Constitution. The judges from the old regime misapplied the Constitution and made things up. They imposed their personal or political values under the guise of interpreting the law. The judges who represent the values of the old regime are misguided, smug, arrogant, antidemocratic, and out of touch with social realities and with the values of the public. They are acting as an elite corps of platonic guardians who think they know better what the Constitution means and what the American people want.⁴⁵ It is time to return the Constitution to the people and restore its correct meaning.

Conversely, members of what is now the opposition party (Republicans in 1932, Democrats in 1980)—and the legal intellectuals associated with

45. LEARNED HAND, *THE BILL OF RIGHTS* 73 (1958) ("For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them . . .").

them—are likely to take the opposite view about the federal courts. They want to protect their constitutional values and policy commitments—which they think are correct and just—from the radicals who have just won major political victories. Those same radicals threaten to tear down the valuable institutions, doctrines, and laws they have carefully built over many years. Defenders of the old order want to protect the existing jurisprudence developed by judges in the previous regime. They fear that the newly dominant party will destroy the Constitution and undermine its central principles. Now more than ever, they believe that it is important for judges to defend the Constitution from misguided majorities in order to protect established rights and freedoms. There is much to be concerned about because the new regime’s lawyers and legal intellectuals are promoting dangerous ideas about constitutional interpretation and judicial review. Robust judicial review and fidelity to the real Constitution is the only thing that can preserve the Republic.

It follows that the newly ascendant party is more likely to preach judicial restraint and argue for a more deferential judiciary, while holdovers from the old regime are more likely to support judicial review and the constitutional jurisprudence of the old regime. Defenders of the old regime want to protect precedents that articulate the Constitution as they understand it, while the new regime’s lawyers want to chip away at these precedents in order to free up democratic energy and renew the country. Politicians in the newly dominant party don’t control the judiciary yet, and they have been subjected to years of judicial review by the other party’s judges. So they preach judicial restraint and tend to be critical of judicial review.

Keith Whittington points out that reconstructive presidents—those who begin a new regime—are the most likely to make “departmentalist” claims.⁴⁶ Departmentalism holds that each branch of government is an equally authoritative interpreter of the Constitution and that, within its own sphere, each branch is entitled to interpret the Constitution as it sees fit. Reconstructive presidents tend to engage in departmentalist talk, Whittington explains, because they usually do not control the federal courts when their presidencies begin.⁴⁷ As a result, they cannot rely on the courts to support their reconstruction of American politics. Therefore, it may be politically more useful, as Franklin Roosevelt did, to treat the courts as an adversary blocking necessary reforms. Or, as Reagan and movement conservatives did, it may be politically advantageous to denounce the courts for having abandoned the Framers’ values.

46. WHITTINGTON, *supra* note 38, at 23, 30–31, 52–53.

47. *Id.* at 73 (noting that when a reconstructive presidency begins, the Supreme Court usually defends the constitutional values of the previous constitutional order).

How great a struggle develops between the courts and the new Administration depends on the configuration of the courts and the Supreme Court when the new regime begins. Roosevelt and Reagan faced different situations. In 1933, when Roosevelt took office, Republicans had controlled the White House for twelve years. Therefore Republican presidents had appointed most of the federal judges. Conservatives also enjoyed a working majority on the Supreme Court that included seven Republican appointees and a conservative Democratic ally, James C. McReynolds. To be sure, some of the Republican appointees were moderates or progressives—that describes Herbert Hoover’s three appointments of Charles Evans Hughes, Benjamin Cardozo, and Owen Roberts. But even the Court’s more progressive Justices were wary of departing too much from the old regime’s jurisprudence of national power—that is one reason why the Court unanimously struck down the National Recovery Act in the *Schechter Poultry*⁴⁸ case. Because Roosevelt was shut out of any Supreme Court appointments until 1937, a collision over the New Deal was predictable if not inevitable.

Imagine, however, that one of Woodrow Wilson’s appointments, John H. Clarke, did not resign in 1922 to campaign for the League of Nations, or that Wilson picked a more progressive candidate instead of the irascible and reactionary McReynolds.⁴⁹ Or imagine that one of the conservative Four Horsemen retired early in Roosevelt’s first term. This actually might have happened if Congress had not stupidly slashed the Justices’ retirement pensions in half in 1932.⁵⁰ Although the pension amounts were soon restored, the episode frightened Justices Sutherland and Van Devanter during the middle of the Great Depression and convinced them not to resign.⁵¹ If either or both had left the Court early, progressives might have enjoyed a majority on the Hughes Court, and the transition to the New Deal might have gone much more smoothly.

In contrast to Roosevelt, when Reagan assumed office in 1981, Republican appointees already had a majority on the Burger Court because, as noted previously, Lyndon Johnson badly misplayed his hand, and Jimmy Carter got no Supreme Court appointments. That meant that the conservative judicial revolution began before the Reagan regime itself. Imagine, however,

48. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528–30, 551 (1935) (striking down provisions of the National Industrial Recovery Act of 1933).

49. LUCAS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008*, at 194 (2009) (describing Clarke’s exit from the Court as a “shocker,” which occurred “because he couldn’t stand McReynolds and wanted to work for U.S. entry into the League of Nations”); *id.* at 179 (“Wilson mistakenly thought that McReynolds’s position on trusts was a proxy for progressive beliefs generally. McReynolds instead was a reactionary, whose votes would affect almost a quarter-century of constitutional doctrine.”).

50. JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VERSUS THE SUPREME COURT* 40 (2010).

51. *Id.* at 40–41.

that history turned out a little differently. Suppose that Johnson had not tried to elevate Fortas and had appointed a liberal Democrat to replace Earl Warren, and either William O. Douglas (who left the Court in 1975) or Hugo Black (who died in 1971) retired before Johnson left the White House. Then Richard Nixon and Gerald Ford together would have gotten only two appointments. Imagine further that Jimmy Carter was able to replace Potter Stewart with another liberal Democrat.⁵² Then Reagan would have faced a phalanx of five and possibly six staunchly liberal Justices, who would have spent the previous decade building on and expanding the Warren Court's liberal jurisprudence. In such a scenario, Reagan, like Roosevelt, might have faced serious conflicts with the Supreme Court.

In any case, even though Reagan faced a friendlier Supreme Court than Roosevelt did, the New Deal/Civil Rights regime had produced many years of accumulated jurisprudence. In 1981, movement conservatives objected to Warren and Burger Court decisions in many areas, including reproductive rights, criminal procedure, church–state relations, and federalism.⁵³ *Roe v. Wade*⁵⁴ was only the most obvious example. Like the New Deal progressives before them, Reagan's movement conservatives were skeptical of judicial power, and they were especially critical of the reasoning by which courts reached these liberal decisions.

As presidents from the dominant party begin to appoint new judges and Justices, judicial review becomes increasingly useful to the regime's dominant party. The newly installed judges are more likely to uphold the party's program and relax some of the constitutional restraints in the old regime's jurisprudence. Legal intellectuals who support the regime's commitments begin to rationalize and celebrate the new decisions, while the legal intellectuals on the opposite side criticize and bemoan them.

Slowly but surely the positions of the dominant and opposition parties begin to shift. The dominant party and its affiliated legal intellectuals increasingly see the value of strong judicial review to protect regime commitments, while members of the opposition party and their associated legal intellectuals become increasingly skeptical of judicial review.

But this process takes a very long time, and it is complicated by many factors. One is the degree of ideological coherence within the parties. Different factions of the party may disagree about legal issues, with some wanting courts to be more active and others wanting it to be more deferential.

52. Stewart retired in 1981, likely waiting long enough for a Republican president to replace him.

53. See OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, *THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION* 2–5, 12–13, 74–75, 131, 133 (1988); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, *GUIDELINES ON CONSTITUTIONAL LITIGATION* 52–53, 82, 86–87 (1988).

54. 410 U.S. 113 (1973).

Good examples are the fierce disagreements within the Democratic Party during the New Deal/Civil Rights regime about race, and especially about *Brown v. Board of Education*.⁵⁵ Southern conservatives did not want the federal courts ordering desegregation of schools and other institutions. Northern liberals supported *Brown*. In addition, southern Democrats were often critical of liberal decisions on criminal procedure and free speech. Conversely, many southern Democrats were skeptical of Congress's powers to pass civil rights statutes and the Voting Rights Act, and wanted the courts to intervene to protect states' rights. Northern liberal Democrats, by contrast, believed that the New Deal settlement applied: courts should defer to Congress just as they should in other kinds of economic and social legislation.

A second, related factor is the degree of polarization between the parties. If there are liberal Democrats and liberal Republicans, as there were during the New Deal/Civil Rights regime, the parties will not have coherent views about when courts should exercise judicial review or engage in judicial restraint. Rather, liberals, regardless of party, are more likely to agree with other liberals and conservatives with other conservatives. The liberal Warren Court was actually a coalition of liberal Justices appointed by presidents of different parties who enforced the commitments of the New Deal/Civil Rights regime.⁵⁶ Two of the most important liberal stalwarts on that court, Chief Justice Earl Warren and Justice William Brennan, were Eisenhower appointees. Although Eisenhower is supposed to have said that they were two of his mistakes as president,⁵⁷ these appointments made perfect sense in the context of the politics of the time, in which Eisenhower wanted to demonstrate his bipartisanship and moderation.⁵⁸ Neither of these appointments were out of line with the moderate politics of his Administration or the moderate liberal politics of his Attorney General, Herbert Brownell.⁵⁹

55. 347 U.S. 483 (1954).

56. WHITTINGTON, *supra* note 38, at 117–20.

57. See Stephen J. Wermiel, *The Nomination of Justice Brennan: Eisenhower's Mistake? A Look at the Historical Record*, 11 CONST. COMMENT. 515, 534–36 (1994–1995) (noting that although Eisenhower may never have “spoken these precise words,” the quote is “right in substance, if not in fact”).

58. Brennan was a Catholic Democrat: his appointment signaled that Eisenhower was moderate and nonpartisan, and, Eisenhower hoped, would also attract Catholic Democrats to the Republican Party. SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 116 (1997) (explaining that Eisenhower wanted to woo Catholic Democrats to the Republican Party); DAVID ALISTAIR YALOF, THE PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 55 (paperback ed. 2001). Warren was a popular reform governor of California (nominated by both parties in 1950!) who had been instrumental in getting Eisenhower the Republican nomination in 1952. Eisenhower admired him and viewed him as a statesman of great integrity. *Id.* at 45–46.

59. See YALOF, *supra* note 58, at 41–42 (describing Eisenhower's and Brownell's politics).

The story is a bit less complicated after the parties begin to divide more strongly by ideology in the Reagan regime. Democrats were increasingly liberals, as Southern Democrats left the party; Republicans became very conservative. Republicans achieved a working conservative majority on the Supreme Court in 1991, when Clarence Thomas succeeded Thurgood Marshall. At that point, the Rehnquist and Roberts Courts began to expand the use of judicial review for conservative ends. Yet, as Thomas Keck explains, the presence of Justices O'Connor and Kennedy on the Court meant that the liberal Justices could form occasional majorities as well. The most important examples concern abortion and gay rights: *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁶⁰ which reformulated the abortion jurisprudence of *Roe v. Wade*, and the Rehnquist Court's landmark gay-rights decisions, *Romer v. Evans*⁶¹ and *Lawrence v. Texas*.⁶² The result was a Supreme Court that employed judicial review both for liberal and conservative causes, although the general tenor was largely conservative.⁶³

The list of conservative uses of judicial review is far too long to catalog, but examples include the Rehnquist Court's federalism revolution in the 1990s and early 2000s, which limited state liability for damage suits under federal statutes, held that states could not be required to enforce federal programs, and limited Congress's powers to enforce the Reconstruction Amendments against the states;⁶⁴ the Roberts Court's decisions in *District of*

60. 505 U.S. 833 (1992).

