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**DOES IT REALLY MATTER?
CONSERVATIVE COURTS IN A CONSERVATIVE ERA**

Gerald Rosenberg's influential The Hollow Hope? Can Courts Bring About Social Reform sharply distinguished between the constrained and dynamic view of judicial power. The constrained view, a version of which is held by most political scientists and a few prominent law professors, insists that litigation is a poor means for bringing about progressive social reform. Proponents insist that judges rarely disagree with elected officials and have little capacity to implement those decrees that do diverge from electoral preferences. Courts, they claim, "can do little more than point out how actions have fallen short of constitutional or legislative requirements and hope that appropriate action is taken."¹ The dynamic view, favored by most law professors and some political scientists, regards courts as more effective promoters of progressive political change. Proponents of judicial capacity believe that Americans enjoy "the world's most powerful court system," one that "protect[s] minorities and defend[s] liberty, in the face of opposition from the democratically elected branches."² To the despair of many liberals,³ Rosenberg's study concluded that American practice provided more support for constrained

¹ Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (University of Chicago Press: Chicago, 1991), p. 3.

² Rosenberg, The Hollow Hope, p. 2.

³ See Laura Kalman, The Strange Career of Legal Liberalism (Yale University Press: New Haven, 1996), pp. 3-4.

courts. “[A]ttempts to use the courts to produce significant social reform,” he insisted, were “mostly disappointing.”⁴ Such judicial decisions as Brown v. Board of Education⁵ and Roe v. Wade⁶ had little impact on political policy and may have even weakened the political movements necessary to secure integrated education and widely available legal abortion.⁷

Findings that outraged many legal liberals during the early 1990s⁸ may provide progressives in law schools with some solace during the decades to come. Three years after The Hollow Hope was published, the Rehnquist Court began striking down federal laws at unprecedented rates.⁹ Conservative judicial majorities found new First Amendment,¹⁰ Tenth Amendment,¹¹ commerce clause¹² and state sovereignty¹³ limitations on federal power.

⁴ Rosenberg, The Hollow Hope, p. 336.

⁵ 347 U.S. 483 (1954).

⁶ 410 U.S. 113 (1973).

⁷ See Rosenberg, The Hollow Hope, pp. 42-201.

⁸ See Gerald N. Rosenberg, “Hollow Hopes and Other Aspirations: A Reply to Feeley and McCann,” 17 **Law and Social Inquiry** 761, 776 (1992).

⁹ See Thomas M. Keck, The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism (University of Chicago Press: Chicago, 2004), p. 40.

¹⁰ See i.e., Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996), United States v. United Foods, 533 U.S. 405 (2001).

¹¹ Printz v. United States, 521 U.S. 898 (1997).

¹² United States v. Morrison, 529 U.S. 598 (2000) United States v. Lopez, 514 U.S. 549

Congressional authority under Section 5 of the Fourteenth Amendment was sharply curtailed.¹⁴

The same conservative majorities imposed constitutional limits on state power to adopt affirmative action policies,¹⁵ forbid invidious discrimination,¹⁶ increase the political power of formerly disenfranchised minorities,¹⁷ regulate land use,¹⁸ prohibit religious proselyting in public schools,¹⁹ limit commercial advertizing,²⁰ and restrict campaign finance.²¹ The most

(1995).

¹³ Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001); Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743 (2002).

¹⁴ United States v. Morrison; City of Boerne v. Flores, 521 U.S. 507 (1997); Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

¹⁵ Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

¹⁶ Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

¹⁷ See Bush v. Vera, 517 U.S. 952 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993)

¹⁸ Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Dolan v. City of Tigard, 512 U.S. 374 (1994).

¹⁹ Good News Club v. Milford Central School, 533 U.S. 98 (2001); Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995).

²⁰ See, i.e., Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); 44 Liquormark, Inc. v. Rhode Island, 517 U.S. 484 (1996)

²¹ See, i.e., Randall v. Sorrell, ___ U.S. ___ (2006).

conservative justices on their Rehnquist Court, Justice Clarence Thomas in particular, consistently urged the conservative majority to increase their conservative activism.²² Thomas's opinions and recent scholarship produced by a new generation of conservative constitutional thinkers²³ call on the Supreme Court to expand these existing conservative constitutional precedents,²⁴ and find new constitutional limitations on government power grounded in the second amendment,²⁵ the public use clause of the fifth amendment,²⁶ the necessary and proper

²² See, i.e., Gonzales v. Raich, 545 U.S. 1, ___, 125 S. Ct. 2195, 2230-37 (2005) (Thomas, J., dissenting); Cutter v. Wilkinson, 544 U.S. 709, 727 n.2 (2005) (Thomas, J., concurring); Whitman v. American Trucking Associations, Inc., 531 U.S. 457, 486-87 (2001) (Thomas, J., concurring); Kelo v. City of New London, ___ U.S. ___, 125 S. Ct. 2655, 2677-87 (2005) (Thomas, J., dissenting). See also, Mark A. Graber, "Clarence Thomas," Biographical Encyclopedia of the Supreme Court: The Lives and Legal Philosophies of the Justices (edited by Melvin I. Urofsky) (CQ Press: Washington, D.C., 2006), pp. 548-52.

²³ See especially, Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty (Princeton University Press: Princeton, 2004).

²⁴ See sources cited in footnotes ___, below.

²⁵ See Eugene Volokh, "The Commonplace Second Amendment," 73 **New York University Law Review** 793 (1998); David B. Kopel, "What State Constitutions Teach About the Second Amendment," 20 **Northern Kentucky Law Review** 827 (2002).

²⁶ Eric R. Claeys, "Public-Use Limitations and Natural Property Rights," 2004 **Michigan State Law Review** 877 (2004).

clause of Article I²⁷ and the spending clause of Article I.²⁸ The two most recent judicial appointees, Chief Justice John Roberts and Justice Samuel Alito, seem sympathetic with these judicial and intellectual trends.²⁹ Assuming liberals are unlikely to gain the electoral victories necessary to move the Roberts Court to the left over time,³⁰ the best progressive hope may be that conservative courts have no more capacity to promote conservative social change than Rosenberg insisted liberal courts have to promote liberal social change.

This essay explores the likelihood that conservative federal courts in the near future will be agents of conservative social change. The following pages assess whether conservative justices on some issues will support more conservative policies than conservative elected officials are presently willing to enact and whether such judicial decisions will influence public policy. This paper touches only tangentially on three other important questions concerning judicial capacity in a conservative age. The first is the continued vitality of litigation as a

²⁷ See Barnett, Restoring the Lost Constitution, pp. 158-89.

²⁸ See, i.e., Lynn A. Baker, “Conditional Federal Spending After Lopez,” 95 **Columbia Law Review** 1911 (1995).

²⁹ See See Seth Rosenthal, “Fair to Meddling: The Myth of the Hands-Off Conservative Jurist,” **Slate**, June 27, 2006; Rancho Viejo, LLC v. Norton, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc); United States v. Rybar, 103 F.3d 273, 286 (3rd Cir. 1996) (Alito, J., dissenting).

³⁰ See L.A. Powe, Jr., “The Not-So-Brave New Constitutional Order,” 117 **Harvard Law Review** 647, 680-85 (2003); Mark A. Graber, “Rethinking Equal Protection in Dark Times,” 4 **University of Pennsylvania Journal of Constitutional Law** 314, 342-45 (2002).

strategy for achieving liberal social change, or at least maintaining liberal precedents, at a time when the federal courts have largely been packed with movement conservatives. The second is the probability that conservatives on the federal bench will sustain and legitimate conservative federal and state policies that a more liberal court might declare unconstitutional. The third is whether future conservative litigation campaigns will promote conservative policies, regardless of any legal success, by mobilizing activists and helping forge conservative political identities.³¹ My focus is strictly on whether the Roberts Court is likely to bring about conservative social changes that conservatives cannot bring about by relying primarily on other governing institutions and political strategies.

Gerald Rosenberg's pathbreaking analysis of judicial power to produce social reform indicates that conservative litigation campaigns must overcome three constraints to be politically efficacious. The first constraint is "the limited nature of constitutional rights." "[N]ot all social reform goals," Rosenberg maintains, "can be plausibly presented in the name of constitutional rights."³² Conservative courts will be poor vehicles for realizing pro-life policies (as opposed to merely overruling Roe) if conservative justices who think abortion is immoral nevertheless

³¹ For claims that liberal litigation campaigns have had this impact, see Michael W. McCann, Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization (University of Chicago Press: Chicago, 1994). See also Thomas M. Keck, "From Bakke to Grutter: The Rise of Rights-Based Conservatism," The Supreme Court & American Political Development (edited by Ronald Kahn and Ken I. Kersch) (University of Kansas Press: Lawrence, Kansas, 2006), pp. 422-25.

³² Rosenberg, Hollow Hope, pp. 10, 11.

conclude that the Fourteenth Amendment does not protect unborn children. The second constraint is “the lack of judicial independence.” Rosenberg observes that “Supreme Court decisions . . . seldom stray[] far what [is] previously acceptable” in large part because “Presidents . . . tend to nominate judges who they think will represent their judicial philosophies.”³³ Conservative courts will be poor vehicles for downsizing the federal government if those conservative elected officials who bestow substantial governmental largess on conservative constituencies are able to secure judicial majorities that find such conservative pork constitutional. The third constraint is “the judiciary’s inability to develop appropriate policies and its lack of powers of implementation.” The Hollow Hope points out that “[l]acking powerful tools to force implementation, court decisions are often rendered useless given much opposition.”³⁴ Conservative courts will be poor vehicles for realizing a color-blind society if liberal universities find effective means for masking or otherwise immunizing from constitutional attack affirmative action policies previously voided by conservative judicial majorities.

These constraints on conservative judicial policy making matter even when conservatives control the elected branches of the national government and most state governments. Conservative litigation campaigns are effective during times of conservative political ascendancy only when litigation secures more conservative policies than can be achieved through electoral politics. If conservative elected officials pass a national ban on abortion, conservatives, at least in the short run, will not need an activist judicial decision declaring that legal abortion violates

³³ Rosenberg, Hollow Hope, pp. 10, 13.

³⁴ Rosenberg, Hollow Hope, pp. 10, 21.

the Fourteenth Amendment rights of the unborn. At most, conservatives will require conservative courts to declare such laws pass constitutional muster under the Fourteenth Amendment or, perhaps, the commerce clause. Pro-life litigation will make a pro-life policy difference only when conservative courts declare existing pro-choice policies unconstitutional and those decisions are implemented by officials who had previously been unwilling to repeal the offending socially liberal laws.

Part I of this essay explores the extent to which conservative policy demands can be translated into plausible conservative legal arguments. Rosenberg found that progressive litigators were often, although not always, able to overcome this constraint on judicial power. The same seems true for conservatives. Important differences exist between contemporary conservative political agendas and the main lines of conservative legal argument. Conservatives who lose political battles over the military budget are unlikely to have such defeats reversed by courts, given the broad consensus that the appropriate level of military spending is not a judicial question. Nevertheless, such prominent scholars as Richard Epstein and Randy Barnett are developing a conservative/libertarian constitutional vision likely to appeal to many conservative justices who share their policy preferences.³⁵ Conservative justices interested in handing down conservative judicial decisions on matters from gun regulation to home schooling for religious children will not lack for plausible constitutional arguments.

