

Party Politics and Constitutional Change:
The Political Origins of Liberal Judicial Activism

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Abstract

This chapter traces the political origins of liberalism in the Warren- and post-Warren-era federal judiciary. Rather than view these developments as a byproduct of unrestrained judicial activists intent of following personal political agendas, I argue that it is more accurate to begin with the self-conscious efforts of Democratic Party office-holders in the 1960s to transform the federal judiciary into a reliable carrier of New Frontier/Great Society constitutional values. While account is consistent with the claim that the Supreme Court should be seen as part of the “dominant governing coalition,” I also explore the ways in which the Supreme Court exacerbated cleavages in that coalition and triggered efforts to block or rollback those developments. Thus, the political significance of 1960s Democratic entrenchment in the judiciary has as much to do with the way in which the political system reacted to the liberalization of the federal judiciary as with the resulting changes in constitutional policy making

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I. Introduction

It has been standard practice in public law scholarship to depict judges as self-interested policy makers competing against other policy makers. Judicial behavioralism fosters this one-against-the-other starting point by adopting a level of analysis that focuses on the preferences of individual judges and by treating the sources of judicial attitudes as exogenous to most models of decision making. Strategic approaches begin with this same starting point but then explore whether the dynamics of collegial or inter-institutional decision making complicate the ways in which judges pursue their individual preferences.¹ These approaches shed light on important aspects of judicial politics, but—to use the lexicon of this volume—they do little to relate the “internal” points of view of judges with the “external” goals and preferences of those power holders who create courts and appoint judges.

This chapter explores the advantages of explaining changes in judicial understandings of the Constitution—that is, non-textual “constitutional change”—with reference to the policy agendas of national governing coalitions. Following Terri Peretti I assume that ideological voting by judges “is not merely the arbitrary expression of [their] idiosyncratic views [but rather] is the expression and vindication of those political views deliberately ‘planted’ on” courts by policy-conscious presidents and senators.² Rather than follow the standard practice in political science of analogizing judges to legislators, this approach recommends viewing federal courts as analogous to other institutions (a) whose officeholders are appointed rather than elected and (b) who are responsible for a specialized subset of everyday policy-making and/or particularized decision making—institutions such as bureaucratic agencies or independent regulatory commissions. For many such institutions, a desire to affect the decision-making bias of those institutions is foremost on the minds of those who are involved in staffing decisions; that is, power holders want the Federal Reserve to follow a certain approach to monetary policy, they want the Environmental Protection Agency to strike a certain balance between industry and the environment, and so on. This concern about the overall decision-making bias of an institution is especially pointed when it comes to judicial appointments, because federal courts (ever since 1875) have decision-making authority over an extremely broad range of policy issues. This makes it even more important for parties in government to care about the political biases and allegiances of the nominee, which (along with patronage considerations) is why presidents and senators overwhelmingly select federal judges from among their own party activists or loyalists.³

¹ See the editors’ introduction to this volume.

² Terri Jennings Peretti, *In Defense of a Political Court* (Princeton: Princeton University Press, 1999), 133.

³ For example, Harding appointed 57 Republicans and 3 Democrats (95% from his own party); Coolidge appointed 92 Republicans and 8 Democrats (92%); Hoover appointed 67 Republicans and 14 Democrats (87.2%); FDR appointed 229 Democrats and 12 Republicans (95%); Truman appointed 143 Democrats and 14 Republicans (91%); and Eisenhower appointed 186 Republicans and 15 Democrats (92.5%). See Harold W. Chase, *Federal Judges: The Appointing Process* (Minneapolis: University of Minnesota), 72 (citing 20 *Congressional Quarterly* 1175 [1962]). Between 1869 and 1992 the “same party appointment rate” of district and circuit court judges was around 93%; see Deborah J. Barrow, Gary Zuk, and Gerard S. Gryski, *The Federal Judiciary and Institutional Change* (Ann Arbor: The

Constitutional change, like changes in agency decision making, might result from a number of factors, including new information about the consequences of older decisions, the development of new constellations of interest-group lobbying, or the need to address innovative issues. However, if there are times when it would seem natural to explain changes in agency decision making (at least in part) by referring to the goals and agendas of those who staff the agencies, then perhaps there are reasons to adopt the same approach when trying to explain changes in the way judges interpret the Constitution. On this view, to witness a shift on the Supreme Court from a more liberal to a more conservative understanding of the Constitution is to witness something that is no different in kind than a shift in the EPA from aggressive prosecution of industrial polluters to a more business-friendly approach to environmental protection. Both are changes in institutional behavior that, in all likelihood, can be traced to changing goals and agendas of other power holders in the regime.