61. 517 U.S. 620 (1996).

62. 539 U.S. 558 (2003).

63. THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* 201, 203 (2004).

64. *See* *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001) (holding the Americans with Disabilities Act invalid to the extent that it allowed suits for money damages against the states); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (striking down the civil rights remedy in the Violence Against Women Act that allowed women to sue their attackers in federal court); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91–92 (2000) (holding the Age Discrimination in Employment Act invalid to the extent that it allowed suits for money damages against the states); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that states could not be sued in state court to enforce the Fair Labor Standards Act); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999) (holding the Trademark Remedy Clarification Act invalid to the extent that it allowed suits for money damages against the states); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 630 (1999) (invalidating the Patent and Plant Variety Protection Remedy Clarification Act to the extent that it allowed suits for money damages against the states); *Printz v. United States*, 521 U.S. 898, 935 (1997) (invalidating provisions of the Brady Act that required state and local government officials to enforce a federal regulatory program); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding RFRA unconstitutional as applied to state governments because it was beyond Congress's powers to enforce the Fourteenth Amendment); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (invalidating a provision of the Indian Gaming Regulatory Act that eliminated the states' Eleventh Amendment immunity from suit in federal court); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (invalidating the Gun Free School Zones Act as beyond Congress's commerce powers); *New York v. United States*, 505 U.S. 144, 149 (1992) (invalidating "take-title" provision of Low-Level Radioactive Waste Policy Act on grounds that Congress may not commandeer state legislatures to pass regulations).

*Columbia v. Heller*⁶⁵ and *City of Chicago v. McDonald*,⁶⁶ recognizing Second Amendment rights; the 2007 *Parents Involved*⁶⁷ decision striking down voluntary desegregation plans; the 2013 decision in *Shelby County v. Holder*⁶⁸ striking down parts of the 1965 Voting Rights Act; and a series of First Amendment cases, including *Citizens United v. FEC*,⁶⁹ which struck down restrictions on campaign finance and commercial speech.⁷⁰ Following Justice Kennedy's retirement in 2018, the solidly conservative Roberts Court majority will likely find new ways to exercise judicial review in a conservative direction.

Why do the parties' positions on judicial review shift? There are multiple reasons, but the most important ones are partisan entrenchment and the reconstitution of the Supreme Court's agenda. As the regime proceeds, the dominant party is able to appoint a larger share of judges and Justices. When that happens, judicial review becomes increasingly useful to politicians in the dominant party, or at least the presidential wing of the dominant party.⁷¹ (As noted above, during the New Deal/Civil Rights regime, northern liberal Democrats often disagreed with southern conservative Democrats.) Federal courts can help the dominant party in three different ways: (1) by upholding its preferred laws, policies, and programs; (2) by striking down or narrowly interpreting disfavored laws or laws that benefit political adversaries; and (3) by enforcing the party's values nationally against state and local governments.

65. 554 U.S. 570, 635 (2008) (holding that the Second Amendment protects an individual right to use firearms in the home for purposes of self-defense).

66. 561 U.S. 742, 791 (2010) (applying the Second Amendment right of self-defense to the states).

67. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709–11 (2007).

68. 570 U.S. 529, 556–57 (2013).

69. 558 U.S. 310 (2010).

70. *See, e.g.*, *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2459–60, 2478 (2018) (holding that requiring nonmembers of public-sector unions to pay fees toward collective bargaining violates the First Amendment); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2368, 2370, 2378 (2018) (enjoining enforcement of California law requiring pro-life pregnancy centers to provide certain factual information to patients); *Harris v. Quinn*, 134 S. Ct. 2618, 2625, 2644 (2014) (striking down agency-fee provision of Illinois's Public Labor Relations Act); *McCutcheon v. FEC*, 572 U.S. 185, 227 (2014) (striking down aggregate limits on federal campaign contributions); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 754–55 (2011) (striking down Arizona law providing "matching funds" to publicly funded state candidates when privately funded opponents spend over a certain amount); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 580 (2011) (striking down a Vermont law restricting the sale and disclosure of physicians' prescription records); *Citizens United*, 558 U.S. at 365, 372 (striking down statutory limits on corporate electioneering).

71. *Cf.* Thomas M. Keck, *Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?*, 101 AM. POL. SCI. REV. 321, 328 (2007) ("[T]he judicial appointment process makes it particularly likely that the justices will side with the presidential wing of their own partisan coalition . . .").

To achieve these goals, it is not enough for courts simply to stay their hands. Rather, courts must actively exercise their powers of judicial review to further the constitutional values and policy commitments of the party (or the presidential wing of the party). And because the Supreme Court controls much of its own docket, the Justices can pick the cases that best further these values and commitments, making judicial review even more valuable to regime politicians and affiliated legal intellectuals.

As a result, as soon as presidents from the dominant party have been able to appoint a majority of Supreme Court and lower court judges—usually within a decade or so after the regime begins—these judges and Justices start to defend and promote the regime’s commitments through striking down laws and executive actions as well as through upholding them and exercising judicial restraint.

In order for judges and Justices to defend the regime’s commitments, it will usually not be sufficient to defer to the political branches in every case. Judges must also strike down, narrowly construe, or hobble laws and executive actions that are inconsistent with the regime’s values. Judicial assertion is especially important in the case of state and local governments, which may be controlled by the opposition party.⁷² In addition, as political time proceeds, the Supreme Court’s agenda gradually changes. The Justices pick a different set of cases, creating opportunities for what members of the conservative movement now call “judicial engagement.”⁷³

The increasing use of judicial review to protect and promote the constitutional and policy values of the dominant party leads to repeated charges of judicial activism by members of the opposition party (and, in the nonpolarized New Deal/Civil Rights regime, also by conservative and Southern Democrats). Critics increasingly charge that the federal courts and the Supreme Court have gotten out of control, are imposing their political preferences in defiance of settled law, and are mangling the Constitution. Progressives during the *Lochner* era, conservatives during the New Deal/Civil Rights regime, and liberals during the Reagan era have all complained about judicial activism by courts promoting regime commitments of ideology and interest.

72. See WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY, *supra* note 38, at 105–07 (noting the importance of the federal judiciary in enforcing regime commitments against state and local governments).

73. CLARK M. NEILY III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION’S PROMISE OF LIMITED GOVERNMENT 129–30 (2013); Clark Neily, *Judicial Engagement Means No More Make-Believe Judging*, 19 GEO. MASON L. REV. 1053, 1053 (2012); Ilya Shapiro, *Against Judicial Restraint*, NAT’L AFFAIRS, Fall 2016, at 113, 117, 125, <https://www.nationalaffairs.com/publications/detail/against-judicial-restraint> [<https://perma.cc/LCE3-YQ3E>]; *Supreme Court at a Crossroads: Judicial Engagement vs. Judicial Restraint: What Should Conservatives Prefer?*, INST. FOR JUST., <http://ij.org/event/supreme-court-crossroads-judicial-engagement-vs-judicial-restraint-conservatives-prefer/> [<https://perma.cc/F6VX-QPGQ>].

One of the most interesting features of the Reagan regime, however, is that liberal Democrats are not the only ones who have complained about judicial activism. Even as the Supreme Court has used judicial review aggressively in the service of conservative values, conservative politicians have continued to pretend that the Warren Court is still in business; they continue to denounce the evils of liberal judicial activism, even though the “activism” is increasingly in a conservative direction.⁷⁴ The most likely reason is that Justices Kennedy and O’Connor occasionally voted with the liberals on culture-war issues, which are highly salient to the Republican Party’s conservative base.⁷⁵

The increasing usefulness of judicial review to the dominant party slowly causes attitudes about judicial review to shift. Politicians and legal intellectuals affiliated with the dominant party begin to argue that strong judicial review is a good thing—and even necessary—when judges reason in the right way about the Constitution.⁷⁶ Continuing to adhere to bromides about judicial restraint makes less and less sense. It may have made sense in the past, but that was because the old jurisprudence was based on a defective vision of the Constitution and defective forms of constitutional reasoning.

Once again, these changes are generational; younger intellectuals are quicker to embrace judicial review, while older ones remain skeptical—remembering the lessons of the past.⁷⁷ (There may also be lack of consensus if the parties are depolarized.) Elected politicians care far less about intellectual consistency; they simply change their rhetoric from case to case, hoping that nobody notices.

Now consider attitudes about judicial review among members of the opposition party—in particular, conservative Republicans in the New Deal/Civil Rights regime, and liberal Democrats in the Reagan regime. Their

74. Keith E. Whittington, *The Least Activist Supreme Court in History? The Roberts Court and the Exercise of Judicial Review*, 89 NOTRE DAME L. REV. 2219, 2221 (2014) (“Conservative politicians continue to rail against judicial activists, as evidenced by everything from bills introduced in Congress to party platforms to congressional hearings.”) (footnotes omitted).

75. *Id.* at 2221, 2224.

76. See, e.g., Shapiro, *supra* note 73 (arguing that “judicial review is constitutional and appropriate . . . if we want a government that stays within its limited powers” and “we should be concerned only that the Court ‘get it right,’ regardless of whether that correct interpretation leads to the challenged law being upheld or overturned”); George F. Will, *The Limits of Majority Rule*, NAT’L AFFAIRS, Summer 2016, at 160, 169–72, <https://www.nationalaffairs.com/publications/detail/the-limits-of-majority-rule> [<https://perma.cc/C5AF-9TC7>] (asserting that judicial review is necessary to ensure fidelity to “those who framed and ratified” the Constitution); George F. Will, *The False Promise of ‘Judicial Restraint’ in America*, WASH. POST (Oct. 21, 2015), https://www.washingtonpost.com/opinions/the-false-promise-of-judicial-restraint/2015/10/21/a0267b36-7760-11e5-a958-d889faf561dc_story.html?noredirect=on&utm_term=.196ad814a556 [<https://perma.cc/P29G-L2BJ>] (“[R]eflexive praise of ‘judicial restraint’ serves the progressives’ Hobbesian project of building an ever-larger Leviathan.”).

77. See Shapiro, *supra* note 37, at 220–21.

views about judicial review tend to be a mirror image of changes occurring in the dominant party.

After a new regime begins, members of the opposition party may continue to support strong judicial review for a long time because they believe that judicial review is necessary to defend important values and commitments. They may even hold out hope that they will soon regain control of the federal courts, and things can return to the way they were before. But as the dominant party takes over the courts, a new generation of judges doesn't seem to be doing what judges should be doing—that is, respecting and protecting the prior regime's values and commitments. The Supreme Court and the lower federal courts are increasingly using judicial review to *undermine* these important values and commitments.

Opposition politicians and legal intellectuals increasingly face a quandary—their rhetoric about the importance of judicial review no longer seems to match reality. At some point, perhaps midway through the regime, oppositional leaders and intellectuals realize, in Sanford Levinson's phrase, that “the Warren Court has left the building.”⁷⁸ The Supreme Court majority is simply not on their side, and probably won't be for years to come. The content of the Supreme Court's docket has changed, and in these new kinds of cases, opposition politicians and legal intellectuals will usually be arguing for deference to the political branches or judicial restraint.