Part II considers the likelihood that conservative judicial majorities will be more

³⁵ See, i.e., See Richard Epstein, Takings: Private Property and the Power of Eminent Domain (Harvard University Press: Cambridge, Massachusetts, 1985); Barnett, Restoring the Lost Constitution.

conservative than conservative electoral majorities. Rosenberg believed the judicial recruitment process was a significant constraint on progressive litigation campaigns, given powerful evidence that elected officials are able to secure federal justices who share their policy preferences. Nevertheless, while the appointment process practically guarantees that conservative justices nominated and confirmed by conservative elected officials will not advance constitutional visions outside the conservative mainstream, the balance of power among conservatives on the court may differ from the balance of power among conservatives in the elected branches of the national government. Executive control over judicial nominations is likely to yield a conservative judiciary that sides with conservative presidents against conservative legislators on questions concerning the separation of powers. Conservative justices who are far more affluent and educated than the average Republican are likely to side with conservative elites against conservative populists when disagreements exist within the conservative majority on such matters as deregulation and torture during the war on terrorism.

Part III assesses the extent to which activist conservative decisions will influence public policy. Rosenberg found that activist progressive decisions were often ignored by less progressive governing officials. Some evidence suggests that activist conservative decisions in several areas of constitutional law are suffering a similar fate. Universities have maintained and adopted hate speech policies that have consistently been declared unconstitutional by federal justices. Hostile judicial decisions have influenced, but hardly halted, race conscious programs in government contracting and university admissions. The conservative attack on regulation, by comparison, has been more successful. Studies suggest that judicial activism in takings clause cases is inhibiting both unconstitutional and constitutional land use and environmental

regulations. The constitutional rules conservative courts hand down, preliminary analysis suggests, matter less as legal standards that dictate particular results than as rhetorical resources that influence the willingness and ability of governing institutions to pay the litigation costs necessary to maintain more liberal policies.

The overall picture suggests that conservative courts in the foreseeable future are likely to promote a drift toward libertarianism. Conservative constitutional commentators have had more success popularizing constitutional arguments for striking down liberal governmental programs than constitutional arguments for mandating conservative governmental programs. The conservative case for limiting eminent domain is far more developed and diffused among conservative lawyers than the conservative case for granting Fourteenth Amendment rights to unborn children. The affluent and well educated conservatives likely to sit on the federal bench are economically more conservative than the average Republican voter, but no more socially conservative. Such justices are far more likely to go on a crusade against burdensome environmental regulations than issue jeremiads against communities that adopt same-sex marriage. The evidence at present suggests that elected officials are more likely to comply with judicial decisions limiting government regulatory power than judicial decisions requiring the restructuring of liberal institutions. The slightest hint of litigation often dissuades localities from enforcing land use regulations, but those same officials often devise ingenious means for evading judicial decisions barring most affirmative action programs. The forces accelerating judicial libertarianism provide some cause for optimism among progressives committed to privacy rights, who are likely to fare no worse in courts than in legislatures, and may fare a bit better in the former. Progressives who believe that “the vigor of government is essential to the security of

liberty,”³⁶ however, are likely to find the Roberts Court to be an additional irritant while Republicans rule, and a major obstacle to liberal reform should the political left establish a better balance of political power in the electoral branches of government.

I. The Limited Nature of Constitutional Rights

Conservative courts engage in conservative judicial activism only when conservative judicial majorities conclude that a conservative policy is judicially enforceable. This truism contains two potential constraints on courts as conservative policymakers. First, conservative justices must conclude that a particular conservative policy choice is constitutionally mandated, that governing officials may not select a more liberal alternative. Judicial proponents of capital punishment will not engage in conservative activism if they believe that elected officials may constitutionally, although unwisely, punish murder by life imprisonment or less. Second, conservative justices must conclude that a conservative policy choice mandated by the constitution is judicially enforceable. James Bradley Thayer’s influential essay in the 1893 **Harvard Law Review** insisted that justices should sustain any government action a reasonable person might think constitutional.³⁷ Conservative proponents of judicial restraint who are

³⁶ Alexander Hamilton, James Madison, and John Jay, The Federalist Papers (New American Library: New York, 1961), p. 35. See Cass R. Sunstein, The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need it More than Ever (Basic Books: New York, 2004).

³⁷ James B. Thayer, “The Origin and Scope of the American Doctrine of Constitutional Law,” 7 **Harvard Law Review** 129 (1893).

committed to this logic will refrain from striking down affirmative action programs they believe are based on a mistaken, but plausible interpretation of the Fourteenth Amendment.

These constraints have not inhibited prominent conservative justices and scholars from championing conservative judicial activism in numerous areas of constitutional law. Conservative majorities on the Rehnquist Court frequently declared federal and state laws unconstitutional.³⁸ Justice Scalia's separate opinions asserted that the justices were required to strike down various liberal policies that Rehnquist Court majorities sustained.³⁹ Justice Thomas would have the Supreme Court overrule the major constitutional decisions underlying the New Deal.⁴⁰ Established and younger conservative scholars are publishing influential essays and books defending the activist directions charted by Justices Thomas and Scalia,⁴¹ and providing constitutional justifications for conservative activism in other areas of constitutional law.⁴²

³⁸ See notes ___ above, and the relevant text.

³⁹ See Tennessee v. Lane, 541 U.S. 509, 554-65 (2004) (Scalia, J., dissenting); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

⁴⁰ See sources cited in note ___, above.

⁴¹ See John O. McGinnis, "Reviving Tocqueville's America: The Rehnquist Court's Journey of Social Discovery," 90 **California Law Review** 485 (2002); J. Harvie Wilkinson III, "Is There a Distinctive Conservative Jurisprudence?" 73 **University of Colorado Law Review** 1383 (2002).

⁴² See especially, Barnett, Restoring the Lost Constitution; Douglas H. Ginsburg, "On Constitutionalism," 2 **Cato Supreme Court Review** 7, 15-17 (2003); Bernard H. Siegan, Economic Liberties and the Constitution (second edition) (Transaction Publishers: New

These conservative legal writings, on and off the bench, have developed plausible constitutional arguments for striking down numerous liberal policies. They include claims that:

1. Various gun control regulations violate the Second and Fourteenth Amendment.⁴³
2. Most, if not all, restrictions on campaign contributions and expenditures violate the First and Fourteenth Amendments.⁴⁴
3. Restrictions on hate speech violate the First and Fourteenth Amendments, as do anti-discrimination laws when applied to much hate speech in employment settings.⁴⁵
4. Restrictions on non-misleading commercial advertising violate the First and Fourteenth Amendments.⁴⁶
5. Racial, gender, and ethnic preferences are unconstitutional,⁴⁷ except in prisons and similar institutions.⁴⁸

Brunswick, New Jersey, 2006).

⁴³ See Eugene Volokh, “The Commonplace Second Amendment,” 73 **New York University Law Review** 793 (1998).

⁴⁴ See Bradley A. Smith, Unfree Speech: The Folly of Campaign Finance Reform (Princeton University Press: Princeton, New Jersey, 2003).

⁴⁵ See David E. Bernstein, You Can’t Say That: The Growing Threat to Civil Liberties from Anti-Discrimination Law (Cato Institute: Washington, D.C., 2003).

⁴⁶ See Alex Kozinski and Stuart Banner, “Whose Afraid of Commercial Speech?” 76 **Virginia Law Review** 627 (1990).

⁴⁷ See Adarand, at 240-41 (Thomas, J., dissenting).

⁴⁸ Johnson v. California, 543 U.S. 499, 524-50 (2005) (Thomas, J., dissenting).

6. The First and Fourteenth Amendments forbid government officials from discriminating against religious groups when administering government programs. Religious groups have a constitutional right to meet on public properties open to secular organizations.⁴⁹ Religious believers have the right to compete for government funds on an equal basis with other persons, even when those funds will be used to pursue religious goals.⁵⁰
7. The free exercise clause vests religious believers with the right to opt out of various government programs and be exempt from neutral government regulations, unless there is a compelling reason to require adherence.⁵¹ Public schooling, by promoting secularism, may be unconstitutional.⁵²
8. Many governmental regulations, land use and environment regulations in particular, violate the takings clause of the Fifth Amendment and the due process clause of the Fourteenth Amendment.⁵³

⁴⁹ See Good News Club v. Milford Central School, 553 U.S. 98 (2001).

⁵⁰ See Locke v. Davey, 540 U.S. 712, 726-34 (2004) (Scalia, J., dissenting); Eugene Volokh, “Freedom of Expressive Association and Government Subsidies,” 58 **Stanford Law Review** 1919, 1928-29 (2006)

⁵¹ See Michael W. McConnell, “Free Exercise Revisionism and the Smith Decision,” 57 **University of Chicago Law Review** 1109 (1990).

⁵² See Richard F. Duncan, “Public Schools and the Inevitability of Religious Inequality,” 1996 **Brigham Young University Law Review** 569 (1996).

⁵³ See Richard Epstein, Takings: Private Property and the Power of Eminent Domain (Harvard University Press: Cambridge, Massachusetts, 1985).

9. The public use clause of the Fifth Amendment forbids government from condemning property under eminent domain and then transferring title to a different private owner, even when government pays just compensation and doing so might promote economic development or other constitutional ends.⁵⁴

10. Minimum wage laws, maximum hour laws, and perhaps even laws forbidding discrimination by private businesses violate the due process clauses of the Fifth and Fourteenth Amendments.⁵⁵

11. Congress under the Fourteenth Amendment may only remedy constitutional violations identified by the Supreme Court.⁵⁶

12. Legal abortion violates the Fourteenth Amendment rights of the unborn.⁵⁷

⁵⁴ Kelo v. City of New London, ___ U.S. ___, 125 S. Ct. 2655, 2679-81 (2005) (Thomas, J., dissenting); Eric R. Claeys, “Public-Use Limitations and Natural Property Rights,” 2004 **Michigan State Law Review** 877 (2004).

⁵⁵ See Bernard H. Siegan, Economic Liberties and the Constitution (University of Chicago Press: Chicago, Illinois, 1980), pp. 110-21, 318-31; Douglas Ginsburg, Delegation Running Riot, 18 **Regulation** 83, 84 (1995); Richard Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws (Harvard University Press: Cambridge, Massachusetts, 1992).

⁵⁶ See Tennessee v. Lane, 541 U.S. 509, 558-560 (2004) (Scalia, J., dissenting).

⁵⁷ See David W. Louisell and John T. Noonan, Jr., “Constitutional Balance,” The Morality of Abortion: Legal and Historical perspectives (edited by John T. Noonan, Jr.,) (Harvard University Press: Cambridge, Massachusetts, 1970), pp. 244-58; James J. Lynch, Jr.,

13. Vague legislative delegations to administrative agencies are inconsistent with the separation of powers mandated by the constitution.⁵⁸

14. The spending power in Article I, Section 8 is limited to money spent to further other enumerated constitutional powers. Any conditions on the receipt of federal funds must be directly connected to the purpose of the spending.⁵⁹

15. The commerce clause permits Congress to regulate only activities that directly affect interstate commerce transactions, not manufacturing, employee/employer relationships, and noncommercial matters.⁶⁰

16. The necessary and proper clause mandates that federal regulations must have a plain and direct connection to an enumerated constitutional power.⁶¹

Conservative jurists who endorse these constitutional claims are not inhibited by any theory of the judicial function that compels judicial restraint in the face of perceived

“Posterity: A Constitutional Peg for the Unborn,” 40 **American Journal of Jurisprudence** 401, 403-04 (1995).