There are a number of different political goals that might be pursued by dominant coalitions with an eye on courts, including simple support for a policy agenda (that is, elimination of a potential veto point or promotion of a “legitimation” function), front-line enforcement of special policies (e.g., the return of fugitive slaves, the protection of black voting rights), the enhancement of “credible commitments” to favored constituencies, or the construction of a forum into which potentially divisive political issues might be channeled (such as slavery, antitrust policy, abortion, or even disputed presidential elections).⁴ In this chapter I argue that constitutional change in the United States sometimes reflects an attempt at “political entrenchment”—that is, an effort of a governing coalition to transform or fortify the policymaking bias of the federal judiciary so that it is in a position to represent the goals of that coalition even if they lose control of the Congress or presidency. Entrenchments become more conspicuous during periods of close party competition where the more ideological wing of one party is fortuitously in a position to gain representation of their views in federal courts before losing control over the appointment process.⁵ Even if such a strategy is driven by short-term political

University of Michigan Press, 1996), 15. For an overview of the political background of selected court of appeals judges in the mid-1960s see J. Woodward Howard, Jr., *Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits* (Princeton: Princeton University Press, 1981), 92. Recall Griffin B. Bell’s famous remark: “For me, becoming a federal judge wasn’t very difficult. I managed John F. Kennedy’s presidential campaign in Georgia. Two of my oldest and closest friends were the two senators from Georgia. And I was campaign manager and special, unpaid counsel for the governor.” Cited in *ibid.*, 93. Obviously, a different political dynamic exists in systems where party leaders do not staff constitutional courts.

⁴ See Robert A. Dahl, “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker,” 6 *Journal of Public Law* 279 (1957); Mark A. Graber, “The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary,” 7 *Studies in American Political Development* 35 (1993); Howard Gillman, “Judicial Independence Through the Lens of *Bush v. Gore*: Four Lessons from Political Science,” *Ohio State Law Journal* 64 (2003):249. On the various motivations that legislators might have when delegating authority to other institutions, see Stefan Voigt and Eli M. Salzberger, “Choosing Not to Choose: When Politicians Choose to Delegate Powers,” *Kyklos* 55 (May).

⁵ For a discussion of this issue from a more comparative perspective, see Ran Hirschl, “Israel’s ‘Constitutional Revolution’: The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order,” *American Journal of Comparative Law* 46 (Summer):427-52 and “The

considerations rather than anticipation of a possible loss of power, the effort might properly be considered “entrenchment” rather than mere “staffing” (as with the EPA) because a federal judge’s tenure of office typically persists across a change in party governance.

Previously I developed and applied this perspective to the efforts of the post-Reconstruction Republican Party.⁶ I argued that by the mid-1870s party leaders had begun to abandon a commitment to black civil rights in favor of a commitment to conservative economic nationalism, and that the institutionalization of this policy was largely accomplished through an expansion of federal judicial power. The party accomplished this goal by using two brief (lame-duck) periods in which Republicans controlled the presidency and the entire Congress to pass legislation expanding the jurisdiction of federal courts (the Judiciary and Removal Act of 1875) and expanding the size and structure of federal courts (the Evarts Act of 1891). Even though Republicans lost the House of Representatives immediately after the passage of these acts they maintained control of the presidency and the Senate (sometimes with less than a majority of the popular vote for president, as in the case of Hayes in 1876 and Harrison in 1888), and with those institutions they were able to staff federal courts with conservative economic nationalists while at the same time fight off House Democratic efforts to rollback federal judicial power.

This time I want to explore whether the concept of political entrenchment provides a useful perspective for understanding the political origins of liberalism in the Warren- and post-Warren-era federal judiciary. Rather than view these developments as a byproduct of unrestrained judicial activists intent of following personal political agendas, or even as a reflection of judges who act as if they are political blank-slates who react to changes in public opinion, I want to see whether modern judicial liberalism can be traced to the self-conscious efforts of Democratic Party office-holders in the 1960s. I hope to show that there are important similarities between the actions of Democrats in the 1960s and Republicans in the latter part of the nineteenth century, especially the use of legislation to reorganize and reconfigure access to federal courts, and the use of the appointment power to fundamentally alter the decision-making bias of the federal judiciary.

However, in order for this account to reflect the perspective of New Institutional scholar, it should be emphasized that “constitutional change as partisan entrenchment” never quite works out as a simple story of judges merely acting as faithful “agents” in service of their “principals.” In part the problem has to do with the scope of the Court’s decision making: it is comparatively more difficult to find decision makers who will be reliable on a wide range of issues than it is to find appointees who will act reliably over a narrow-defined set of policies; that is, getting someone who will do what you want over at the EPA is easier than getting a justice who will do what you want within the expansive universe of “constitutional law.” Also, federal judges have

Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions,” *Law and Social Inquiry* 25 (Winter):91-148.

⁶ “How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891,” *American Political Science Review* 96 (2002):511-524.

more decision making independence than many agency officials, and this means greater opportunities to strike out in surprising directions. Moreover, justices must reconcile their preferences with a web of “internal” institutional constraints, perspectives, and responsibilities, including (perhaps) legal norms.