Again, these effects are also generational, and many opposition leaders and intellectuals will still cling to the old-time religion. Moreover, because of the long-term secular trend of a more powerful judiciary supported by both parties, there will still be issues in which opposition leaders and intellectuals believe that judicial review is necessary to protect the commitments of the opposition party. In the Reagan regime, the most obvious examples involve criminal procedure, reproductive rights, and gay rights. These cases follow the pattern of the end of the New Deal/Civil Rights regime—liberals want courts to step in, while conservatives want them to stay out. Perhaps even more to the point, liberals want courts to preserve older, liberal jurisprudence, so they become defenders of *stare decisis*, especially for decisions like *Roe v. Wade*.

As a political regime progresses, jurisprudential accomplishments build up, and arguments that were once off-the-wall become on-the-wall. Judicial creativity and ambition appear to increase because earlier decisions have already laid important groundwork, and because social movements and litigation campaigns can make increasingly ambitious arguments for

78. Sanford Levinson, *The Warren Court Has Left the Building: Some Comments on Contemporary Discussions of Equality*, 2002 U. CHI. LEGAL F. 119. Reviewing Ronald Dworkin's defense of strong judicial review in 1996, Cass Sunstein put it more bluntly: “Earl Warren Is Dead.” Cass R. Sunstein, *Earl Warren Is Dead*, NEW REPUBLIC (May 16, 1996), <https://newrepublic.com/article/62143/earl-warren-dead> [<https://perma.cc/D65C-45N8>].

reinterpreting or changing the law. This acceleration in judicial creativity and ambition is most likely to occur in the middle of the regime. The judicial creativity of the Warren Court and the first few years of the Burger Court is an example; so too is the work of the post-1995 Rehnquist Court and the Roberts Court.

Near the end of a regime, the dominant party finds it difficult to accomplish its ideological goals through the political branches. This makes control of the judiciary increasingly important. That is not because people know that the regime is about to end; rather, it is because the judiciary is simply in a better position to achieve political and ideological victories when the political branches are stymied. Judicial appointments are important throughout the life of a regime, but they become increasingly important late in the regime. Senate Majority Leader Mitch McConnell has devoted a great deal of his energies during the Trump Administration to stocking the courts with as many strong conservatives as he can. That is not because McConnell knows that the Reagan era is about to end—indeed, he hopes that it will last for many years to come. Rather, it is because McConnell recognizes that conservatives will get more mileage out of judicial appointments when their legislative agenda is effectively stalled.

Once a regime is over, and the dominant party has lost power, much depends on whether the party has already lost control of the courts—this was the Democrats' fate in 1980—or still maintains majority control, as Republicans did in 1932. In the latter situation, it may seem that judicial ambition is going into overdrive. An example is the conservative majority that faced off with FDR during the struggle over the New Deal.⁷⁹ What is really happening is that the new regime is starting to enact its political program. Judges representing the values of the old regime feel that they must be especially vigilant to preserve the old regime's interests and constitutional values in the face of a newly ascendant party with contrary values.

An interesting example is the Chase Court in the first years of the post-Civil War Republican regime. Suddenly, the Court became very active. Mark Graber explains that this was because the Court still had a group of Jacksonian Democrats who were defending the values of the previous regime.⁸⁰ When the Jacksonians controlled Congress or the White House in the previous regime, they successfully blocked laws they regarded as unconstitutional aggrandizements of federal power. But once Republicans gained control of both Congress and the Presidency in 1861, Jacksonian

79. SHESOL, *supra* note 50, at 56–57.

80. See Mark A. Graber, *The Jacksonian Origins of Chase Court Activism*, 25 J. SUP. CT. HIST. 17, 26–27 (2000) (“Jacksonian sympathizers on the Taney Court almost never voted to declare federal laws unconstitutional because Jacksonians in the executive and legislative branches of the national government almost always successfully prevented constitutionally controversial exercises of national power from becoming national law.”).

2019] Why Liberals and Conservatives Flipped 241

judges were the only remaining defense against what they viewed as assaults on the Constitution.⁸¹

We can summarize the way the cycle proceeds in this chart:

81. *See id.* at 28 (“Defeated in the national legislature, opponents of these constitutionally controversial [Republican] policies turned to the courts for redress, a step Jacksonians had not been forced to take before 1860.”).

Table 3: Judicial Review in the Cycle of Regimes

Views About Judicial Review (Relative to the Other Party)	Dominant Party	Opposition Party
Early in Regime	Judicial restraint	Judicial engagement
Middle of Regime	Disagreements emerge (especially if party system is depolarized); generational shift to judicial engagement	Disagreements emerge (especially if party system is depolarized); generational shift to judicial restraint
Late Regime	Judicial engagement	Judicial restraint

[N.B.: The long-term secular trend is increasing reliance on judicial review by both parties.]

If, as I have argued, we are nearing the end of a cycle, what does this analysis hold for the future? President Trump and Senate Majority Leader McConnell have solidified a conservative Republican majority on the Supreme Court, and they are trying to appoint as many conservative Republicans as possible to the lower federal courts. If the dominant party in the next regime is the Democrats, this would make the most likely scenario similar to that faced by FDR in 1937. The new regime will begin with the old regime having appointed most of the federal judiciary and a majority on the Supreme Court.

By contrast, imagine that President Obama had managed to appoint Merrick Garland to replace Antonin Scalia. Then the Roberts Court would be a little like the early years of the Burger Court after Richard Nixon's four appointments. The Roberts Court would have had a moderately liberal Supreme Court majority *before* the new Democratic regime began. This is analogous to the situation that Ronald Reagan faced in 1980, when the Burger Court's moderately conservative majority was already in place.

That, however, is not what happened. McConnell successfully held Scalia's seat open, and Trump obtained not one but two Supreme Court appointments and many lower federal court appointments, solidifying conservative control. As a result, if the Democrats are the new dominant party, we are likely to see a series of confrontations with the federal judiciary as the Democrats try to enact their policy program. As those confrontations happen, liberal Democrats will be increasingly hostile to judicial review. Yet at the same time, because of the long-term trend mentioned earlier, Democrats will be unwilling to give up completely on the powers of judicial review. They will want to defend liberal precedents such as *Roe v. Wade* and

Obergefell v. Hodges.⁸² The Democratic position will probably be more complicated than the strong progressive critique of judicial review in the 1920s and 1930s.

Earlier I noted that attitudes about judicial review begin to change as the new regime gets control of the Supreme Court. Roosevelt did not obtain a Supreme Court appointment until 1937, four years into his presidency. In the present case, it may take the Democrats considerably longer to obtain a new liberal majority. Most of the members of the current Republican Supreme Court majority are still fairly young, and two of the Democrats on the Court are very old. If President Trump wins reelection, he may be able to replace both Ginsburg and Breyer with conservative Republicans. Then the Supreme Court would have a phalanx of seven conservative Republicans, who would defend the values of the Reagan regime for many decades into the future.

III. The Role of Constitutional Theory in the Cycle of Regimes

In 2004, Barry Friedman noticed that constitutional theory ran in cycles.⁸³ In response to the Rehnquist Court's federalism revolution and *Bush v. Gore*,⁸⁴ liberal legal scholars had started to become skeptical of judicial power after many years of defending strong judicial review.⁸⁵ We can connect Friedman's insight to the cycle of the rise and fall of regimes.

I begin, however, with a few caveats.

First, constitutional theories—at least those generally offered by academics and other commentators—tend to focus almost obsessively on the Supreme Court, rather than on the lower federal courts or the state courts.⁸⁶

Second, constitutional theories are shaped by the living memory of the theorists who create them. For example, liberal constitutional theorists who came of age during the constitutional struggle over the New Deal tended to view later developments through that lens. This led older liberal thinkers to be deeply suspicious of Warren Court jurisprudence.⁸⁷ Theorists who came of age during the civil rights era, by contrast, had different views about judicial review. In this sense, constitutional theorists are often “fighting the last war,” which is a major source of intergenerational disagreements.

Third, constitutional theories purport to offer general views about constitutional interpretation and the judicial role. But because they are

82. 135 S. Ct. 2584 (2015).

83. Friedman, *supra* note 1, at 149; *see also* Whittington, *supra* note 1, at 604 n.27 (“Constitutional theory regarding judicial activism and restraint, and relative authority of the various branches of government, is linked to long partisan cycles of reconstruction and affiliation with dominant constitutional norms and institutions.”).

84. 531 U.S. 98 (2000).

85. Friedman, *supra* note 1, at 162–64.

86. *Id.* at 149.

87. Shapiro, *supra* note 37, at 218–19.

produced in historical circumstances, they tend to focus on the canonical cases of their era (for example, *Brown v. Board of Education* or *Roe v. Wade*) and on relatively recent Supreme Court decisions. Constitutional theories may pay relatively little attention to how judicial review operates in wide swaths of doctrine because recent decisions have not made these areas of doctrine particularly salient.⁸⁸

Thus, constitutional theories are often strongly influenced by the Justices' control over their own docket, which is a contingent feature of judicial politics. For example, when a conservative Court constructs the docket, this will eventually create the illusion of a general liberal preference for judicial restraint. But if liberal Justices constructed the Supreme Court's docket, they would pick a different set of cases involving a different set of plaintiffs. Then questions about judicial review and constitutional interpretation might look very different to liberal theorists. The same points apply to conservative theorists. Conservatives will be very skeptical of judicial review when liberals control the docket and liberal public-interest firms make most of the novel constitutional claims. Their views will shift once conservative public-interest firms bring different kinds of novel claims and conservative Justices construct the Supreme Court's docket.

Fourth, it follows that academic theories of constitutional interpretation have little to say about the work of lower federal courts, which cannot choose their own cases, and which must follow existing Supreme Court precedents—regardless of what the constitutional theories of the day say that courts should do.⁸⁹

Fifth, constitutional theory is affected by the long-term secular trend toward more powerful courts, and by the political construction of judicial review by political parties over two centuries. Regardless of their rhetoric

88. See Friedman, *supra* note 1, at 149 (“Theorizing about judicial review necessarily occurs in response to Supreme Court decisions. Those decisions themselves are a function of the composition of the bench, the issues that come before the Court, and the Court’s position vis-à-vis the other branches of government.”); Jack M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703, 1719 (1997) (“Our theories of the Constitution are makeshift attempts, reflecting the concerns of our era, but dressed up as timeless claims about interpretation.”).

89. See Sanford Levinson, *On Positivism and Potted Plants: “Inferior” Judges and the Task of Constitutional Interpretation*, 25 *CONN. L. REV.* 843, 844–45 (1993) (arguing that most theories of constitutional interpretation say little about the role of lower court judges who must follow the Supreme Court’s precedents). As Seth F. Kreimer observes:

[A]lthough accounts of the Supreme Court’s legislative confrontations are legion, few commentators survey the landscape outside of the “high practice” of constitutional confrontation between legislature and judiciary at the Supreme Court level, and law review literature is virtually devoid of informed discussion of the realities of the ways in which the Constitution is used by trial courts.

Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 *WM. & MARY BILL RTS. J.* 427, 430–31 (1997). For exceptions, see generally *id.*; Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 *VAND. L. REV.* 1183 (2017); and Barry Friedman, *The Politics of Judicial Review*, 84 *TEXAS L. REV.* 257 (2005).

about judicial activism, which varies from case to case, contemporary politicians from both parties support judicial review to protect their interests. By the early twenty-first century, it is simply not plausible for politicians on either side to take as strong a position in favor of judicial restraint as progressives once did in the 1920s and 1930s.