⁵⁸ Whitman v. American Trucking Associations, Inc., 531 U.S. 457, 486-87 (2001) (Thomas, J., concurring); Ginsburg, “On Constitutionalism,” p. 16-17.

⁵⁹ See Cutter v. Wilkinson, 544 U.S. 709, 727 n.2 (2005) (Thomas, J., concurring); Baker, “Conditional Federal Spending.”

⁶⁰ See United States v. Lopez, 514 U.S. 549, 585-601 (1995) (Thomas, J., dissenting); Barnett, Restoring the Lost Constitution, pp. 274-318.

⁶¹ See Gonzales v. Raich, 545 U.S. 1, ___, 125 S. Ct. 2195, 2231-34 (2005) (Thomas, J., dissenting); Barnett, Restoring the Lost Constitution, pp. 158-89.

unconstitutional government action. The conservative generation that called on liberal justices to exercise judicial restraint⁶² is rapidly being replaced by a younger generation of scholars who are as eager to employ judicial power on behalf of conservative causes as the previous generation of liberals were to employ judicial power on behalf of liberal causes.⁶³ No proponent of Thayer's rule of clear constitution mistake now sits on the Supreme Court.⁶⁴ The leading academic proponents of limited judicial power are either liberal law professors⁶⁵ or conservative political scientists who have little influence on conservative judicial practice.⁶⁶ Justices Thomas and

⁶² See, i.e., Robert H. Bork, The Tempting of America: The Political Seduction of the Law (Simon & Schuster Inc.: New York, 1990); Lino A. Graglia, "Constitutional Mysticism: The Aspirational Defense of Judicial Review," 98 **Harvard Law Review** 1331 (1985).

⁶³ See, i.e., Ernest A. Young, "Judicial Activism and Conservative Politics," 73 **University of Colorado Law Review** 1139 (2002); Saikrishna B. Prakash and John C. Yoo, "The Constitutional Origins of Judicial Review: Questions for Critics of Judicial Review," 72 **George Washington Law Review** 354 (2003).

⁶⁴ See Keck, Most Activist Supreme Court, p. 200.

⁶⁵ See Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (Oxford University Press: New York, 2004); Mark Tushnet, Taking the Constitution Away From the Courts (Princeton University Press: Princeton, New Jersey, 1999), pp. 134-35.

⁶⁶ See Matthew J. Franck, Against the Imperial Judiciary: The Supreme Court vs. the Sovereignty of the People (University Press of Kansas: Lawrence, Kansas, 1996); Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review (University Press of Kansas: Lawrence, Kansas, 1999).

Scalia may employ the traditional rhetoric of judicial restraint when condemning exercises of liberal judicial activism,⁶⁷ but they do not hesitate to use judicial power to promote many conservative causes.⁶⁸

The legal constraint on conservative judicial activism, however, is more powerful than a glance at recent law reviews suggest. Conservative constitutional agendas are far narrower than conservative policy agendas. Tocqueville may have asserted that “scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question,”⁶⁹ but a review of recent Republican party platforms reveals numerous political issues that are not likely to be resolved into constitutional or judicial issues for the foreseeable future.⁷⁰ The conservative constitutional agenda has little to say about foreign policy, other than a commitment to executive power⁷¹ that will advance conservative causes only when the national

⁶⁷ See, i.e., Lawrence v. Texas, 539 U.S. 538, 599, 602-05 (2003) (Scalia, J., dissenting); Lawrence, at 605-06 (Thomas, J., dissenting).

⁶⁸ See footnotes ____, above. See also, Mark A. Graber, “Clarence Thomas and the Perils of Amateur History,” Rehnquist Justice: Understanding the Court Dynamic (edited by Earl Maltz) (University Press of Kansas: Lawrence, Kansas, 2003).

⁶⁹ Alexis de Tocqueville, Democracy in America (Vol. I) (edited by Phillips Bradley) (Vintage Books: New York, 1945), p. 280.

⁷⁰ See Mark A. Graber, “Resolving Political Questions into Judicial Questions: Tocqueville’s Thesis Revisited,” 21 **Constitutional Commentary** 485 (2004).

⁷¹ See John Yoo, The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11 (University of Chicago Press: Chicago, 2005).

executive is more conservative than the national legislature. Conservative courts presently lack the rhetorical materials for fashioning constitutional arguments mandating that the United States maintain existing troop strength in Iraq or promote a reduction in tariffs throughout the world. To the extent conservatives are unable to obtain their major economic initiatives through legislation, there is little on their constitutional agenda suggesting that a litigation campaign might convert political losses into judicial victories. Should President Bush be unable to convince Congress that additional tax cuts are necessary or that subsidies for the energy industry should be increased, no extant strain of conservative constitutional thought provides grounds that can be invoked to support a judicial decision proclaiming that such policies are constitutionally mandated.

Law constrains many conservative justices even when academically respectable arguments support judicial activism on behalf of a conservative cause. Conservatives dispute the merits of various manifestations of conservative judicial activism. John Noonan defends judicial activism on behalf of the unborn,⁷² but not on behalf of state sovereignty.⁷³ Justice Scalia seems content to challenge federal powers assumed during the Great Society, while Justice Thomas wishes to overturn the judicial underpinnings for the New Deal.⁷⁴ Hardly any prominent conservative has signed on to Richard Epstein's claim that the Civil Rights Act of 1964 is

⁷² John Thomas Noonan, A Private Choice: Abortion in America in the Seventies (Free Press: New York, 1979).

⁷³ John T. Noonan, Jr., Narrowing the Nation's Power: The Supreme Court Sides with the States (University of California Press: Berkeley, California, 2002).

⁷⁴ Graber, "Clarence Thomas," pp. 542, 549.

unconstitutional.⁷⁵ While some of these disputes among conservative lawyers reflect different policy preferences, many are rooted in law. Most conservatives oppose minimum wage laws as economically inefficient. Prominent conservative scholars have made constitutionally reasonable arguments that the Court in Lochner v. New York⁷⁶ correctly held that maximum hour laws were constitutionally suspect.⁷⁷ Nevertheless, the vast majority of conservative justices and scholars still maintain that Lochner was a gross abuse of the judicial power. Justice Scalia, commonly identified with the Chicago School of law and economics,⁷⁸ recently referred to the “discredited substantive-due-process case of Lochner v. New York.”⁷⁹ The number of conservatives who insist that Roe v. Wade was wrongly decided is far greater than the number who insist that legal abortion violates the constitutional rights of the unborn. Scalia spoke for the majority of conservative jurists when he declared that the “States may, if they wish, permit abortion on demand, but the Constitution does not require them to do so.”⁸⁰

Litigation campaigns may enable conservatives to overcome some of these legal

⁷⁵ Richard Epstein, Forbidden Grounds.

⁷⁶ 198 U.S. 45 (2005).

⁷⁷ See sources cited in note ____, above.

⁷⁸ See Eric W. Orts, “Simple Rules and the Perils of Reductionist Legal Thought,” 75

Boston University Law Review 1441, 1442 (1995).

⁷⁹ College Sav. Bank v. Fla. Prepaidpostsecondary Ed. Expense Bd., 527 U.S. 666, 690 (1999).

⁸⁰ Planned Parenthood v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring and dissenting).

constraints on conservative judicial activism. Conservative judicial activism on behalf of some conservative causes will provide legal foundations for conservative judicial activism on behalf of other causes. Just as Griswold v. Connecticut⁸¹ paved the road to Roe v. Wade, so decisions narrowing the scope of the commerce power may provide crucial precedents for judicial decisions narrowing the scope of the spending power.⁸² Litigation campaigns succeed, in part, by over time providing politically sympathetic justices with stronger legal grounds for reaching a desired conclusion.⁸³ This accumulation of precedent would hardly be necessary, however, if law did not constrain constitutional decisionmakers. Just as justices motivated only by policy preferences would have mandated that all states adopt minimum wage laws when overruling Lochner, so crude judicial behaviorialists are seemingly committed to predicting that a judicial decision overruling Roe will mandate that all states ban abortion.

Conservative legal victories may foster increased conservative policy commitments. Some conservative judicial decisions will fashion political environments conducive to a more conservative citizenry. Just as judicial decisions sustaining affirmative action were partly responsible for numerous businesses learning that a racially balanced work force often improves profits,⁸⁴ so judicial decisions sustaining policies that stigmatize abortion may increase popular

⁸¹ 381 U.S. 479 (1965).

⁸² See Baker, "Conditional Spending," pp. 1962-78.

⁸³ See, i.e., Mark V. Tushnet, The NAACP's Legal Strategy Against Segregated Education 1925-1950 (University Of North Carolina Press: Chapel Hill, North Carolina, 1987), pp. 70-81; ,

⁸⁴ See Mark A. Graber, "Constructing Judicial Review," 8 **Annual Review of Political**

support for pro-life policies. The causation arrow between law and policy preferences runs in both directions.

Scholars studying the Roberts Court are likely to witness how law both constrains and facilitates judicial activism. Contrary to Tocqueville and the attitudinal model of judicial decisionmaking,⁸⁵ justices do not automatically translate their policy preferences into judicial enforceable constitutional mandates. No prominent conservative jurist presently thinks that the Supreme Court should declare unconstitutional legislation increasing funding for stem cell research. Most conservative opponents of legal abortion insist that the constitution permits, but does not require, states to prohibit reproductive choice. Nevertheless, increased conservative judicial activism is likely to influence both conservative policy preferences and conservative constitutional understandings. Roberts Court decisions limiting governmental regulatory power and restricting legal abortion may create precedents sufficient to convince conservative citizens opposed to minimum wages and legal abortion that such policies are also unconstitutional. Such decisions will also help shape a regime that tends to produce citizens who believe that minimum wages and legal abortion are undesirable public policies. Indeed, during a sustained period of conservative ascendancy in all branches of the national government, conservative political and legal successes are likely to push constitutional politics far to the right of their present ideological location. The political and legal decisions that entrenched the New Deal provided crucial political and legal underpinnings for Great Society programs and Warren Court decisions that

Science 425, 442 (2005).

⁸⁵ See Jeffrey A. Segal and Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (Cambridge University Press: New York, 2002).

were almost inconceivable in 1932. The political and legal decisions that entrench Reagan/Bush conservatism may similarly provide crucial political and legal underpinnings for conservative policies and constitutional decisions that are presently, at most, mere cocktail conversation at Heritage Foundation and Federalist Society meetings.

II. Judicial Support

Conservative justices engage in conservative judicial activism only when they support more conservative policies than conservative elected officials are willing to make. Rosenberg found that this constraint significantly weakened liberal litigation campaigns. Justices who were aware that, at best, weak political support existed for integration and reproductive choice, were unwilling to insist on measures mandating immediate desegregation or requiring public hospitals to terminate pregnancies, policies that would have significantly increased racial balance in public schools and access to legal abortion.⁸⁶ Some evidence suggests that Rehnquist Court majorities were no more willing aggressively champion conservative policies that threatened prominent conservative constituencies. Faced with opposition from big business and libertarian suburbanites, the justices refused to insist on a color-blind constitution⁸⁷ and overrule Roe v. Wade.⁸⁸ Nevertheless, good reasons exist for thinking that on many issues, particular those of

⁸⁶ See Rosenberg, The Hollow Hope, pp. 74-75, 189-93.

⁸⁷ Grutter v. Bollinger, 539 U.S. 306 (2003).