When liberals and conservatives flip positions on judicial restraint in successive cases depending on whether the substantive issue is (for example) abortion rights or gun rights, same-sex marriage or the constitutionality of the Voting Rights Act, we must take contemporary arguments for judicial restraint with a very large grain of salt.⁹⁰ Thomas Keck has called the modern approach “bipartisan judicial activism.”⁹¹ He argues that it makes far more sense of what both politicians and the public want and expect from the federal judiciary than most academic constitutional theories would suggest.⁹²

Sixth, the views of legal intellectuals, whether liberal or conservative, are not monolithic. People’s views about constitutional law are shaped by background and experience—including age, race, gender, immigrant status, educational training, and many other factors. My claim is that, in general, as we move through political time, judicial review will look different to successive generations of legal intellectuals.

In contrast to politicians, legal intellectuals resist changing their minds and flip-flopping on these questions. Most will continue to preach the lessons of their youth. To be sure, like Saint Paul on the road to Damascus, a few members of the older generation may have a conversion experience about judicial review midcareer. But if legal intellectuals have more than one conversion experience in their careers, they start to look unserious and more like simple partisans. Instead, changes in theoretical perspective usually come from the next generation of legal intellectuals. This creates perpetual tensions and conflicts within groups of liberal or conservative legal intellectuals.

With these six caveats in mind, consider the two major schools of modern constitutional theory—living constitutionalism and originalism. The relationship of both of these theories to judicial review and judicial restraint has cycled with the rise and fall of political regimes.

90. For example, *Shelby County v. Holder*, 570 U.S. 529 (2013), which struck down § 4 of the Voting Rights Act, was decided on June 25, 2013. The next day, June 26, 2013, the Court struck down § 3 of the Defense of Marriage Act in *United States v. Windsor*, 570 U.S. 744 (2013). Compare *Windsor*, 570 U.S. at 778 (Scalia, J., dissenting) (accusing the majority of “aggrandiz[ing]” the Court’s power and “diminishing” “the power of our people to govern themselves,” arguing that “we have no power under the Constitution to invalidate this democratically adopted legislation”), with *Shelby County*, 570 U.S. at 587 (Ginsburg, J., dissenting) (“[T]he Court’s opinion can hardly be described as an exemplar of restrained and moderate decisionmaking. Quite the opposite. Hubris is a fit word for today’s demolition of the VRA.”).

91. THOMAS M. KECK, *JUDICIAL POLITICS IN POLARIZED TIMES* 257 (2014).

92. *Id.* at 256–57.

A. *The Cycle of Regimes and Living Constitutionalism*

The idea of a living Constitution emerged at the turn of the twentieth century.⁹³ The idea of a constitution that evolved in response to changing conditions soon developed into the idea that the Constitution's application should change with changing circumstances, which, in turn, was adapted to progressive criticisms of the Supreme Court's work in the *Lochner* era. Progressives criticized decisions of the *Lochner*-era Supreme Court that limited federal regulatory power and protected freedom of contract from economic regulation. The Constitution, progressives argued, should evolve to meet changing social and economic circumstances; it must adapt to a world very different from that of the founding.⁹⁴

Thus, in its early incarnation, living constitutionalism was an argument for judicial restraint that criticized how conservative judges exercised judicial review in the then-existing (Republican) regime.⁹⁵ Living constitutionalism attacked the status quo with respect to all three questions of the judicial role: judicial restraint, legal reasoning, and majoritarianism. First, the early version of living constitutionalism was a theory of judicial restraint.⁹⁶ It argued that judges should uphold reforms that sought to deal with new social realities. Second, advocates of a living Constitution argued that conservative judges were engaged in formalist reasoning that was out of touch with the world they lived in. These judges were imposing their laissez-faire economic views on the country under the guise of interpreting the Constitution; they were mangling the Constitution and betraying its true spirit.⁹⁷ Third, advocates of a living Constitution argued that judges should defer to the will

93. Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 *STUD. AM. POL. DEV.* 191, 192–93 (1997).

94. *Id.* at 218–24; Morton J. Horwitz, *The Supreme Court 1992 Term—Foreword: The Constitution of Change Legal Fundamentalism Without Fundamentalism*, 107 *HARV. L. REV.* 30, 51–56 (1993).

95. See, e.g., Brad Snyder, *Frankfurter and Popular Constitutionalism*, 47 *U.C. DAVIS* 343, 360–65 (2013) (describing Frankfurter's frustration with the courts in the 1910s, 1920s, and 1930s, and his embrace of judicial restraint and deference to majorities).

96. See David E. Bernstein, *From Progressivism to Modern Liberalism: Louis D. Brandeis as a Transitional Figure in Constitutional Law*, 89 *NOTRE DAME L. REV.* 2029, 2030–31 (2014) (describing progressive hostility toward judicial review); Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 *CORNELL L. REV.* 527, 543 (2015) (connecting judicial restraint to the emergence of legal realism); Gillman, *supra* note 93, at 220 (connecting judicial restraint to pragmatism).

97. See Horwitz, *supra* note 94, at 77 (“Progressive politicians such as Theodore Roosevelt and progressive historians such as Charles and Mary Beard launched what would become for an entire generation of American thinkers the dominant interpretation of *Lochner*: a shocking example of the Court's capitulation to big business.”); *id.* at 78–79 (explaining that various progressives “maintained that the Supreme Court Justices had, under cover of natural law, written their own political or economic views into the Constitution” or had a “commitment to a mechanical jurisprudence that left the Justices out of touch with the changing social reality”).

of democratically elected majorities, who wanted social and economic reform.⁹⁸

The early version of living constitutionalism corresponds to the views of an opposition party near the end of an old political regime, and of a newly dominant party at the very beginning of the successor regime. FDR argued that the Court was imposing a “horse-and-buggy” vision of the Constitution on a modern nation.⁹⁹ The country needed, in Franklin Roosevelt’s words, “members of the Court who understand . . . modern conditions, . . . who will not undertake to override the judgment of the Congress on legislative policy, . . . [and] who will act as Justices and not as legislators.”¹⁰⁰ This version of living constitutionalism made sense of the judicial role in the early years of the new regime, when the political branches and the Supreme Court were sharply in conflict.

By the end of the 1940s, however, Democratic presidents had appointed all of the Supreme Court’s Justices. New issues confronted the Court, including civil rights and civil liberties. Justice Frankfurter and his followers continued to advance the idea of living constitutionalism as a theory of judicial restraint. Eventually, however, legal intellectuals allied with the New Deal/Civil Rights regime began to employ the idea of a living Constitution in a different way. Now living constitutionalism became an argument for active judicial protection of civil rights and civil liberties.

The Supreme Court’s footnote four in *United States v. Carolene Products Co.*¹⁰¹ suggested how this might come about: the Court should intervene when democracy or the Bill of Rights were at stake.¹⁰² The New Deal Justices began to disagree among themselves about how and when to exercise judicial review. A famous early example was the 1943 decision in *West Virginia State Board of Education v. Barnette*,¹⁰³ which overturned the 1940 decision in *Minersville School District v. Gobitis*.¹⁰⁴ *Barnette* held that the State could not require Jehovah’s Witness schoolchildren to salute the

98. Felix Frankfurter, *The Present Approach to Constitutional Decisions on the Bill of Rights*, 28 HARV. L. REV. 790, 791–93 (1915); see, e.g., Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 371–72 (1916) (describing decisions like *Lochner* as “impair[ing] that public confidence upon which the healthy exercise of judicial power must rest,” and urging deference to legislatures on social and economic issues).

99. FRANKLIN D. ROOSEVELT, The Two Hundredth and Ninth Press Conference. May 31, 1935, in 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 200, 221 (1935) (“We have been relegated to the horse-and-buggy definition of interstate commerce.”).

100. FRANKLIN D. ROOSEVELT, A “Fireside Chat” Discussing the Plan for Reorganization of the Judiciary. Washington, D.C. March 9, 1937, in 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 122, 129 (1941).

101. 304 U.S. 144 (1938).

102. *Id.* at 152 n.4.

103. 319 U.S. 624 (1943).

104. 310 U.S. 586 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

flag, arguing that the First Amendment and other fundamental rights should be “beyond the reach of majorities and officials,”¹⁰⁵ while Justice Frankfurter’s dissent continued to preach the virtues of judicial restraint.¹⁰⁶

The Supreme Court’s 1954 decision in *Brown v. Board of Education*¹⁰⁷ marked a crucial turning point. Although all of the Justices—including Frankfurter—supported the decision, Chief Justice Earl Warren’s opinion invoked the idea of a living Constitution as a justification for judicial review, not judicial restraint:

[W]e cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.¹⁰⁸

Writing in 1963 in the *Harvard Law Review*, Yale Law Professor Charles Reich, in a tribute to Justice Hugo Black, argued that the growth of government power following the New Deal meant that courts had to be vigilant in protecting civil rights and civil liberties in compensation.¹⁰⁹ The living Constitution, Reich argued, required judges to be active, not passive, in defense of these rights and liberties, and to read constitutional liberties broadly in order to meet contemporary versions of the problems they were designed to prevent. This “concept of ‘faithful adherence’ keeps the Bill of Rights alive and capable of growth along with the rest of the Constitution.”¹¹⁰ Although Reich attributed these ideas to Justice Black, he was actually

105. *Id.* at 638, 642.

106. *See id.* at 666 (Frankfurter, J., dissenting) (“As appeal from legislation to adjudication becomes more frequent, and its consequences more far-reaching, judicial self-restraint becomes more and not less important, lest we unwarrantably enter social and political domains wholly outside our concern.”).

107. 347 U.S. 483 (1954).

108. *Id.* at 492–93. At the first oral argument in *Brown*, Justice Burton invoked a similar idea: “But the Constitution is a living document that must be interpreted in relation to the facts of the time in which it is interpreted. Did we not go through with that in connection with [the] child labor cases, and so forth?” RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 575 (rev. & expanded ed. 2004). Note how Burton equates the earlier focus on government power (child labor) to the new concern with civil rights, civil liberties, and equality (school desegregation).

109. Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 729 (1963) (“Today virtually nothing in the Constitution effectively limits the massive advance of government power except the Bill of Rights. It is the final barrier, all others having been overwhelmed.”); *see also* Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 653 (1994) (“[T]he removal of traditional restrictions on legislative power not only allowed powerholders to take control of a tumultuous economy and mitigate the social costs of industrialization, but also to extend power into areas that these reformers considered inviolate.”).

110. Reich, *supra* note 109, at 734.

articulating the views of many liberal legal intellectuals who wanted courts to protect civil rights and civil liberties.

In 1966, in *Harper v. Virginia Board of Elections*,¹¹¹ Justice William O. Douglas took these ideas one step further. He argued that the Supreme Court could and should recognize new rights not specifically mentioned in the text.¹¹² Virginia could not impose a poll tax that disenfranchised its poorest citizens because there was an unenumerated guarantee of an equal right to vote under the Fourteenth Amendment's Equal Protection Clause.¹¹³

In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights . . . [n]otions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.¹¹⁴

His erstwhile ally, the liberal originalist Justice Hugo Black, dissented vigorously, arguing that the Equal Protection Clause meant no such thing.¹¹⁵ The previous year, in *Griswold v. Connecticut*,¹¹⁶ the Court, in another opinion by Douglas, recognized an unenumerated right of marital privacy that protected the purchase and use of contraceptives.¹¹⁷ Once again, Black dissented.¹¹⁸

By the 1960s and 1970s, the concept of a living Constitution had mutated from a Progressive-era *critique* of how the *Lochner* Court had engaged in judicial review to a liberal *justification* of judicial review to protect important rights and liberties—whether or not explicitly mentioned in the Constitution's text. By the mid-1970s, liberal legal scholars had swung decisively toward strong judicial review as necessary to protect liberty and equality.