⁸⁸ See Sanford V. Levinson, "Redefining the Center: Liberal Decisions from a

concern to conservative elites, the Roberts Court may act more consistently on certain conservative principles than conservative elected majorities.

Conservative litigators aiming for broad social impact must convince conservative justices to make policies that are not being made by the conservatives who control the elected branches of the national government. American constitutional politics, however, is structured in ways that apparently privilege judicial restraint rather than judicial activism. If “the vast majority of federal jurists have been affiliated with a partisan group and . . . have shared the party affiliation of the president who nominated them,” and these “justices . . . bring their politics into the courtroom,”⁸⁹ then conservative justices are far more likely to sustain conservative policies than insist on policies more conservative than elected officials are willing to make. When conservative majorities in the elected branches of the national government act on the same narrow view of federal power as is shared by conservative majorities in the national judiciary, the national government does not pass new laws or enforce existing laws in ways the justices think unconstitutional.⁹⁰ Conservative judicial activism, in this political universe, seems likely to

Conservative Court,” **The Village Voice** 38 (July 2-8, 2003).

⁸⁹ Lee Epstein and Jeffrey A. Segal, Advice and Consent: The Politics of Judicial Appointments (Oxford University Press: New York, 2005), p. 143.

⁹⁰ See generally, Mark A. Graber, “The Jacksonian Origins of Chase Court Activism,” 25 **Journal of Supreme Court History** 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 constitutional controversial exercises of national power from becoming national law”).

be limited to striking down liberal state policies in blue state outliers.⁹¹

Other enduring features of American constitutional politics increase the probability that justices selected by a relatively enduring conservative coalition will frequently be willing to act when those elected officials are not. Elected officials, various political science studies demonstrate, frequently promote judicial power to resolve difficult policy issues.⁹² Pushing politically divisive issues to the federal judiciary enables political leaders to overcome

⁹¹ See Lucas A. Powe, Jr., The Warren Court and American Politics (Harvard University Press: Cambridge, Massachusetts, 2000), p. 488-494 (noting that Warren Court activism was disproportionately directed at conservative outliers in an age of liberal political ascendancy).

⁹² See Mark A. Graber, "Constructing Judicial Review," 8 **Annual Review of Political Science** 425 (2005); Howard Gillman, "How Political Parties Can Use the Courts to Advance their Agendas: Federal Courts in the United States, 1875-1891," 96 **American Political Science Review** 511 (2002); Ran Hirschl, Toward Juristocracy: The Origins and Consequences of the New Constitutionalism (Harvard University Press: Cambridge, Massachusetts, 2004); Keith W. Whittington, Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History (Princeton University Press: Princeton, New Jersey, 2007) (forthcoming); Paul Frymer, "Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935-85," 97 **American Political Science Review** 483 (2003); George I. Lovell, Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy (Cambridge University Press: New York, 2003); Kevin J. McMahon, Reconsidering Roosevelt on Race: How the Presidency Paved the Road to Brown (University of Chicago Press: Chicago, Illinois, 2004).

weaknesses in their partisan coalitions, avoid making decisions on matters that crosscut existing partisan cleavages, and engage in credit claiming. Keith Whittington observes how “(p)olitical majorities may effectively delegate a range of tasks to a judicial agent that the courts may be able to perform more effectively or reliably than the elected officials can acting directly.”⁹³

Rehnquist Court decisions limiting the scope of national power under the Fourteenth Amendment enabled Republican legislative officials to express publicly sympathy for rape victims, religious minorities and the disabled,⁹⁴ while minimizing Republican political accountability for the judicial decisions declaring those legislative efforts unconstitutional.⁹⁵ The judicial selection process, while practically guaranteeing that only conservatives will be appointed to the Roberts Court, also practically guarantees that those conservatives will tend to favor the presidential wing of the Republican party and conservative elites whenever disputes arise that divide conservative presidents and conservative legislators or conservative elites and conservative populists.

The prospects for conservative judicial activism in a conservative era are as obscured as enlightened by constant repetition of Robert Dahl’s famous observation that “it would appear, on

⁹³ Keith E. Whittington, “‘Interpose Your Friendly Hand,’” Political Supports for the Exercise of Judicial Review by the United States Supreme Court,” 99 **American Political Science Review** 583, 584 (2005). See Mark A. Graber, “The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary,” 7 **Studies in American Political Development** 35 (1993).

⁹⁴ Morrison; Boerne; Garrett.

⁹⁵ See Graber, “Constructing Judicial Activism,” p. 445.

political grounds, somewhat unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court Justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite.”⁹⁶ Dahl understood that conservative elected officials were unlikely to appoint and confirm justices who would side with liberals on those issues that divided conservatives from liberals. Even when one party controls all elected branches of the national government, however, the political elite is unlikely to be a monolith. “[J]udicial conservatism,” Eric Claeys correctly observes, “is not a coherent single project of constitutional interpretation.”⁹⁷ Libertarians offer constitutional visions that differ substantially from those championed by evangelic Christians. Both frequently advance claims hostile to the constitutional concerns of big business. The internal divisions within contemporary conservatism and the Republican party explain why some members of the present political elite support enthusiastically, others merely tolerate, and still others vigorously oppose conservative litigation campaigns for second amendment rights, religious exemptions from anti-discrimination rules, fewer government restrictions on campaign finance restriction, greater respect for private property rights, and an end to affirmative action.⁹⁸ The prospects for conservative judicial

⁹⁶ Robert A. Dahl, “Decision-Making in A Democracy: The Supreme Court as a National Policy-Maker,” 50 **Emory Law Journal** 563, 578 (2001). See Tushnet, Taking the Constitution Away From the Courts, pp. 134-35.

⁹⁷ Eric R. Claeys, “Raich and Judicial Conservatism at the Close of the Rehnquist Court,” 9 **Lewis & Clark Law Review** 791, 817-181 (2005). See Young, “Judicial Activism,” pp. 1188-1209.

⁹⁸ See notes ____, above, and the relevant text.

activism on these and other issues depends on whether the balance of power among various conservatives in the elected branches of the national government mirrors or slightly differs from the balance of power among conservatives in the national judiciary.

Random selection may explain some judicial activism in conservative and other ages. Nine members of the governing majority selected at random are unlikely to mirror the governing majority perfectly, particular governing majorities as diverse as American governing majorities.⁹⁹ The arbitrariness associated with small groups provides reasons for thinking much judicial review will be “noise around zero,” offering “essentially random changes, sometimes good and sometimes bad, to what the political system produces.”¹⁰⁰ During the 1920s, the

⁹⁹ Gary Miller and Norman Schofield, “Activists and Partisan Realignment in the United States,” 97 *American Political Science Review* 245, 249 (2003) (“successful American parties must be coalitions of enemies. A party gets to be a majority party by forming fragile ties across wide and deep differences in one dimension of the other”).

¹⁰⁰ Mark Tushnet, Taking the Constitution Away from the Courts (Princeton University

judicial majority was somewhat more conservative than the national majority. During the 1950s and 1960s, the judicial majority was somewhat more liberal than the national majority. The Rehnquist Court was somewhat more conservative than the national majority on some issues and somewhat more liberal than the national majority on others.¹⁰¹ These deviations, a statistical analysis might suggest, are the normal outcome of a very small sample.

Press: Princeton, 1999), p. 153.

¹⁰¹ See Michael J. Klarman, "Majoritarian Judicial Review: The Entrenchment Problem," **85 Georgetown Law Review** 491, 548-49 (1997).

Random judicial review offers some hope for conservative and liberal litigators alike. Given the present conservative coalition consists of libertarians, proponents of certain big businesses, suburbanites who like low taxes, westerners opposed to land restrictions, religious conservatives and proponents of the war in Iraq, a very high probability exists that by sheer statistical accident, some members of the Republican coalition will be overrepresented in the Supreme Court and others will be underrepresented. To the extent religious conservatives are overrepresented, religious conservative litigators may be able to obtain exemptions from anti-discrimination laws that conservative electoral majorities will unwilling to adopt. To the extent proponents of big business wind up overrepresented on the Supreme Court, federal environmental regulations and prohibitions on commercial advertizing might be declared unconstitutional. The downside for (some) conservative litigators is that random fluctuations are as likely to benefit liberals as conservatives. If, for example, big business conservatives are overrepresented in the federal judiciary, then conservative courts may prove quite supportive of affirmative action programs favored by the Chamber of Commerce.¹⁰² To the extent libertarians are overrepresented on a conservative judiciary, proponents of gay rights are likely to have some litigation successes.¹⁰³

Conservative courts may also make conservative policies that conservative elected

¹⁰² See Sanford V. Levinson, "Redefining the Center: Liberal Decisions from a Conservative Court," **The Village Voice** 38 (July 2-8, 2003).

¹⁰³ See Randy E. Barnett, "Justice Kennedy's Libertarian Revolution: Lawrence v. Texas," **2 Cato Supreme Court Review** 21 (2003).

officials privately prefer but for political reasons would rather not publicly endorse.¹⁰⁴

Conservatives in Congress have the power under Section 5 of the Fourteenth Amendment to ban affirmative action. They may prefer, however, that judicial majorities take the political heat for such a decision. Representatives under great political pressure to pass campaign finance regulations they believe either unconstitutional or likely to favor political rivals may resolve their dilemmas by favoring legislation and supporting judicial nominees highly likely to declare such regulations unconstitutional. Similar efforts to have one's cake and eat it may explain why many conservatives supported the Gun Free Schools Act, the Religious Freedom Restoration Act, the Violence Against Women Act and the Americans with Disabilities Act, all the while praising and supporting the federal justices who declared unconstitutional crucial provisions of these measures.¹⁰⁵ Such symbolic politics, however, may also promote liberal policymaking. Conservative lawmakers who vote for statutes banning flag-burning or obscenity have also supported judicial nominees who are strong first amendment libertarians.¹⁰⁶ Some prominent commentators think Republicans are quietly quite happy that the Supreme Court presently protects a modicum of abortion and gay rights, thus allowing suburbanites to vote their

¹⁰⁴ The phenomenon of elected officials foisting off political responsibility for making policies they privately prefer is discussed at length in George I. Lovell, Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy (Cambridge University Press: New York, 2003). See also, Graber, "The Non-Majoritarian Difficulty."

¹⁰⁵ See Graber, "Constructing Judicial Review," p. 445.

¹⁰⁶ See Graber, "Constructing Judicial Review," p. 445.

conservative economic values rather than their liberal social values.¹⁰⁷

Presidential influence on the judicial selection process provides another reason why conservative judicial majorities may prove more conservative than conservative law-making majorities. Supreme Court justices are nominated by the president and confirmed by the Senate. Presidents typically select justices whom they believe will provide strong support for their political program.¹⁰⁸ Senators usually confirm all presidential nominees they believe reasonably qualified and not ideologically extreme.¹⁰⁹ Many Senators support judicial nominees whose views they perceive to be quite extreme when the nominating president is a member of their party.¹¹⁰ Members of the House of Representatives have almost no say in the process by which the federal bench is staffed. Not surprisingly, therefore, Supreme Court justices have historically favored constitutional visions championed by the presidential wing of the dominant national coalition when that vision differs from that of the legislative wing of the dominant national coalition.¹¹¹ The Roosevelt, Truman, Eisenhower, and Kennedy administrations were able to staff

¹⁰⁷ See, i.e., Jeffrey Rosen, The Most Democratic Branch: How Courts Serve America (Oxford University Press: New York, 2006), p. 102.