The change was generational, with different thinkers taking different positions over the years. Liberal legal-process scholars like Herbert Wechsler (b. 1909) were skeptical of the Warren Court's innovations, and continued to argue for judicial restraint and adherence to “neutral principles” of constitutional law that would prevent the courts from appearing political.¹¹⁹

111. 383 U.S. 663 (1966).

112. *Id.* at 665–66; *cf. id.* at 675–76 (Black, J., dissenting) (pointing out that the Court was adding new rights to the text).

113. *Id.* at 665–66.

114. *Id.* at 669.

115. *Id.* at 675–78 (Black, J., dissenting).

116. 381 U.S. 479 (1965).

117. *Id.* at 485–86.

118. *Id.* at 507 (Black, J., dissenting).

119. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15–16 (1959).

Frankfurter's mentee, the great Yale constitutional theorist Alexander Bickel (b. 1924), tried to take a middle position. He supported *Brown* and wanted the Court to protect civil rights and civil liberties, but argued that in a large number of cases the Court should employ the "passive virtues" and avoid exercising judicial review in order to conserve its political capital for the cases that mattered most.¹²⁰ As the Court and the Democratic party moved further to the left, Bickel became disillusioned and grew more conservative. In his 1969 Holmes Lectures, *The Supreme Court and the Idea of Progress*,¹²¹ he warned that the Warren Court's aggressive use of judicial review would backfire.¹²² Bickel's intellectual odyssey reflects the intellectual strains on midregime legal intellectuals who experienced an increasing dissonance between the regime's changing ideological commitments and their settled views about the judicial role.

John Hart Ely (b. 1938) dealt with the tension in a different way. He sought to confine the scope of judicial review to the protection of the political process, while maintaining the progressive theory of judicial restraint elsewhere.¹²³ Expanding the theory of *Carolene Products*, Ely argued for strong judicial review to protect democracy, free speech, and the rights of criminal defendants, but stopped short of endorsing the Court's reproductive-rights decisions, and famously criticized *Roe v. Wade*.¹²⁴ Other scholars, like Ronald Dworkin (b. 1931), Owen Fiss (b. 1938), Paul Brest (b. 1940), and Laurence Tribe (b. 1941), offered full-throated defenses of judicial review in defense of liberal-rights jurisprudence.¹²⁵

By the 1970s, the Frankfurterian vision of judicial restraint had been eclipsed in the younger generation of liberal legal intellectuals. The progressives' ideas of judicial restraint and majoritarianism were now taken up by political conservatives and conservative legal intellectuals—primarily in the Republican Party—who objected to liberal judicial decisions in the New Deal/Civil Rights regime.

120. See generally Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

121. ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).

122. *Id.* at 173 (arguing that the Court's desegregation, apportionment, and school-prayer cases "are heading toward obsolescence, and in large measure abandonment. . . . [I]t must be read as a lesson").

123. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 181 (1980).

124. See generally John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

125. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 148–49 (1978); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, at iv (1st ed., 1978); Paul Brest, *The Supreme Court 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 21–22 (1976); Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 1–5 (1979).

B. *The Cycle of Regimes and Originalism*

The story of originalism has a similar structure and takes up where the story of living constitutionalism leaves off. In the 1970s, Robert Bork and Raoul Berger adapted the progressive critique of *Lochner* to conservative ends.¹²⁶ They connected progressive ideas about judicial restraint to the philosophy of original intention, just as the liberal Justice Hugo Black had in his dissent in *Griswold v. Connecticut*.¹²⁷ (In fact, Black's *Griswold* dissent makes virtually every argument for judicial restraint that conservative originalists would eventually adopt.) Conservatives used originalism to criticize the liberal jurisprudence of the Warren and early Burger Courts, including criminal procedure and First Amendment decisions, *Griswold v. Connecticut*, and *Roe v. Wade*.¹²⁸

The idea of using originalism as a critique of the status quo did not begin with conservatives. Franklin Roosevelt had defended the New Deal as a return to the Framers' flexible vision of a national government that was able to meet the crises and challenges of the future.¹²⁹ The Warren Court had used originalist arguments in many of its famous civil rights and civil liberties cases.¹³⁰ Criticizing the Warren Court's use of history, Alfred Kelly noted that the Warren Court often used appeals to the Founding as a "precedent-breaking" device that allowed judges to sweep away old doctrinal structures and put new ones in their stead under the guise of preserving continuity.¹³¹

126. Johnathan G. O'Neill, *Raoul Berger and the Restoration of Originalism*, 96 NW. U. L. REV. 253, 255 (2001) ("Considered in the history of twentieth-century American jurisprudence, Berger's originalism elaborated the legal positivist majoritarianism of Progressive and process jurisprudence."); see also JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 122–23, 165–66, 187–88 (2005) (arguing that both Burger and Bork were influenced by midcentury "process-restraint" jurisprudence, but both believed that even this gave judges too much discretion).

127. *Griswold v. Connecticut*, 381 U.S. 479, 507, 512–13, 519–22 (1965) (Black, J., dissenting) (comparing the Court's decision to *Lochner v. New York*).

128. Whittington, *supra* note 1, at 601–03.

129. ROOSEVELT, *supra* note 100, at 124; FRANKLIN D. ROOSEVELT, "The Constitution of the United States Was a Layman's Document, Not a Lawyer's Contract." Address on Constitution Day, Washington, D.C. September 17, 1937, in 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 359, 362–63 (1941).

130. See FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM 92–96 (2013) (describing the use of adoption history in the Warren Court school prayer, reapportionment, and criminal procedure opinions); *id.* at 136–43 (collecting statistics on the Warren Court's use of originalist rhetoric). Cross notes, for example, that the Warren Court used *The Federalist* "more than any previous Court [in] American history," although usage increased even further in the Burger and Rehnquist Courts' years. *Id.* at 136. The regular and frequent use of adoption history in Supreme Court opinions began with the Warren Court, not the conservative courts that succeeded it. *Id.* at 96.

131. Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 125–26; see also *id.* at 131 ("In search of some adequate guiding principle upon which to support their libertarian interventionism in the social order, the reformist activists on the Court initiated a new

This is, in fact, a familiar use of a return to origins: it allows a critic to delegitimize existing practices and start over again by appealing to an even older authority and a deeper fidelity.¹³² Now that liberals had established a new status quo, conservatives employed originalist rhetoric to attack it as well.

This early version of originalism was primarily a criticism of judicial activism by liberal judges. Keith Whittington explains that, like much constitutional theory, “originalism was largely oriented around the actions of the U.S. Supreme Court,” so that “originalism’s agenda was whatever was on the Court’s agenda.”¹³³ Hence, the early version of originalism was primarily a way of critiquing the Court’s civil rights and civil liberties decisions.¹³⁴

Like living constitutionalism before it, conservative originalism criticized the status quo on grounds of judicial restraint, legal reasoning, and majoritarianism. First, like early versions of progressive living constitutionalism, conservative originalism was a theory of judicial restraint.¹³⁵ Courts should not expand rights or recognize novel rights claims against governments. Second, like their progressive forebears, conservative originalists argued that liberal judges in the New Deal/Civil Rights regime had engaged in a defective form of legal reasoning.¹³⁶ Their decisions had no

era of historically oriented adjudication.”). The Justices flirted with the idea of using an appeal to the framers of the Fourteenth Amendment to justify overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896). Finding the historical record inconclusive, they eventually settled on social science as the precedent-breaking device. Kelly, *supra*, at 142.

132. Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 674–75 (2013); Jack Balkin, *Why Are Americans Originalist?*, in *LAW, SOCIETY AND COMMUNITY: SOCIO-LEGAL ESSAYS IN HONOUR OF ROGER COTTERRELL* 309–26 (Richard Nobles & David Schiff eds., 2014); *see also* AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 198 (2012) (explaining that the reason why the Warren Court overturned so many precedents is that it was returning to “the deepest ideals of the written Constitution”). Justice Hugo Black, the most famous liberal originalist, exemplified liberals’ turn to history both before and during the Warren Court era; indeed, in Bruce Ackerman’s words, he is “the original originalist on the modern Supreme Court.” Bruce Ackerman, *The Living Constitution*, 120 *HARV. L. REV.* 1737, 1799 (2007); *see also* PHILIP C. BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 31 (1982) (explaining that Justice Hugo Black’s turn to text and history allowed him “to restore to judicial review the popular perception of legitimacy which the New Deal crisis had jeopardized”); Akhil Reed Amar, *Hugo Black and the Hall of Fame*, 53 *ALA. L. REV.* 1221, 1242 (2002) (arguing that Justice Black was the true intellectual leader of the Warren Court).

133. Whittington, *supra* note 1, at 601.

134. *Id.*

135. *Id.* at 602 (“The primary commitment within this critical posture was to judicial restraint. Originalist methods of constitutional interpretation were understood as a means to that end. . . . [O]riginalism was thought to limit the discretion of the judge.”).

136. *Id.* at 601 (“Strikingly, a core theme of originalist criticisms of the Court was the essential continuity between *Lochner v. New York* and *Griswold v. Connecticut*. It is an intriguing feature of conservative critiques of the Court during this era that they mirror the central critique of the *Lochner*

basis in the Constitution's text, history, or structure and merely substituted their personal ideology for the law. This betrayed the true meaning and spirit of the Constitution. The theory of a "living Constitution" was nothing more than a cover for the belief that unelected judges could decide for themselves what was best for the country.¹³⁷ Channeling progressive-era rhetoric, Robert Bork argued, for example, that *Griswold v. Connecticut* was no better than *Lochner v. New York*.¹³⁸

Third, like progressive living constitutionalists, conservative originalists argued that judges should defer to the will of democratically elected majorities.¹³⁹ Liberal jurists were just like the members of the Old Court that opposed FDR.¹⁴⁰ They were elitists who were out of touch with the public's values and views. Originalism was necessary to restrain judges from imposing their personal preferences, and to maintain the separation of law from politics.¹⁴¹

Once again, these kinds of attacks made perfect sense for conservatives in the last years of the New Deal/Civil Rights regime and the first years of the new Reagan regime. Although Richard Nixon had moved the Court to the right, Republican presidents had not yet thoroughly reshaped the federal courts, and there was still a considerable amount of liberal jurisprudence to object to. Accordingly, Reagan's second Attorney General, Edwin Meese, announced that the Reagan Administration was committed to a jurisprudence of original intention,¹⁴² and the Reagan Justice Department's Office of Legal

Court favored by the New Dealers in the 1930s: that the justices were essentially making it up and 'legislating from the bench.'").

137. See William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693, 695 (1976) (complaining that "nonelected members of the federal judiciary may address themselves to a social problem" even though they are "responsible to no constituency").

138. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 99 (1990) ("*Griswold*, as an assumption of judicial power unrelated to the Constitution is, however, indistinguishable from *Lochner*."); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 11 (1971) (comparing *Griswold* to *Lochner*).

139. Whittington, *supra* note 1, at 602 ("The originalist Constitution, as [early originalists] imagined it, was primarily concerned with empowering popular majorities.").

140. Attorney General Edwin Meese, who championed the development of originalism in the Reagan Justice Department, explained that "[l]ike the Warren Court decades later, the Court in the *Lochner* era ignored the limitations of the Constitution and blatantly usurped legislative authority." Edwin Meese III, *A Return to Constitutional Interpretation from Judicial Law-Making*, 40 N.Y.L. SCH. L. REV. 925, 927 (1996).

141. Bork, *supra* note 138, at 6–7; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854, 863–64 (1989).

142. See Edwin Meese III, U.S. Att'y Gen., Address before the American Bar Association (July 9, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 1, 9 (Paul G. Cassell ed., 1986) (arguing that constitutional jurisprudence "should be a Jurisprudence of Original Intention"); Edwin Meese III, U.S. Att'y Gen., Address before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), in *OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK* 91, 95, 96, 98 (1987) (arguing for a

Policy began compiling lists of cases that should be overruled because they were inconsistent with originalist principles.¹⁴³

By the 1990s, however, the political situation had changed. The Supreme Court had a conservative majority. Its docket reflected a conservative policy agenda. A reflexive posture of judicial restraint increasingly made less sense. The question was no longer what courts should not do. It was what the courts should do.¹⁴⁴

In the meantime, conservative litigators and conservative public-interest firms began bringing a series of federalism and rights claims that promoted conservative values and attacked liberal laws and policies.¹⁴⁵ As Steve Teles has explained, conservative public-interest lawyers discovered an important structural bias in public-interest lawyering in the United States—one that was already known to liberal lawyers in the previous generation.¹⁴⁶ In general,

“jurisprudence of original intention”); Edwin Meese III, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 22, 25–26, 30 (1985) (same); Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 465–66 (1986) (“It has been and will continue to be the policy of this administration to press for a jurisprudence of original intention.”) [hereinafter Meese, *Bulwark of a Limited Constitution*].

143. See OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION 3–10 (1988) (describing originalist interpretive principles for Reagan Administration lawyers and listing “Decisions Inconsistent with These Principles of Interpretation”); OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION 185 (1988) (discussing areas for proposed changes in constitutional law); Steven M. Teles, *Transformative Bureaucracy: Reagan’s Lawyers and the Dynamics of Political Investment*, 23 STUD. AM. POL. DEV. 61, 75–82 (2009) (describing how the Meese Justice Department sought to promote and legitimize originalism as a method of constitutional interpretation) [hereinafter Teles, *Transformative Bureaucracy*]; Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 396–99 (2003) (discussing the Reagan Justice Department’s *Constitution in the Year 2000* project and the Reagan Administration’s strategy of judicial appointments to change the direction of constitutional doctrine).

144. As Keck observes:

None of the five conservatives, it is worth reiterating, have adopted a posture of pure judicial deference in the Frankfurter mold. . . . [B]y the time they came to the bench, the very mission of an independent Supreme Court had come to be identified—in the minds of ordinary citizens and of the justices themselves—with the enforcement of rights-based limits on political action. For the justices to abandon this role would be to call into question the very justification for their office.

KECK, *supra* note 63, at 281

145. JEFFERSON DECKER, *THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT* 2 (2016); AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* 148–49 (2015); ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* 8 (2008) [hereinafter SOUTHWORTH, *LAWYERS OF THE RIGHT*]; STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 232 (2008) [hereinafter TELES, *CONSERVATIVE LEGAL MOVEMENT*]; Ann Southworth, *Lawyers and the Conservative Counterrevolution*, 43 LAW & SOC. INQUIRY 1698, 1698–700 (2018) (reviewing Decker and Hollis-Brusky); see also Teles, *Transformative Bureaucracy*, *supra* note 143, at 61–83.

146. See TELES, *CONSERVATIVE LEGAL MOVEMENT*, *supra* note 145, at 232 (explaining that,

there are greater rewards for bringing cases that *challenge* government discretion and authority than for bringing cases that *defend* it.¹⁴⁷ Put another way, claims that promote liberty and seek to limit government discretion tend to work better for public-interest firms than claims that hope to buttress government power. First, funders for public-interest litigation are more impressed by challenges that succeed in striking things down or halting government policies; second, governments already have a group of lawyers to defend their actions.

This structural feature of public-interest work produced a bias toward libertarian rights claims and away from traditional conservative defenses of government authority. For example, lawyers representing Christian conservatives tended to make rights claims under the Free Speech and Free Exercise Clauses rather than defend municipal governments from Establishment Clause claims.¹⁴⁸ The result is that conservative litigators did what liberal litigators had done decades before: They began producing a series of rights claims that required courts to use judicial review to vindicate.

The Supreme Court's conservative majority now began to use judicial review energetically, to protect the rights of states, commercial advertisers, and conservative Christians; to limit liberal civil rights laws; and to strike down liberal affirmative-action programs and campaign-finance regulations.¹⁴⁹ These decisions, Thomas Keck explains, "created what we might think of as a 'policy feedback' effect, with the Court's protection of conservative rights claims fostering the development of organized conservative interests committed to defending judicially enforceable rights, and with those interests, in turn, demanding ever more active judicial protection."¹⁵⁰ As the Court's docket changed, originalism took on a new role. It was no longer enough to justify judicial restraint against liberal rights claims; now originalism had to explain and justify an increasingly active use of judicial review to protect conservative rights and values.¹⁵¹

By the turn of the twenty-first century, originalism had largely shed its role as a theory of judicial restraint and majoritarianism. Instead, originalism

like liberals before them, conservative public litigators were driven to "strip executive institutions of discretion and force them to operate in accordance with clear national rules or professional standards"); *id.* at 264 (noting that conservative public-interest firms took advantage of "a structural bias in the American legal system orienting public-interest law to challenging governmental discretion and power rather than (as many traditional conservatives preferred) defending it").

147. *Id.* at 231–32, 264, 324 n.29.

148. *Id.* at 324 n.29 (citing STEPHEN BROWN, TRUMPING RELIGION: THE NEW CHRISTIAN RIGHT, THE FIRST AMENDMENT, AND THE COURTS (2004)).

149. See KECK, *supra* note 63, at 267 ("[T]he conservative justices' chief motivation has been their hostility toward modern liberalism rather than a particular vision of judicial power.").

150. *Id.* at 282.

151. Whittington, *supra* note 1, at 604 ("As conservatives found themselves in the majority, conservative constitutional theory—and perhaps originalism—needed to develop a governing philosophy appropriate to guide majority opinions, not just to fill dissents.").

had become a theory that held that courts should actively protect important rights, structures, and interests from interference by the political branches. Its central rationale was no longer majoritarianism but judicial duty to confront unconstitutional laws and executive actions.¹⁵² Conservative judges and Justices now used originalism to argue that they were required to strike down laws and ignore majority will when the Constitution's original meaning—or the basic structural assumptions of the Constitution—required it. (At the same time, primarily because of abortion and gay rights, conservative politicians continued to pretend that Earl Warren was still Chief Justice and warned the public against elitist judges legislating from the bench.)

Conservative intellectuals sought to create a new vocabulary to explain the transformation. A few conservative intellectuals attempted to rehabilitate the concept of “judicial activism” in defense of original meaning and limited government.¹⁵³ Others distinguished between judicial *activism* (a misleading term) and judicial *engagement* (to protect individual liberty and limited government);¹⁵⁴ between judicial *passivism* (bad as a general principle) and judicial *restraint* (in appropriate cases);¹⁵⁵ or between judicial *deference* (often bad) and judicial *constraint* (i.e., being constrained by the Constitution's original meaning).¹⁵⁶

Once again, the shift from originalism as a theory of majoritarianism and judicial deference to originalism as a defense of judicial engagement was gradual and generational, with many intermediate positions. The oldest group of conservative originalists, which included Raoul Berger (b. 1901), Robert Bork (b. 1927), Lino Graglia (b. 1930), Edwin Meese (b. 1931), and Antonin

152. As the Institute for Justice, a conservative public-interest law firm, explained: “Today, we have far more government than the Constitution permits and far less freedom than the Constitution guarantees. We need a cutting-edge approach to judging in order to restore long-lost liberty and keep government in check in the years to come. That approach is *judicial engagement*.” *What Is Judicial Engagement?*, INST. FOR JUST., <http://ij.org/center-for-judicial-engagement/programs/what-is-judicial-engagement> [https://perma.cc/L3BL-NYL8].

153. Clint Bolick, *The Proper Role of “Judicial Activism,”* 42 HARV. J.L. & PUB. POL’Y 1, 1 (2019) (“I define judicial activism as any instance in which the courts strike down a law that violates individual rights or transgresses the constitutional boundaries of the other branches of government. In that regard, the problem with judicial activism is not that there is far too much, but that there has been far too little.”).

154. CLARK M. NEILY III, *TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION’S PROMISE OF LIMITED GOVERNMENT* 10 (2013).

155. Edward Whelan, *The Presumption of Constitutionality*, 42 HARV. J.L. & PUB. POL’Y 17, 20 (2019) (defining “judicial passivism” as “a court’s wrongful failure to enforce constitutional rights and limits on governmental power. Judicial restraint is the sound mean between the two extremes of judicial activism and judicial passivism. Judicial restraint means that judges do not wrongly decline to apply democratic enactments”).

156. Randy Barnett, *Constraint vs. Deference: Two Possible Meanings of ‘Judicial Restraint,’* WASH. POST: VOLOKH CONSPIRACY (June 29, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/29/constraint-vs-deference-two-possible-meanings-of-judicial-restraint/?utm_term=.c2778e521eca [https://perma.cc/76A9-U7JE].

Scalia (b. 1934), generally argued for judicial restraint in controversial cases—except, of course, for affirmative action, which conservative originalists believed was unconstitutional but never quite squared with originalism. Meese, Berger, and Graglia claimed that the Warren Court’s incorporation of the Bill of Rights against state governments was inconsistent with originalism.¹⁵⁷ Movement conservatives would later abandon that position, which was not well supported historically.¹⁵⁸ Moreover, the notion that the Bill of Rights did not bind state and local governments made little sense strategically as the focus shifted from the Warren Court’s criminal procedure decisions to conservative constitutional challenges to state and local restrictions on commercial speech, land use, and gun rights.

In its early incarnation, originalism was closely linked to majoritarianism and the rejection of liberal rights claims.¹⁵⁹ Scalia’s 1989 Taft Lecture, *Originalism: The Lesser Evil*,¹⁶⁰ argued that a central reason to adopt originalism was that it forced judges to restrain themselves and respect majority will.¹⁶¹ As the Supreme Court’s docket changed, however, the central cases before the Court involved conservative requests to exercise judicial review—in cases brought by conservative public-interest firms and litigators and supported by conservative amicus briefs written by conservative law professors and think tanks.¹⁶² Fidelity to original meaning was often (but not always) a justification. Conservative legal intellectuals increasingly argued that the courts should exercise judicial review to strike down unconstitutional laws and policies, cheering on the Rehnquist and Roberts Courts when they did so. Scalia himself joined or wrote many of these opinions. Like many conservative jurists, he retained the older rhetoric of judicial restraint and majoritarianism primarily for prominent “culture

157. RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 154–56 (1977) (arguing that the framers of the Fourteenth Amendment did not intend to incorporate the Bill of Rights); Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435, 440, 445–46 (1981) (same); Lino A. Graglia, “Interpreting” the Constitution: Posner on Bork, 44 STAN. L. REV. 1019, 1033–34 (1992) (“[T]here is very little basis for the implausible proposition that the states that ratified the Fourteenth Amendment understood that it would ‘incorporate’ the Bill of Rights.”); Meese, *Bulwark of a Limited Constitution*, *supra* note 142, at 463–64 (“[N]owhere else has the principle of Federalism been dealt such a politically violent and constitutionally suspect blow as by the theory of incorporation.”).