¹⁰⁸ See Epstein and Segal, Advise and Consent, pp. 130-35

¹⁰⁹ See Charles M. Cameron, Albert D. Cover, and Jeffrey A. Segal, "Senate Voting on Supreme Court Nominees: A Neoinstitutional Model," 84 **American Political Science Review** 526, 530-31 (1990).

¹¹⁰ See Cameron, Cover, and Segal, "Senate Voting," p. 531.

¹¹¹ See David Adamany, "The Supreme Court's Role in Critical Elections," Realignment

the federal courts with racial liberals at a time when they were not able to convince the Democratic Congress to pass major civil rights legislation. The resulting Warren Court did not mirror the dominant national coalition, but was fairly representative of those persons who served in the Justice Department during the Roosevelt, Truman, Eisenhower, Kennedy administrations.¹¹²

This presidential influence suggests the Roberts Court will be more conservative than the present Republican Congress. The Bush Administration favors more conservative policies than the national legislature. When, for the past six years, the executive and the legislative branch of the national government have disagreed, the president has typically taken the more conservative position.¹¹³ Separation of powers concerns have become particularly acute when President Bush signs bills into law. The Bush administration has issued more than 750 signing statements asserting that some provision in legislation passed by Republican majorities in both houses of Congress is unconstitutional. In virtually every instance, President Bush has indicated that he will not enforce measures more liberal than his administration believes appropriate. The objectionable

in American Politics: Toward a Theory (edited by Bruce A. Campbell and Richard J. Trilling) (University of Texas Press: Austin, Texas, 1980), p. 248; Graber, "The Non-Majoritarian Difficulty," pp. 43-44, 63-64.

¹¹² See Kevin J. McMahon, Reconsidering Roosevelt on Race: How the Presidency Paved the Road to Brown (University of Chicago Press: Chicago, 2003).

¹¹³ See, i.e., George C. Edwards III, Governing by Campaigning: The Politics of the Bush Presidency (Pearson Education, Inc.: New York, 2007), pp.171, 198, 206-09

provisions include:

bills banning the use of U.S. troops in combat against rebels in Columbia, bills requiring reports to Congress when money from regular appropriations is diverted to secret operations; two bills forbidding the use in military intelligence of materials “not lawfully collected” in violation of the Fourth Amendment; a post-Abu Ghraib bill mandating new regulations for military prisons in which military lawyers were permitted to advise commanders on the legality of certain kinds of treatment even if the Department of Justice lawyers did not agree; bills requiring the retraining of prison guards in humane treatment under the Geneva Conventions, requiring background checks for civilian contractors in Iraq and banning contractors from performing security, law enforcement, intelligence and criminal justice functions.¹¹⁴

Other signing statements declare that the president will not comply with legislative demands that scientific findings be presented to Congress uncensored and “refuse[] to honor Congressional attempts to impose affirmative action or diversity requirements on federal hiring.”¹¹⁵ To the extent President Bush successfully secures a Supreme Court that mirrors his conservative constitutional vision rather than that of the Congress, the judicial majority is likely to declare unconstitutional many laws that his administration will not enforce. Such justices are also likely to support presidential prerogative not to enforce measures the president regards as unconstitutional.

The tendency for federal courts to be staffed by legal elites provides a final reason why conservatives on some issues might be more successful in court than in electoral politics.

Virtually all contemporary Supreme Court justices have attended a very prestigious law school

¹¹⁴ See American Bar Association, “Task Force on Presidential Signing Statements and the Separation of Powers Doctrine,” p. 15.

¹¹⁵ American Bar Association, “Task Force,” pp. 16-18

and either practiced with an elite law firm or taught at an elite law school.¹¹⁶ These informal qualifications for judicial service mean that conservatives on the bench are likely to be far more educated and wealthier than the average conservative or Republican voter. Numerous surveys suggest that highly educated, affluent conservatives politically differ from their less educated, poorer peers. For most of the late twentieth century, such persons were likely to be more economically conservative and more socially liberal than other conservatives.¹¹⁷ These differences between elite and mass opinion help explain why, in both the United States and in other countries, justices during the late twentieth century tended to promote both economic and sexual liberty.¹¹⁸

Pew Research Center surveys of the American political landscape reveal changing differences between more affluent, better education Republicans and their less fortunate peers that

¹¹⁶ See Henry J. Abraham, Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Clinton (new and revised edition) (Rowman & Littlefield Publishers, Inc.: Lanham, Maryland, 1999), pp. 44-45.

¹¹⁷ See, i.e., Lerner, Robert, Nagai, Althea K., and Rothman, Stanley, "Abortion and Social Change in America," 37 **Society** 8 (January/February 1990), pp. 11-12; McClosky, Herbert and Brill, Alida, Dimensions of Tolerance: What Americans Believe About Civil Liberties (Russell Sage Foundation: New York, 1983), pp. 218-19.

¹¹⁸ See Ran Hirschl, Toward Juristocracy: The Origins and Consequences of the New Constitutionalism (Harvard University Press: Cambridge, Massachusetts, 2004),

may help predict the future direction of the Roberts Court.¹¹⁹ Researchers found that core Republican voters can be divided into three groups, Enterprisers, Social Conservatives and Pro-Government Conservatives. Voters in two other groups, Upbeats and Disaffecteds, also vote overwhelmingly for Republican candidates. Enterprisers differ from every other group of voter in two respects. They are much better educated and far more affluent on average. Their high socioeconomic status makes Enterprisers far more likely than Social Conservatives, Pro-Government Conservatives, or any other group of voters to secure federal judiciary appointments. Second, Enterprisers are far more committed to limited government and Bush administration policies during the war against terror than any other group of voters. Substantially higher percentages of Enterprises than Conservatives or Pro-Government Conservatives favor privatizing social security, drilling for oil in the Alaska Wilderness, reducing domestic spending, increasing military spending, torturing suspected terrorists, retaining the Patriot Act, maintaining recent tax cuts, eliminating minimum wages, banning affirmative action, and foregoing national health insurance. Enterprisers, however, are no more inclined than other core Republicans to support such socially conservative policies as banning abortion. Upbeats, the other group of affluent, highly educated, Republican voters, are far more likely than other Republicans to favor legal abortion and gay marriage. A judiciary composed of affluent, highly educated Republican elites, these findings

¹¹⁹ The material in this paragraph is taken from The Pew Research Center for the Press and the People, Beyond Red and Blue: Republicans Divided About Role of Government—Democrats by Social and Personal Values (released May 10, 2005) <http://people-press.org/reports/display.php3?ReportID=242>

indicate, will be far more conservative economically than the average Republican, more supportive of Bush administration foreign policies than the average Republican, but no more and perhaps even less supportive of social conservatism than the average Republican. Such a judiciary can be expected to take a narrower view than the national legislature of federal power under the commerce and spending clauses, but be no more tempted than any other governing institution to see aggressively to have Roe v. Wade or Lawrence v. Texas overruled.¹²⁰

Social conservatives hoping for some judicial activism on behalf of their causes may be heartened by political science research on elite polarization.¹²¹ Recent surveys are finding that “political party elites in the United States have grown increasingly polarized along a single ideological dimension.” Party elites now tend to take more extreme positions than average citizens on “social welfare, racial, and cultural issues.”¹²² One consequence of this elite polarization is that all governing official, legislators, executives and justices, in a conservative era

¹²⁰ 539 U.S. 558 (2003).

¹²¹ See, i.e., Geoffrey C. Layman, Thomas M. Carsey, and Juliana Menasce Horowitz, “Party Polarization in American Politics,” 9 **Annual Reviews in Political Science** 83 (2006); Marc J. Hetherington, “Resurgent Mass Partisanship: The Role of Elite Polarization,” 95 **American Political Science Review** 619 (2001).

¹²² Geoffrey C. Layman and Thomas C. Carsey, “Party Polarization and ‘Conflict Extension’ in the American Electoral,” 46 **American Journal of Political Science** 786, 786 (2002).

are likely to be more conservative than the average voter, even the average Republican voter.¹²³ Prominent Republicans are presently far more likely than the average Republican voter to prefer limited government, oppose affirmative action, and favor bans on abortion.¹²⁴ Given the political risks inherent in pushing programs more extreme than their constituents prefer, Republican elected officials more conservative than their average constituent have electoral incentives to foist responsibility for pursuing the conservative revolution on to the federal courts. Jacob Hacker and Paul Pierson note how Republicans prefer to “Run from Daylight,” when making policies more conservative than the constituents favor. This political strategy entails finding “alternative routes” that typically “throw up fewer roadblocks and attract less attention” than legislation, making such practices “especially attractive for moving public policy off center.”¹²⁵ On matters as diverse as weakening environmental regulations, banning affirmative action, and ensuring that religious believers are exempt from anti-discrimination laws, conservatives in the elected branch of government may prefer that the “dirty work” be done by conservatives in the federal judiciary. Rather than pass legislation securing these ends, Republicans may prefer staffing the bench with persons who share their more extreme conservative views but who, not having to seek reelection, are politically freer to make policies more conservative than warranted by public opinion.¹²⁶

¹²³ See Jacob S. Hacker and Paul Pierson, Off Center: The Republican Revolution and the Erosion of American Democracy (Yale University Press: New Haven, 2005).

¹²⁴ Layman and Carsey, “Party Polarization,” pp. 795-96.

¹²⁵ Hacker and Pierson, Off Center, p. 71.

¹²⁶ See Graber, “Constructing Judicial Review,” p. 445-46.

III. Implementation

Conservative litigation movements promote conservative causes in a conservative age only when non-judicial officials who are unwilling on their own initiative to enact or implement certain conservative policies will nevertheless implement those policies in response to judicial decisions. As Rosenberg demonstrated with respect to liberal constitutional causes, gaining favorable judicial decisions is merely half the political battle, if that. Southern conservatives maintained segregated schools long after Brown.¹²⁷ Police officers on the beat, with the help of sympathetic local judges, frequently ignored Supreme Court rulings protecting the Fourth and Fifth Amendment rights of persons suspected of crimes.¹²⁸ Preliminary observations and anecdotes, while providing some cause for thinking conservative judicial decisions may help facilitate more libertarian environmental and regulatory policies, also suggest that many of the same factors that made liberal courts weak vehicles for reforming conservative institutions when elected officials were unwilling to act are making conservative courts weak vehicles for reforming liberal institutions when elected officials are unwilling to act.

Jon B. Gould's analysis of hate speech regulations on college campuses provides a particular note of caution for conservative litigators bent on changing practices in a largely liberal

¹²⁷ See Rosenberg, The Hollow Hope, pp. 52-57.

¹²⁸ See Rosenberg, The Hollow Hope, pp. 304-35.

academy. Conservative litigators are undefeated in court. Whenever a court has ruled on the constitutionality of a college speech code, the policy has been declared unconstitutional.¹²⁹ The Supreme Court’s decision in R.A.V. v. St. Paul, declaring unconstitutional a city ordinance that prohibited “plac[ing] on public or private property a symbol, object, appellation, characterization or graffiti, . . . which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender”¹³⁰ was widely understood as aimed at campus speech codes.¹³¹ These legal successes, however, have had very limited practical impact. Gould’s investigation revealed that most colleges retained existing hate speech restrictions after nearly identical policies were declared unconstitutional. Far more universities adopted than abandoned bans on racist expression, even when those policies failed to survive judicial scrutiny in other jurisdictions. “[F]ive years after the Supreme Court spoke on hate speech regulation,” Speak No Evil: The Triumph of Hate Speech Regulation documents,

¹²⁹ See Dambrot v. Central Michigan University 55 f.3rd 1177 (6th Cir. 1995); Bair v. Shippensburg University, 280 F. Supp. 357 (M.D. Pa. 2003); The UWM Post v. Board of Regents of the University of Wisconsin System 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989); Corry v. Stanford University, No. 740309 (Cal. Super. Ct. 1995).

¹³⁰ R.A.V. v. St. Paul, 505 U.S. 377, 380 (1992).

¹³¹ See, i.e., Nadine Strossen, “In Defense of Freedom and Equality: The American Civil Liberties Union Past, Present, and Future,” 29 **Harvard Civil Rights-Civil Liberties Law Review** 143, 158 (1994).

“almost half of American colleges and universities had hate speech policies on their books, a rise of nearly 30 percent from the time of the Court’s opinion.”¹³² The few universities that abandoned speech codes did so in response to public pressure, not judicial rulings. Gould found that when institutions rescinded hate speech regulations, desires to conform to judicial “holdings were not part of their calculus.” “Their decisions reflected a cost-benefit calculation,” he observes, “with the costs of internal strife and negative press attention outweighing any benefits that administrators may have anticipated in the quality of campus life or the expectations for racial, gender, or ethnic relations at the school.”¹³³ Significantly, those institutions that have complied with judicial decisions are “only a handful.” Gould concludes, “(a) much greater number ignored, evaded, or directly challenged the courts’ authority.”¹³⁴

Affirmative action is a second area in which conservative judicial victories have not automatically been translated into conservative policy gains. The Supreme Court in City of Richmond v. J.A. Croson¹³⁵ ruled that affirmative action programs had to satisfy strict scrutiny, a

¹³² Jon B. Gould, Speak No Evil: The Triumph of Hate Speech Regulation (University of Chicago Press: Chicago, 2005), pp. 5-6.

¹³³ Gould, Speak No Evil, pp. 156. See also, Donald Alexander Downs, Restoring Free Speech and Liberty on Campus (Cambridge University Press: New York, 2004) (noting that pressure from faculty and students, not judicial decisions, explains why the University of Wisconsin rescinded its speech code).

¹³⁴ Gould, Speak No Evil, p. 153.

¹³⁵ 488 U.S. 469 (1989).

standard that at the time was thought to be “strict in theory, fatal in fact.”¹³⁶ Lower courts faithfully followed this standard. Conservative litigators who challenged minority set-aside programs in the wake of Croson almost always succeeded in having those policies declared unconstitutional by federal judges.¹³⁷ Nevertheless, affirmative action remained vibrant. Local governments refused to reopen previous settlements requiring racial preferences, even after the Supreme Court indicated that such decrees would be struck down.¹³⁸ Local officials committed to race conscious measures found means for crafting “policies that deviate[d] from the judiciary’s policy preferences [in Croson] while simultaneously insulating those programs from litigation.”¹³⁹ Martin Sweet found that “at least 150 local governments enacted, or at least attempted to enact, revised or adopted entirely *new* affirmative action programs in the decade following Croson.”¹⁴⁰ Claims that “elected officials” have “treat[ed] Court decisions as little more than ‘waste

¹³⁶ Gerald Gunther, “In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,” 86 **Harvard Law Review** 1, 8 (1972).

¹³⁷ Sweet, “Supreme Policymaking,” p. 81.

¹³⁸ Neal Devins, “*Adarand Constructors, Inc. v. Pena* and the Continued Irrelevance of Supreme Court Affirmative Action Decisions,” 37 **William and Mary Law Review** 673, 686 (1996).

¹³⁹ Sweet, “Supreme Policymaking,” p. 23.

¹⁴⁰ Martin J. Sweet, “Supreme Policymaking: Coping with the Supreme Court’s Affirmative Action Policies.” PhD dissertation, University of Wisconsin, Madison, Department of Political Science, 2004, p. 2.

paper,”¹⁴¹ may be too strong. A few jurisdictions abandoned affirmative action programs in response to court decisions and other programs were scaled down.¹⁴² Still, few conservatives would point to judicial decisions striking down affirmative action plans when celebrating judicial capacity to promote conservative constitutional change.¹⁴³

Liberal jurisdictions responded to Croson primarily by obtaining disparity reports demonstrating that past discrimination had influenced the local market for government construction contracts.¹⁴⁴ Sweet notes that after 1989, more than one hundred local governments procured disparity studies at costs between \$500,000 and \$7,000,000.¹⁴⁵ Many studies are “designed to be briefs for MBE [Minority Business Enterprise] programs and to function as insurance policies designed to discourage litigation.”¹⁴⁶ These studies did not directly challenge the holding in Croson. Justice O’Connor in Croson asserted that better statistical evidence demonstrating that “nonminority contractors were systematically excluding minority businesses from subcontracting opportunities” would under certain circumstances justify “some form of

¹⁴¹ Devins, “Continued Irrelevance,” p. 681.

¹⁴² Sweet, “Supreme Policymaking,” pp. 16, 106, 111.

¹⁴³ Devins, “Continued Irrelevance,” p. 681.

¹⁴⁴ Devins, “Continued Irrelevance,” p. 685.

¹⁴⁵ Sweet, “Supreme Policymaking,” p. 49. See George R. La Noue, “The Impact of Croson on Equal Protection Law and Policy,” 61 **Albany Law Review** 1, 13 (1997).

¹⁴⁶ See La Noue, “Impact,” at 13.

narrowly tailored racial preference.”¹⁴⁷ Nevertheless, disparity studies were not simply good faith efforts to satisfy conservative judicial demands. For both legitimate reasons owing to the nature of past discrimination and illegitimate reasons owing to the desire to maintain an unconstitutional minority set-aside, localities took steps to ensure that the relevant disparity study reached the politically correct conclusion.¹⁴⁸ Litigants challenging minority set-asides ostensibly grounded in a disparity study either had to engage in equally expensive studies to demonstrate error, or at least hire experts at expensive fees who would testify against the disparity study. George R. La Noue notes how even a faulty disparity study would typically “cheer the MBE program supporters, intimidate the program's opponents, create some useful headlines, satisfy editorial writers, and perhaps most importantly, add immeasurably to the plaintiff's costs in litigation.”¹⁴⁹

Sweet's study of minority contracting programs in Philadelphia, Portland and Miami highlighted other ways in which localities limited the immediate and long term impact of Croson. Philadelphia was able to maintain an unconstitutional minority business enterprise program for many years by engaging in protracted litigation that city attorneys were fairly confident would be unsuccessful. When, long after Croson, the city's minority set-aside program was finally declared unconstitutional, the mayor responded with a nominally race-neutral spending program that was thought to have a similar impact on minority contracting with the city.¹⁵⁰ Rather than respond to

¹⁴⁷ Croson, at 509.

¹⁴⁸ Devins, “Continued Irrelevance,” p. 685; La Noue, “Impact,” pp. 13-14.

¹⁴⁹ La Noue, “Impact,” p. 12.

¹⁵⁰ Sweet, “Supreme Policymaking,” p. 78.

the colorblind demands of the conservative justices who decided Croson, Portland developed a new minority business enterprise program that responded to the quite different financial demands of the main conservative interest group that was sponsoring constitutional attacks on minority set-asides in other cities. Portland's new program retained racial set-asides for some municipal contracts, but excluded from that program the larger construction contracts routinely bid on by established firms.¹⁵¹ Without financing help from these larger construction companies, smaller majority owned construction firms had no capacity to challenge what was clearly an unconstitutional program by conservative judicial standards. Miami similarly forestalled litigation in part by limiting implementation of a minority set aside to the contracts typically given to small companies that lack the resources necessary for a lengthy law suit against the city.¹⁵² Dade County "complied" with court orders striking down minority set asides in construction by maintaining a "Black, Women and Hispanic Business Enterprise" program for all county contracts other than construction and establishing a "Community Small Business Enterprise" for allocating construction contracts.¹⁵³ Minority contractors in Miami are also likely to benefit from proposals to convert minority business enterprise programs into geographically based business enterprise programs that provide special breaks for contractors who live in particular areas. Given

¹⁵¹ See Sweet, "Supreme Policymaking," pp. 102-105. Portland further forestalled litigation by hiring as a consultant the professor must often called as an expert witness by plaintiffs challenging affirmative action programs. See Sweet, "Supreme Policymaking," p. 93.

¹⁵² Sweet, "Supreme Policymaking," p. 113, 128.

¹⁵³ Sweet, "Supreme Policymaking," p. 115.

the level of residential segregation in Miami, a program based on geography is not likely to differ from a program based on race.¹⁵⁴

A similar phenomenon is occurring with other affirmative action programs, although evidence is frequently anecdotal. Girardeau Spann notes how institutions committed to progressive understandings of racial justice for the foreseeable future will likely be able “to secure at least some of the benefits of racial balance” by “us(ing) race-neutral factors as proxies for race.”¹⁵⁵ Substituting geography for race is proving popular. Even prominent Republicans hail as constitutional alternatives to affirmative action programs which guarantee university admissions to any student who finishes in the top ten percent of their class.¹⁵⁶ The constitutional problem with such policies is that existing precedent requires strict scrutiny both for race conscious measures and for race neutral measures that were adopted for the purpose of benefitting or disadvantaging a particular race,¹⁵⁷ and such programs are openly defended as means for increasing racial balance in state universities.¹⁵⁸ Still, as Spann points out, conservative justices

¹⁵⁴ Sweet, “Supreme Policymaking,” p. 137.

¹⁵⁵ Girardeau A. Spann, “Neutralizing Grutter,” 7 **University of Pennsylvania Journal of Constitutional Law** 633, 647 (2005).

¹⁵⁶ See Lackland H. Bloom, Jr., “Grutter and Gratz: A Critical Analysis,” 41 **Houston Law Review** 459, 485 (2004).

¹⁵⁷ See, i.e., Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 270 (1977).

¹⁵⁸ See Gratz v. Bollinger, 539 U.S. 244, 297-98 (2003) (Souter, J., dissenting).

who “delve that deeply into the intent of executive or legislative policy-makers” responsible for race-neutral measures that benefit persons of color, “would be analytically required to delve just as deeply into the intent lying beneath all of the facially neutral classifications that American culture presently uses to disadvantage racial minorities with respect to education, employment, housing, and political power.”¹⁵⁹ Another popular move is to substitute diversity for race, making race one element of diversity. As Justice Rehnquist pointed out in his dissent in Grutter v. Bollinger,¹⁶⁰ diversity programs at major universities seem to function similarly to quota systems.¹⁶¹ The Court’s willingness to discount the relevant evidence suggests that “Grutter . . . can be used to support the proposition that well camouflaged racial balancing is constitutionally permissible.”¹⁶²

Future conservative litigation campaigns aimed at realizing a color-blind society are unlikely to produce more conservative policy changes in the absence of greater conservative commitment to race neutral practices. Present constitutional doctrine contains many loopholes in part because important conservative constituencies, such as the Chamber of Commerce and the military, favor some forms of race preference. As *Business Week* has declared, support for affirmative action is “deeply ingrained in American corporate culture.”¹⁶³ As long as prominent

¹⁵⁹ Spann, “Neutralizing Grutter,” p. 650.

¹⁶⁰ 539 U.S. 306 (2003).

¹⁶¹ Grutter, at 381-86 (Rehnquist, C.J., dissenting).

¹⁶² Spann, “Neutralizing Grutter,” p. 652.