158. The turning point in scholarly opinion was the work of MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986) (showing that the Republican drafters of the Fourteenth Amendment sought to enforce the Bill of Rights against the states).

159. Whittington, *supra* note 1, at 601.

160. Scalia, *supra* note 141.

161. *Id.* at 862–64.

162. SOUTHWORTH, *LAWYERS OF THE RIGHT*, *supra* note 145, at 39–40 (2008); TELES, *CONSERVATIVE LEGAL MOVEMENT*, *supra* note 145, at 220.

war” cases, especially those involving abortion and gay rights.¹⁶³ Justice Clarence Thomas (b. 1948) adopted even more forceful originalist rhetoric, arguing in 1995 for rolling back substantial parts of the New Deal settlement.¹⁶⁴ Thomas, even more than Scalia, became a hero to the younger generation of conservative legal intellectuals who sought to use the courts to advance conservative constitutional principles.

As with liberals, the transition between generations was gradual rather than sharp. The older generation of conservative originalists like Bork, Scalia, and Graglia, essentially accepted the New Deal settlement and the progressive theory of judicial restraint that came with it. In the 1980s, libertarian intellectuals like Bernard Siegan and Richard Epstein proposed that courts once again protect economic liberties under the Fourteenth Amendment.¹⁶⁵ But most of the older generation of originalists disagreed; they had absorbed the progressive critique of the Old Court and were not about to change their minds: *Griswold*, *Roe*, and *Lochner* were equally illegitimate.¹⁶⁶

By contrast, younger generations of conservative legal intellectuals were far more willing to question the New Deal and reject the nostrums of judicial restraint—which, they correctly understood, had been borrowed from their political adversaries, the progressives.¹⁶⁷

163. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626, 2629 (2015) (Scalia, J., dissenting) (calling the Court’s decision a “threat to American democracy” and a “judicial Putsch”); *United States v. Windsor*, 570 U.S. 744, 778 (2013) (Scalia, J., dissenting) (“We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation.”); *Lawrence v. Texas*, 539 U.S. 558, 603–04 (2003) (Scalia, J., dissenting) (“[J]udgments [about legal protection for same-sex relations] are to be made by the people, and not imposed by a governing caste that knows best.”); *Romer v. Evans*, 517 U.S. 620, 652–53 (1996) (Scalia, J., dissenting) (criticizing the Court for imposing its elite values on the citizens of Colorado, who seek “to prevent piecemeal deterioration of the sexual morality favored by a majority”); *Planned Parenthood v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (“[B]y foreclosing all democratic outlet for the deep passions this issue arouses . . . [T]he Court merely prolongs and intensifies the anguish.”).

164. *United States v. Lopez*, 514 U.S. 549, 584–85 (1995) (Thomas, J., concurring) (arguing for reconsidering the substantial-effects test in Commerce Clause doctrine).

165. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 30–31 (1985); BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 304 (2d ed. 2006).

166. See, e.g., BORK, *supra* note 138, at 225 (“If we reject *Lochner* and *Adkins*, then we cannot have *Griswold* and *Roe*.”); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 829–31 (1986) (rejecting special judicial protection of economic liberties); see also Colby & Smith, *supra* note 96, at 565–69 (noting broad rejection among conservative originalists of Siegan’s and Epstein’s early attempts to revive constitutional protection of economic liberties).

167. See, e.g., RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* 17 (2016) (“[C]onservatives had inherited their commitment to judicial restraint from the progressive supporters of the New Deal, who had opposed the Supreme Court holding Congress to its enumerated powers.”) [hereinafter BARNETT, *OUR*

A Federalist Society debate in 2013 between Judge J. Harvie Wilkinson III (b. 1944) and Georgetown University Law Professor Randy Barnett (b. 1952) symbolized the evolution of conservative theories about the Constitution. The debate was entitled *RESOLVED: Courts Are Too Deferential to the Legislature*, a proposition that would have come as a shock to the first generation of conservative originalists like Bork, Berger, and even the early Antonin Scalia.¹⁶⁸

Wilkinson, who supported the Rehnquist Court's federalism revolution, took a position roughly analogous to John Hart Ely's attempt at a middle way. In his view, originalists could and should use judicial review to protect the Constitution's structural guarantees, but not to adjudicate substantive disputes.¹⁶⁹ This approach distinguished modern conservative originalists from the activism of the *Lochner* Court and the Warren Court.¹⁷⁰ Wilkinson rejected the idea that originalists should use the Fourteenth Amendment to protect new rights, including economic liberties.¹⁷¹ This was no better than the liberal judicial activism that conservatives had long criticized.¹⁷² In his 2012 book, *Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance*,¹⁷³ Wilkinson described the Court's decisions in *Heller* and *McDonald*, which recognized an individual right

REPUBLICAN CONSTITUTION]; Jack M. Balkin, "Wrong the Day It Was Decided": *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 678 (2005) (noting that it is no longer obvious for many legal thinkers that *Lochner* was incorrectly decided); Randy E. Barnett, *After All These Years, Lochner Was Not Crazy—It Was Good*, 16 GEO. J.L. & PUB. POL'Y 437, 437 (2018) (arguing that *Lochner* was a "reasonable and good decision") [hereinafter Barnett, *After All These Years*]; Colby & Smith, *supra* note 96, at 569–71 ("In the last decade, however, a new wave of libertarian scholars—operating closer to the mainstream of conservative legal thought—has argued anew for a revival of *Lochner*'s aggressive scrutiny for regulations that interfere with economic liberty.").

168. *Sixth Annual Rosenkranz Debate - RESOLVED: Courts Are Too Deferential to the Legislature - Event Audio/Video*, FEDERALIST SOC'Y (Nov. 25, 2013), <https://fedsoc.org/commentary/videos/sixth-annual-rosenkranz-debate-resolved-courts-are-too-deferential-to-the-legislature-event-audio-video> [<https://perma.cc/VEE8-Q9LL>].

169. In *Brzonkala v. Virginia Polytechnic Institute & State University*, 169 F.3d 820, 893 (4th Cir. 1999) (Wilkinson, C.J., concurring), *aff'd*, *United States v. Morrison*, 529 U.S. 598 (2000), Wilkinson recognized that the Rehnquist Court's federalism revolution was a contemporary form of judicial activism. But he argued that it was a more defensible form of judicial activism than that of the *Lochner* Court or the Warren Court because "the outcomes of the current era have not consistently favored a particular constituency," *id.*; because "[c]ourts are not motivated by a desire that a particular substantive meaning be given to a constitutional term such as commerce, but instead by the duty to find that some meaning must exist," *id.* at 894; and because "our role in this modern era is not as substantive adjudicators, but as structural referees. . . . Instead of aggressively pursuing substantive preferences, this court validates a structural principle found throughout the Constitution." *Id.* at 895. Wilkinson argued that whether courts should incorporate the Bill of Rights was a structural question, not a substantive question. *Id.* at 896.

170. *Id.* at 895.

171. *Id.* at 896.

172. *Id.*

173. J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* (2012).

under the Second Amendment, as nothing more than judicial activism, and even compared them to the *bête noir* of constitutional conservatism, *Roe v. Wade*.¹⁷⁴

In one respect, Wilkinson's position was consistent with familiar originalist themes: disputes over hot-button social issues should be left to majorities to decide, and the federal courts should not reach out to recognize novel constitutional rights claims. His views, however, were increasingly out of step with the conservative movement's constitutional vision. During the 2013 Federalist Society debate, the room, filled with younger conservatives, was mostly on Barnett's side.¹⁷⁵

Barnett, who represented a younger generation of libertarian conservatives—most of them younger than he was—had helped develop the constitutional arguments against Obamacare.¹⁷⁶ He argued that the concept of “judicial restraint” was a snare that kept courts from enforcing the Constitution.¹⁷⁷ Barnett would eventually assert that *Lochner v. New York*—the central target of Robert Bork's early originalist arguments—was actually correctly decided.¹⁷⁸ He was not alone: George Mason Law Professor David Bernstein (b. 1967) wrote a 2011 book entitled *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform*.¹⁷⁹

Meanwhile, Chief Justice Roberts (b. 1955), three years younger than Barnett, had not gotten the memo. In his 2015 dissent in the same-sex marriage case, *Obergefell v. Hodges*, he accused the majority of behaving just like the Justices in *Lochner v. New York*. It was not meant as a

174. *Id.* at 57–58 (arguing that *Heller* and *McDonald* are originalist activism); *id.* at 68 (arguing that *Heller* and *McDonald* were an “originalist parallel” to *Roe*, and “showed originalism to be susceptible to the temptation of imposing judicial value judgments based on thin and shaky grounds”).

175. Brian Beutler, *The Rehabilitationists*, NEW REPUBLIC (Aug. 30, 2015), <https://newrepublic.com/article/122645/rehabilitationists-libertarian-movement-undo-new-deal> [https://perma.cc/M2G2-VXVC] (“‘One of the leaders of the Federalist Society—one of the senior staff—said clearly I had the room,’ Barnett told me. ‘It wasn’t that I beat J. Harvie Wilkinson in a debate—who knows?—it’s just that the room was with me. The room would not have been with me ten years ago.’”); Josh Blackman, *The New Republic on ‘The Rehabilitationists,’* JOSH BLACKMAN’S BLOG (Aug. 30, 2015), <http://joshblackman.com/blog/2015/08/30/the-new-republic-on-the-rehabilitationists/> [https://perma.cc/Q7UC-6PSD] (describing the event and noting “the shifting tides in the Federalist Society crowd towards the perspective of judicial engagement. It is my distinct sense that people of my generation are much closer to the Volokh Conspiracy wing than the Bork wing”).

176. HOLLIS-BRUSKY, *supra* note 145, at 134; Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 582 (2010).

177. BARNETT, OUR REPUBLICAN CONSTITUTION, *supra* note 167, at 14–18; Randy E. Barnett, *The Wages of Crying Judicial Restraint*, 36 HARV. J.L. & PUB. POL’Y 925, 931–32 (2013).

178. Barnett, *After All These Years*, *supra* note 167, at 437.

179. DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

compliment. For Roberts, *Lochner* was the very symbol of what judges should not do.¹⁸⁰

Similar developments occurred in administrative law. During the early years of the Reagan Administration, conservatives argued for deference to administrative agencies. Justice Scalia offered a famous defense of the *Chevron* doctrine—which requires courts to defer to reasonable agency interpretations of the statutes administrative agencies enforce¹⁸¹—in *Duke Law Journal* in 1989, the same year as his majoritarian defense of originalism.¹⁸² By the 2010s, Barack Obama had demonstrated how liberals could use administrative agencies to advance their policy goals in areas ranging from environmental law to immigration. Conservatives, who had never been all that happy with the administrative state in the first place, began to turn against judicial deference to administrative agencies. *Chevron*, once defended by conservatives, was now a conservative target.¹⁸³

C. *The Return of Liberal Skepticism About Judicial Review*

While all this was going on, liberal legal intellectuals' views on the courts were evolving in almost a mirror image. Liberals were frustrated by the Rehnquist Court's federalism revolution and by the conservative majority's increasingly assertive use of judicial power.¹⁸⁴ For many liberal legal intellectuals, the 2000 decision in *Bush v. Gore* seemed like the last straw—only it wasn't, because the Supreme Court continued to grow even more conservative after Justice Alito replaced Justice O'Connor in 2006. As Barry Friedman pointed out in his article on the cycles of constitutional theory:

180. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611–12, 2616–19, 2621–22 (Roberts, C.J., dissenting) (comparing the majority's decision to *Lochner*).