¹⁶³ Devins, Continued Irrelevance,” p. 697. See Mark Tushnet, A Court Divided: The

elites in the Republican coalition do not share Justice Scalia's abhorrence of racial classifications, a reasonable probability exists that Scalia's views will not command a judicial majority, even if Republicans are able to replace some of the more moderate members of the Roberts Court. Republican activists who could not persuade Reagan and Bush I administration officials to rescind executive orders mandating affirmative action¹⁶⁴ are unlikely to be more successful persuading such officials to nominate to the federal judiciary only those persons vehemently opposed to any affirmative action program. Moreover, devising judicial doctrine that does not have loopholes may be exceptionally difficult. One wonders, for example, whether the Michigan Law admissions process at issue in Grutter would have generated different outcomes had decision makers not been required to consider race as an element of diversity, but could simply have used their own best judgment. Similarly, as long as major businesses perceive the economic value of having a workforce that racially and ethnically resembles the markets they serve, a high probability exists that judicial decisions outlawing any form of racial preference will simply drive such practices further underground.¹⁶⁵

Rehnquist Court and the Future of Constitutional Law (W.W. Norton & Company: New York, 2006), pp. 233-34; Thomas M. Keck, "From Bakke to Grutter: The Rise of Rights-Based Conservatism," The Supreme Court & American Political Development (edited by Ronald Kahn and Ken I. Kersch) (University of Kansas Press: Lawrence, Kansas, 2006), p. 430 ("an overwhelming elite consensus in defending the importance of racial diversity").

¹⁶⁴ See Devins, "Continued Irrelevance," p. 688-89.

¹⁶⁵ See, i.e., Roger Clegg, "Striking a Balance: EEO, Diversity, and Affirmative Action,"

Conservatives may have more success transforming conservative judicial victories into significant conservative policy outcomes when they litigate property rights. Conventional wisdom among scholars and litigators is that such cases as Nollan v. California Coastal Commission¹⁶⁶ and Lucas v. South Carolina Coastal Council¹⁶⁷ are significantly restraining land use and environmental regulation, though not necessarily for reasons that appear on the face of the majority opinions in those decisions. Supreme Court decisions providing what may seem fairly minor legal protections for property holders often substantially increase the litigation costs localities must pay to maintain even regulations that federal courts would probably declare constitutional. J. Peter Byrne notes, “(e)ven when local governments successfully defend against takings lawsuits, the mere cost of litigating these claims can be staggering.”¹⁶⁸ Not surprisingly, many local officials prefer settlement when their zoning or environment rules are legally challenged. The consequence is probably substantial underregulation.¹⁶⁹ Affluent Americans are particularly likely to benefit from judicial decisions that require local governments passing land use and environmental regulations to meet vague constitutional standards. “Although the

May 16, 2006, <http://www.ceousa.org/pdfs/eeoctestimony.pdf>.

¹⁶⁶ 483 U.S. 825 (1987).

¹⁶⁷ 505 U.S. 1003 (1992).

¹⁶⁸ J. Peter Byrne, “Basic Themes for Regulatory Takings Litigation,” 29 **Environmental Law** 811, 815 (1999).

¹⁶⁹ William Michael Treanor, “The Armstrong Principle, the Narratives of Takings, and Compensation Statutes,” 38 **William & Mary Law Review** 1151, 1176 (1997).

increased litigation costs may favor the government over small property owners who do not have the resources to maintain a costly lawsuit,” Barton Thompson notes, “the increased expense concomitantly may favor large property owners over the government.”¹⁷⁰

Susan MacManus and Patricia Turner’s 1992 survey of municipal law officers provides generalized support for claims that local governments refrain from enforcing constitutional land use and environmental regulations in order to avoid litigating takings lawsuits. Their findings confirmed that one major cause of the sharp rise in litigation costs municipalities experienced during the early 1990s was “an explosion in the non-tradition use of civil rights statutes . . . to include cases involve such areas as zoning and land development.”¹⁷¹ Poorer municipalities reported that defending environmental regulations was eating away at the local budget.¹⁷² Local officials responded to this litigation crisis primarily by foregoing projects they thought constitutional. MacManus and Turner found that “81.4[of all officers surveyed] acknowledged they settled at least some of their ‘winnable’ cases just to save money.”¹⁷³ Some jurisdictions

¹⁷⁰ Jordan C. Kahn, “Lake Tahoe Clarity and Takings Jurisprudence: The Supreme Court Advances Land Use Planning in Tahoe-Sierra,” 26 **Environs Environmental Law & Policy J.** 33, 61. n. 181 (2002) (quoting Barton H. Thompson, Jr.).

¹⁷¹ Andrew Blum, “Lawsuits Put Strain on City Budgets,” 10 **National Law Journal** 1, 32-33 (1988); Susan A. MacManus and Patricia A. Turner, “Litigation as a Budgetary Constraint: Problem Areas and Costs,” 53 **Public Administration Review** 462, 465, 467 (1993).

¹⁷² MacManus and Turner, “Litigation as a Budgetary Constraint,” p. 467.

¹⁷³ MacManus and Turner, “Litigation as a Budgetary Constraint,” p. 469 (1993).

settled “over half their cases to save money.”¹⁷⁴

These conservative litigation successes paradoxically suggest that more conservative judicial decisions in regulatory cases may have diminishing public policy returns. Preliminary evidence indicates that official decisions to enforce regulations are as much based on comparative ability to pay litigation costs as beliefs about whether the regulation at issue will survive judicial scrutiny.¹⁷⁵ If this is correct, property holders with the capacity to litigate need only a constitutional standard strong enough to avoid having their lawsuit dismissed on a motion for summary judgment in order to secure a favorable settlement with local officials. By comparison, government officials need only a constitutional standard weak enough to prevent summary judgment for the property holder in order to forestall litigation by those without the resources to engage in protracted litigation.

The admittedly sketchy evidence on the different impacts conservative judicial decisions have had on affirmative action and regulatory policy highlight the important role willingness and ability to litigate play in American constitutional politics.¹⁷⁶ Various tiers of judicial scrutiny may

¹⁷⁴ Susan A. McManus, “The Impact of Litigation on Municipalities: Total Cost, Driving Factors and Cost-Containment Mechanisms,” 44 **Syracuse Law Review** 833, 842 (1993).

¹⁷⁵ See Kahn, “Lake Tahoe Clarity and Takings Jurisprudence,” p. 61. n. 181 (2002).

¹⁷⁶ See especially, Susan E. Lawrence, The Poor in Court: The Legal Services Program and Supreme Court Decision Making (Princeton University Press: Princeton, New Jersey, 1990); Charles R. Epp, The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspectives (University of Chicago Press: Chicago, Illinois, 1998).

have more influence on legal theory than on political practice. Mere rationality tests have significant policy consequences when, as seems to be the case with environmental and land use law, an apparently deferential legal standard nevertheless enables private parties to avoid summary judgment, thus increasing the litigation costs fiscally weak localities must pay to maintain both constitutional and unconstitutional policies. Strict scrutiny may have a lesser policy impact when, as seems to be the case with affirmative action, local officials are willing to pay substantial litigation costs to maintain putatively unconstitutional policies and are able to impose substantial litigation costs on parties seeking to challenge their actions. These differences in willingness and capacity to litigate help explain and supplement Rosenberg's conclusion that "courts may effectively produce significant social reform when other actors impose social costs to induce compliance."¹⁷⁷ When conservative litigants are able to impose more litigation costs than liberal officials are willing to pay, the resulting public policy is likely to be more conservative than mandated by the Supreme Court. When liberal officials are willing to pay litigation costs and are able to impose more litigation costs than potential conservative litigants are willing to pay, public policy is likely to be more liberal than mandated by the Supreme Court.

IV. Conclusion

A. Whither the Roberts Court

¹⁷⁷ Rosenberg, The Hollow Hope, p. 33.

Progressives at present should be more worried about radicals in suits than radicals in robes.¹⁷⁸ The conservative Republicans who presently control all elected branches of the national government are adopting programs that most progressives believe transfer wealth from the poor to the best off Americans, degrade an already degraded environment, weaken national capacity to form crucial alliances in the war against terrorism, foster unconscious and conscious bigotry on the basis of race, ethnicity, religion, and sexual orientation, favor drug companies over the medically needy, and largely give government over to large investors.¹⁷⁹ The Roberts Court is likely to contribute to this conservative agenda, if at all, only at the margins. If country-club conservatives continue influencing the judicial selection process, the Supreme Court in the future may strike down particularly egregious (and one suspects largely symbolic) restrictions on abortion and homosexuality.¹⁸⁰ If libertarians continue influencing the judicial selection process, certain national environmental laws will be declared unconstitutional.¹⁸¹ These decisions will have some impact, particularly if they can be enforced by market mechanisms or impose more

¹⁷⁸ The phrase “radicals in robes” is taken from Cass R. Sunstein, Radicals in Robes: Why Extreme Right-Wing Courts are Wrong for America (Basic Books: New York, 2005).

¹⁷⁹ See, i.e., Jacob S. Hacker and Paul Pierson, Off Center: The Republican Revolution and the Erosion of American Democracy (Yale University Press: New Haven, Connecticut, 2005); Richard Clarke, Against All Enemies: Inside America’s War on Terror (Free Press: New York, 2004); Chris Mooney, The Republican War on Science (Basic Books: New York, 2005).

¹⁸⁰ See Tushnet, Taking the Constitution Away from the Courts, p. 149.

¹⁸¹ See notes ____, above, and the relevant text.

litigation costs than liberal administrators are willing to pay.¹⁸² Still, when seen in political context, worrying about the impact of a conservative Supreme Court in a conservative era is a bit like our worrying about whether global warming will increase the flooding in our basement.

Progressives probably will not have to worry about the impact of the Roberts Court should the political left in the near future established relatively enduring control over the national legislative, national executive, and most state governments. Throughout American history, dominant national coalitions have consistently triumphed over recalcitrant courts. Justices when faced with hostile elected officials frequently pull their punches. The Marshall Court began by refusing to challenge the Jeffersonian decision to repeal the Judiciary Act of 1801¹⁸³ and ended by finding ways to avoid a direct challenge to Jacksonian policies toward the Cherokee Indians.¹⁸⁴ Governing officials have ignored justices who have or are likely to declare cherished policies unconstitutional. President Abraham Lincoln refused to obey a writ of habeas corpus issued by Chief Justice Roger Taney.¹⁸⁵ Members of his cabinet and military officers for the next four

¹⁸² See Rosenberg, The Hollow Hope, p. 33; notes ____, above, and the relevant text.

¹⁸³ See Stuart v. Laird, 5 U.S. 299 (1803); Marbury v. Madison, 5 U.S. 137 (1803); Bruce Ackerman, The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy (Harvard University Press: Cambridge, Massachusetts, 2005), pp. 163-198.

¹⁸⁴ Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832); Mark A. Graber, "Federalists or Friends of Adams: The Marshall Court and Party Politics," 12 **Studies in American Political Development** 229, 260-61 (1998).

¹⁸⁵ See David M. Silver, Lincoln's Supreme Court (University of Illinois Press: Urbana,

years transferred prisoners or refrained from appealing adverse lower court rulings in order to avoid a Supreme Court decision on the constitutionality of martial law.¹⁸⁶ Other judicial challenges to popular policies are soon reversed. The Chase Court's challenge to the constitutionality of legal tender lasted one year.¹⁸⁷ The Hughes Court's challenge to the New Deal lasted two years.¹⁸⁸ When all else fails, jurisdiction may be curtailed. Congress, by repealing the Judiciary Act of 1866, prevented the Supreme Court from declaring unconstitutional crucial reconstruction measures.¹⁸⁹ Jurisdiction was restored shortly after several Republican appointees replaced Democratic holdovers.¹⁹⁰ Courts in other countries that too aggressively challenged a dominant national coalition were completely reconstituted.¹⁹¹

Illinois, 1956), pp. 27-36.

¹⁸⁶ Silver, Lincoln's Supreme Court, pp. 123-25, 171-73.

¹⁸⁷ Compare Hepburn v. Griswold, 75 U.S. 603 (1870); Knox v. Lee, 79 U.S. 457 (1871).

¹⁸⁸ Compare Schechter Poultry Corporation v. United States, 295 U.S. 495 (1935) and Carter v. Carter Coal Co., 298 U.S. 238 (1936) with N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

¹⁸⁹ See Ex Parte McCordle, 74 U.S. 506 (1868).

¹⁹⁰ See Howard Gillman, "How Political Parties Can Use the Courts To Advance Their Agendas: Federal Courts in the United States, 1875-1891," 96 **American Political Science Review** 511, 515-17 (2002).

¹⁹¹ Ran Hirschl, "Beyond the American Experience: The Global Expansion of Judicial Review, Marbury v. Madison: Documents and Commentary (edited by Mark A. Graber and

Conservative courts may be more than a small irritant when progressives first gain control of all national elected institutions. Progressives who come to power while the Roberts Court sits will likely be forced to spend scarce political resources combating judicial hostility to their national agenda. The consequence will likely be that their “majority coalition [will be] diverted from its program of substantive policies to a quarrel, often inspiring internal disunity, about issues of constitutional structure and organization.” This “division in both the electoral and the governmental wings of the majority party over the counterattack on the judiciary,” David Adamany points out, “diminishes the [progressive] coalition’s ability to act in concert on other matters.”¹⁹² Roosevelt’s court-packing plan cost his administration crucial political support and time, and may have been partly responsible for the conservative surge in the 1938 midterm elections.¹⁹³ Nevertheless, progressive problems with conservative courts played only a minor

Michael Perhac) (Washington, D.C.: CQ Press, 2002), pp. 142-44; Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge University Press: New York, 2003), p. 187-200.

¹⁹² David Adamany, “The Supreme Court’s Role in Critical Elections,” Realignment in American Politics: Toward a Theory (edited by Bruce A. Campbell and Richard J. Trilling) (University of Texas Press: Austin, Texas, 1980), p. 246.

¹⁹³ See David Adamany, “Legitimacy, Realigning Elections, and the Supreme Court,” 1973 **Wisconsin Law Review** 790, 839-41, 844-45 (1973); James MacGregor Burns, Roosevelt: The Lion and the Fox (Harcourt, Brace and Company: New York, 1956), pp. 314-15.

role in the waning of the New Deal.¹⁹⁴ Both history and scholarship suggest that to the extent progressives successfully establish a durable electoral majority, their long-run concern is more likely to be staffing a court that best serves those progressive values than combating a court that does not.¹⁹⁵

Conservative courts are likely to influence public policy significantly only after progressives secure partial control of the national government. Divided government throughout the world facilitates judicial policymaking. “The more diffused politics are,” Tom Ginsburg observes, “the more space courts have in which to operate.”¹⁹⁶ When the national executive and national legislature are controlled by two very different majorities, courts that support legislative constitutional commitments, executive constitutional commitments, a combination of both, or a middle way, can be confident that at least one major national institution will come to their defense

¹⁹⁴ See Burns, Roosevelt, p. ____.

¹⁹⁵ See, i.e., Lucas A. Powe, Jr., The Warren Court and American Politics (Harvard University Press: Cambridge, Massachusetts, 2000); Howard Gillman, “Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism,” The Supreme Court & American Political Development (edited by Ronald Kahn and Ken I. Kersch) (University of Kansas Press: Lawrence, Kansas, 2006); Jack M. Balkin and Sanford Levinson, “Understanding the Constitutional Revolution,” 87 **Virginia Law Review** 1045 (2001).

¹⁹⁶ Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge University Press: New York, 2003), p. 18. See Graber, “The Nonmajoritarian Difficulty,” p. 71.

should the national branch controlled by judicial losers attack. Ginsburg details how judicial activism flourished in Taiwan, South Korea, and Mongolia when government was divided.¹⁹⁷ The same is true in the United States. Much Warren Court activism was rooted in the sectional divisions that divided the dominant Democratic party, divisions that encouraged liberal executives to promote liberal judicial policymaking when they could not always rely on liberal legislative policymaking.¹⁹⁸ Much Burger Court activism was a consequence of liberal legislators and conservative executives turning to courts to resolve their policy and constitutional disputes.¹⁹⁹

The Roberts Court may prove to be quite destructive to progressive interests during a time of divided government. A conservative court is likely to side with conservatives when disputes arise between elected institutions controlled by conservatives and elected institutions controlled by liberals. The Roberts Court augmented by one more conservative appointee is highly likely to interpret narrowly or declare unconstitutional progressive legislation intended to reign in a conservative president's efforts to engage in unilateral policymaking and rights violations during the war against terrorism. The same justices might also insist on approval from a conservative congress should a progressive president seek to abolish the military ban on gay soldiers or mandate by executive order that affirmative action be practiced in the federal workplace.

Most important, conservative courts are likely to be able to do more damage to liberal regulatory reforms than liberal courts can do to conservative regulatory reforms. For the most

¹⁹⁷ See Ginsburg, *Judicial Review*, pp. 227, 261

¹⁹⁸ See sources cited in footnote ____, above.

¹⁹⁹ See, i.e., Graber, "The Nonmajoritarian Problem," p. 59-60.

part, conservatives promote deregulation. Courts contribute to those efforts even when they announce fairly weak standards for protecting property rights, because financially strapped localities often cannot afford to pay the litigation costs necessary for maintaining constitutional regulations. Progressive regulatory reform, by comparison, typically requires the well-coordinated efforts between multiple actors that is very difficult to achieve in a regime where power is diffused as widely as in the United States.²⁰⁰ To the extent that courts merely add to the complexity and expense of that coordination, they are likely to inhibit significantly progressive efforts to improve the environment, promote national health care, and redistribute economic resources. In short, good reasons exist for thinking that Roberts Court decisions during a time of divided government will do more to prevent liberal policymaking than Warren and Burger Court decisions during a time of divided government did to promote liberal policymaking.

B. Drifting Toward Libertarianism

The Roberts Court in almost every conceivable political environment is likely to make American public policy more libertarian. Independent judicial capacity to limit government will be relatively minimal should the present conservative ascendancy endure or be replaced by a durable progressive majority. The Roberts Court will have a far greater impact during periods of divided government by siding with the more conservative branch of the national government

²⁰⁰ See Mark A. Graber. “Social Democracy and Constitutional Theory,” 69 **Fordham Law Review** 1969,1978-85 (2001).

against the more progressive branch when the latter seeks to promote government power to redistribute wealth, provide universal health care, promote greater social equality, and heal the environment.²⁰¹ This judicial libertarianism is partly rooted in distinctive features of contemporary constitutional conservatism. Republican elites consistently place higher legislative priority on cutting taxes than banning abortion.²⁰² The most prominent conservatives in the legal academy, Richard Epstein and Randy Barnett, write bold arguments for judicial activism on behalf of libertarianism and have little affinity for religious communitarianism.²⁰³ Contemporary liberals exhibit similar tendencies. Democratic elites fight to death to prevent any law regulating abortion, but typically cave on welfare issues.²⁰⁴ Other causes of judicial libertarianism, however, are more rooted in American constitutional practice and more global aspects of judicial review.

Courts, American courts in particular, tend to push policy in more libertarian directions for three reasons. First, the Constitution of the United States has historically been understood to consist of enumerated powers and limits on government power. The Constitution, most judges and scholars believe, "is a charter of negative rather than positive liberties."²⁰⁵ This common

²⁰¹ See notes ____, above, and the relevant text.

²⁰² See Graber, "The Non-Majoritarian Problem," pp. 56-59..

²⁰³ See sources cited in notes ____, above.

²⁰⁴ See Mark A. Graber, "The Clintonification of American Law: Abortion, Welfare and Liberal Constitutional Theory," 58 **Ohio State Law Journal** 731, 731-33 (1997).

²⁰⁵ Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983). See David P. Currie, "Positive and Negative Constitutional Rights," 53 **University of Chicago Law Review** 864, 890

characterization of the constitution explains why both conservatives and liberals have emphasized constitutional arguments against government regulation rather than constitutional arguments mandating government action. Liberals during the 1960s and 1970s gained more judicial support when they asserted the constitution forbade government regulation of abortion than when they asserted that the constitution mandated that the poor be supplied with certain basic necessities.²⁰⁶ Conservatives have more plausibly asserted that the constitution forbids government regulation of campaign finance than that the constitution mandates protection of unborn children.²⁰⁷ Second, the affluent, well educated citizens who tend to become justices are more concerned with freedom from government regulation than government protection. Ran Hirschl observes how judges throughout the world typically are allied with secular elites who promote libertarian agendas. Their decisions protect more marginalized citizens only when doing so is “congruent with the prevalent conceptualization of rights as safeguards against state interference with the private sphere.”²⁰⁸ The country club Republicans who cast crucial votes on the Rehnquist Court were far more concerned with limiting environmental regulations than prohibiting abortion.²⁰⁹ Their more liberal counterparts were far more committed to a constitutional right to sexual autonomy than

(1986).

²⁰⁶ See Rosenberg, The Hollow Hope, p. 11; Graber, “The Clintonification of American Law,” p. 741-43.

²⁰⁷ See notes ____, above, and the relevant text.

²⁰⁸ Hirschl, Toward Juristocracy, p. 218.

²⁰⁹ See Tushnet, Taking the Constitution Away From the Courts, p. 148.

constitutional rights to basic necessities.²¹⁰ Third, judicial decisions prohibiting government action consistently have had more policy impact than judicial decisions requiring government action. Courts have proven poor vehicles for requiring schools to integrate or adopt color-blind policies. By increasing litigation costs and allowing private markets to function more freely, however, judicial decisions have more successfully protected property holders from land-use regulations and increased middle class access to safe abortions.

The legitimacy of judicial review rests on what courts do in practice rather than on what they do in theory. Whether justices are more likely than other officials to interpret the constitution correctly is contestable,²¹¹ but accumulating evidence is demonstrating that judicial review has predictable policy consequences. Courts have powerful tendencies, particularly when government is divided, to impede government action, liberal or conservative, good or bad. Progressives who should not worry much about the role of conservative courts in a conservative era ought to worry a good deal about whether courts in general are more inclined and able to

²¹⁰ Compare Lawrence v. Texas with M.L.B. v. S.L.J., 519 U.S. 102, 125 (1996) (refusing to challenge cases “recognizing that the Constitution ‘generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.’ DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 196 . . . (1989)”).

²¹¹ See Jeremy Waldron, “The Core of the Case Against Judicial Review,” 115 **Yale Law Journal** 1346, 1376-86 (2006); Tushnet, Taking the Constitution Away from the Courts, pp. 54-71, 152-53.

promote the deregulatory projects generally preferred by the political right to the regulatory projects generally preferred by the political left.