181. *Chevron U.S.A., Inc., v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

182. See generally Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

183. See, e.g., Charles J. Cooper, *Confronting the Administrative State*, NAT'L AFFAIRS, Fall 2015, at 96, 102–04 (arguing “our constitutional order has been subverted” by *Chevron* and other modern administrative law doctrines); John Yoo, *A Thousand Little Tyrants—Obama's Problems Are a Chance to Rein in the Bureaucracy*, NAT'L REV., Sept. 16, 2013, at 16, 18 (criticizing *Chevron* and the growth of the administrative state under President Obama); Michael S. Greve, *Yoo to Conservatives: Reverse Course*, LAW & LIBERTY (Sept. 9, 2013), <http://www.libertylawsite.org/2013/09/09/yoo-to-conservatives-reverse-course/> [<https://perma.cc/7LUA-XDPF>] (endorsing Yoo's call to “[d]itch judicial deference”).

184. See, e.g., Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 83 (2011) (“In acting repeatedly to invalidate federal legislation, the Court is using its authority to diminish the proper role of Congress.”); Friedman, *supra* note 1, at 162 (“[A]ll of a sudden, the talk among progressives is of complaints about judicial supremacy and the hegemony of the Supreme Court.”); Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 14 (2001) (“[T]his Court sees no need to accommodate the political branches at all.”).

All of a sudden, the talk *among progressives* is of complaints about judicial supremacy and the hegemony of the Supreme Court. We have come full circle: the early 2000s are the early 1900s all over again, and one might as well forget that the Warren Court happened in the middle.¹⁸⁵

In fact, the early twenty-first century was different from the twentieth century in one important respect. The long-term trend of both parties investing in judicial review tempers the cycling of positions between judicial review and judicial restraint. This secular trend is one aspect of Skowronek's concept of the "institutional thickening" of politics over time.¹⁸⁶

In the early twenty-first century, American politicians and legal intellectuals depend so heavily on the federal judiciary for so many things that it is almost unthinkable that they would willingly renounce judicial review as a tool of policy advancement.¹⁸⁷ For example, it is difficult to believe that most liberal constitutional theorists will wholly abandon judicial review and simply adopt the progressive critique of judicial review from the 1920s and 1930s. Even given today's deep disillusionment with judicial review in the hands of a conservative judiciary, liberal legal intellectuals continue to defend a large number of liberal civil rights and civil liberties precedents—for example, *Roe* and *Lawrence*—and there are still other precedents they would like to extend further. (Similarly, after decades of conservative judicial hegemony, conservative legal intellectuals will continue to have strong interests in preserving their own favored set of precedents and doctrines—for example, *Heller* and *Citizens United*.) In short, liberal intellectuals in the late twentieth and early twenty-first centuries have been skeptical of judicial power and judicial supremacy, but not quite as skeptical as their progressive forebears.

Liberal theorists have taken a variety of approaches to criticize the conservative decisions of the Reagan regime. The first strategy was popular constitutionalism, which has many variations. Mark Tushnet (b. 1945) argued that judicial review was by nature hopelessly conservative, and, in a 1999 book, he argued for "Taking the Constitution Away from the Courts."¹⁸⁸ Larry Kramer (b. 1958), the Dean of the Stanford Law School, advocated popular constitutionalism as a counterweight to the Court's conservative elitism.¹⁸⁹ Robert Post (b. 1948) and Reva Siegel (b. 1956) argued that courts

185. Friedman, *supra* note 1, at 162.

186. SKOWRONEK, *THE POLITICS PRESIDENTS MAKE*, *supra* note 17, at 55.

187. See KECK, *supra* note 63, at 199–201 (arguing that neither liberals nor conservatives are likely to return to Frankfurterian judicial restraint because both have interests in rights-based claims).

188. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

189. LARRY D. KRAMER, *THE PEOPLE THEMSELVES* (2004); Kramer, *supra* note 184.

should be informed by legislative interpretations of the Constitution—as part of their larger theory of “democratic constitutionalism.”¹⁹⁰

A second strategy offered new variations on progressive ideas of judicial restraint. Cass Sunstein (b. 1954) revived Alexander Bickel’s ideas about prudentialism.¹⁹¹ But instead of focusing on Bickel’s passive virtues, Sunstein offered a theory of “judicial minimalism,” in which courts would refrain from deciding too much, and would offer rationales that could command assent from a broad spectrum of public opinion.¹⁹²

A third strategy was preservationist—explaining why the achievements of liberal constitutionalism in the previous New Deal/Civil Rights regime had been legitimate and why they should not be disturbed by conservative courts. Precisely because judicial review had become so important to both parties by the end of the twentieth century, preservationist strategies had important differences from progressive arguments in the 1920s and 1930s for judicial restraint. Because older precedents should be preserved, courts should continue to strike down laws and executive actions that violated the constitutional principles of the previous (liberal) regime. Bruce Ackerman’s (b. 1943) project sought to show that Americans had amended their constitution outside of Article V through a series of “constitutional moments,” and that conservatives had so far failed to create a new constitutional moment that would justify deviating from the New Deal and the Civil Rights revolution.¹⁹³ David Strauss (b. 1951) argued for a common law theory of constitutional interpretation, which, he argued, was superior to originalism.¹⁹⁴ Courts should avoid sudden shifts in doctrine (for example, to the right) and respect liberal precedents.

A fourth strategy was to borrow a page from Hugo Black and the Warren Court and reinterpret originalism as a liberal theory of interpretation. Akhil Amar (b. 1958) and yours truly (b. 1956) argued for liberal versions of originalism that were tied to a narrative of democratic progress (in Amar’s case) or constitutional redemption (in mine).¹⁹⁵

190. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 525–26 (2000); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2 (2003); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007).

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

192. *Id.* at 3–4, 13.

193. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 49–51, 111 (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 255–61 (1998); 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 50, 332 (2014).

194. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 3 (2010).

195. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 471–73 (2005); JACK M. BALKIN, *LIVING ORIGINALISM* 74 (2011).

Liberal legal intellectuals (with the exception of Amar and myself) also attacked originalism in much the same way that progressives had attacked the formalism of the Old Court and movement conservatives had attacked living constitutionalism. They argued that originalism was an incoherent philosophy of judging that allowed conservative judges to impose their personal and ideological predilections into the law.¹⁹⁶ Sunstein declared the conservative Republican-appointed judges “Radicals in Robes.”¹⁹⁷ Mitchell Berman (b. 1966) declared that “Originalism Is Bunk.”¹⁹⁸ Eric Segall (b. 1958) argued that modern originalism is little more than window dressing for conservative policies and that originalist judges conveniently jettisoned originalism whenever it got in the way of their preferred results.¹⁹⁹

Conclusion

The 2016 election and the appointment of Justices Gorsuch and Kavanaugh supercharged liberal discontent with the Supreme Court. If we are near the end of the Reagan regime, it would make sense that legal intellectuals affiliated with the current opposition party (the Democrats) would engage in a version of the progressive triptych: advocating judicial restraint; criticizing the reasoning of the current conservative majority as political, incoherent, and arbitrary; and demanding deference to democratic decision-making. And if, as I expect, the Democrats create the next constitutional regime, *relative* skepticism about judicial review will continue until Democrats regain control of the Supreme Court and the lower federal courts through new appointments. That will change both the Court’s personnel and, equally important, the selection of cases on its docket.

However, given the Trump Administration’s energetic attempts to flood the judiciary with young conservative jurists, that transformation may take some time. As a result, Felix Frankfurter’s star may rise again among liberal

196. See, e.g., FRANK CROSS, *THE FAILED PROMISE OF ORIGINALISM* 15 (2013) (arguing that originalism is easily manipulated and that judges may “claim to rely on originalist materials to legitimize their results, even though originalism had little to do with producing those results”); ERIC J. SEGALL, *ORIGINALISM AS FAITH* 12 (2018) (arguing that originalism is based on a mistaken faith that “the original meaning of the text drives Supreme Court decisions”); Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009) (arguing that the theoretical justifications for originalism are unsuccessful); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 247 (2009) (arguing that originalism has many versions, that originalist theory has been constantly changing, and that originalists tend to adopt whichever version is most likely to produce results they personally favor); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 554 (2006) (arguing that originalism makes less sense as a coherent methodology of interpretation than as a political practice of mobilized groups who seek political change and vindication of their political values).

197. CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT WING COURTS ARE WRONG FOR AMERICA* (2005).

198. Berman, *supra* note 196.

199. SEGALL, *supra* note 196, at 178.

legal academics, and we are likely to see new rounds of theoretical arguments for judicial restraint.²⁰⁰ Only when a liberal Supreme Court majority is firmly in place and the docket of the Court has been fully transformed will a new cycle of liberal constitutional theories justifying strong judicial review emerge.

Even so, liberals today are in a very different position than progressives in the 1930s. They are heirs to a considerable liberal jurisprudence that protects civil rights and civil liberties and requires judicial review to defend it. Although we should probably expect more liberal theories that attack judicial supremacy and advocate judicial restraint in the face of a conservative judiciary, each of these theories will have to deal with this inheritance. They will have to contend with how—and how much—they wish to preserve previous liberal precedents—such as *Roe v. Wade* and the gay-rights decisions.

Conversely, the current generation of conservative and libertarian legal intellectuals, who have spent so much time and intellectual capital defending judicial engagement, will not soon abandon their views about judicial review. They will continue to argue that the Supreme Court should embrace judicial engagement to vindicate their constitutional values. Eventually, the ideological character of the courts will change. Yet, like liberals in the 1980s, conservative legal intellectuals may still hold out hope that conservatives can once again obtain a Supreme Court majority and that the rightward march of constitutional jurisprudence can continue unabated. Some years later, a newer generation of conservative intellectuals will gradually recognize—to vary Sanford Levinson’s metaphor—that Clarence Thomas and Antonin

200. See ERIC J. SEGALL, *SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT* (2012) (asserting that the Supreme Court’s work is inherently political and arguing for judicial restraint); SEGALL, *supra* note 196, at 12–14 (same); see also Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1922 (2016) (arguing that “economically libertarian tendencies . . . may be intrinsic to judicial enforcement of civil liberties, regardless of the politics of individual judges” and that “the creation of a truly non-Lochnerian First Amendment would require a fundamental break” with the twentieth century “civil libertarian status quo dating back to the 1940s”); Brad Snyder, *The Former Clerks Who Nearly Killed Judicial Restraint*, 89 NOTRE DAME L. REV. 2129, 2153 (2014) (arguing for more research into theories of judicial restraint); Samuel Moyn, *Resisting the Juristocracy*, BOSTON REV. (Oct. 5, 2018), <http://bostonreview.net/law-justice/samuel-moyn-resisting-juristocracy> [<https://perma.cc/2Q3G-TZXF>] (“A legal culture less oriented to the judiciary and more to public service in obtaining and using democratic power in legislatures at all levels is the sole path to progress now.”); Samuel Moyn, *Stop Worrying About Kavanaugh, Liberals. Start Winning the Political Argument.*, WASH. POST: POST EVERYTHING (Aug. 8, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/08/08/stop-worrying-about-kavanaugh-liberals-start-winning-the-political-argument/?noredirect=on&utm_term=.eec33aca45f2 [<https://perma.cc/6NDV-KUTG>] (“Democracy requires judges on both sides of our political divide to be relegated to the margins of national life, rather than have their selection remain the biggest reason elections matter.”).

Scalia have left the building.²⁰¹ At that point, the slow, generational transformation of positions on judicial review will begin again.

201. Levinson, *supra* note 78.