Finally, it is an axiom of historical institutionalism that institutional politics rarely conforms to simple, linear models of causation or neatly schematized understandings of political “order”; instead, it is assumed that institutional politics is comprised of multiple orders and patterns of intercurrency which often create unintended consequences, paradoxes, and disjunctions. Institutional change—including constitutional change—inevitably triggers a dynamic whereby some mobilize in support of new developments and others begin work to block or rollback those developments. Thus, the political significance of 1960s Democratic entrenchment in the judiciary has as much to do with the way in which the political system reacted to the liberalization of the federal judiciary as with the resulting changes in constitutional policy making.

Still, before pursuing the case of the 1960s, more should be said about the idea of political entrenchment as it relates to constitutional change.

II. Political Entrenchment and Judicial Politics

Jack Balkin and Sanford Levinson recently proposed a “theory of partisan entrenchment” as a way of understanding “how constitutional revolutions occur.”⁷ In their view, federal judges “resemble Senators who are appointed for 18-year terms [the average tenure of a Supreme Court justice] by their parties and never have to face election.” They define partisan entrenchment as precisely this “temporal extension of partisan representation” that is so characteristic of the tenure of federal judges, and they argue that this extension of partisan representation through presidential appointment “is the best account of how the meaning of the constitution changes over time.” More specifically, they argue that the balance of power between the president and the senate often shapes whether presidents are in a position to entrench strong party ideologues or party moderates. For example, even though Justices Blackmun and Scalia were both Republicans who were appointed by Republican presidents, they turned out different mostly because Nixon had to get an appointment through a Democratic Congress and Reagan did not. As a rule, “judges—and particularly Supreme Court Justices—tend to reflect the vector sum of political forces at the time of their confirmation.”⁸ Presidents

⁷ Jack M. Balkin and Sanford Levinson, “Understanding the Constitutional Revolution,” 87 *Virginia Law Review* 1045 (Oct. 2001), see especially pp.1066-83.

⁸ *Ibid.*, 1067-69. For examples of the political science literature demonstrating the effect of Senate politics on presidential Supreme Court nominations see Lilliard E. Richardson, Jr. and John M. Scheb, II, “Divided Government and the Supreme Court,” *American Politics Quarterly* 21 (1993):458-72; Byron J. Moraski and Charles R. Shipan, “The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices,” *American Journal of Political Science* 43 (Oct. 1999):1069-1095. For a study of the factors influencing whether Senators vote to confirm Supreme Court nominees (including the ideology of the Senator and the preferences of interest groups) see Jeffrey A. Segal, Charles M. Cameron, and Albert Cover, “A Spatial Model of Roll Call Voting: Senators,

sometimes make notorious “mistakes” but a regrettable appointment “is a familiar feature of democratic politics” whether one is talking about the judiciary or the cabinet.⁹

One thing that prevents judges from being viewed as entrenched partisans is that they tend to represent the political agenda that was most salient at the time of their appointment. Unlike other elected partisans, they are under no pressure (as a condition of holding onto power) to update their views based on new contexts, changing coalitions, and evolving electoral strategies. New Deal justices did their work by upholding the New Deal, and if later they diverged on issues relating to civil rights and liberties that merely demonstrates that consensus on these issues was not a salient consideration for Roosevelt when he made his appointments. The fact that John Paul Stevens is now viewed as the Court’s leading liberal is not inconsistent with the view that he was properly viewed as a life-long moderate Republican at the time of his appointment.¹⁰ In a nutshell:

If you stock the federal judiciary with enough Reagan Republicans, you can expect that some fifteen to twenty years later they will be making a significant impact on the structure of constitutional doctrine. And so they are.... Indeed, given that the Democrats did not have a single Supreme Court nomination between 1967 and 1993, it is hard to expect otherwise. If one doesn’t like the decisions of the Rehnquist Court, one should really have been putting more Democrats in the White House during the 1970s and 1980s. Put another way, if you don’t like what the Court is doing now, you (or your parents) shouldn’t have voted for Ronald Reagan.¹¹

Once we pay attention to the relationship between conventional partisan politics and the shape of judicial decision making then (among other things) a more complicated relationship emerges between democratic theory and decision-making by unelected federal judges. At a minimum it should be acknowledged that the views represented by judges have some relationship to views considered acceptable by members of the dominant political coalition at some point in the (more or less) recent past, and it is very likely that they will continue to reflect the views of some portion of the party in government (e.g., the ideological wing of a previously majoritarian party). This “temporal extension of partisan representation” also occurs when Senators are given extended terms of office and (on a much more focused set of issues) when the board of governors of the Federal Reserve are given fourteen-year terms of office. Moreover, we should recall that parties “serve as sites for working out their adherents’ views about constitutional politics. They collect, filter, co-opt and accumulate the constitutional beliefs and aspirations of the party faithful, of prospective voters, and, perhaps equally

Constituents, Presidents, and Interest Groups in Supreme Court Confirmations,” *American Journal of Political Science* 36 (Feb. 1992):96-121.

⁹ Balkin and Levinson, “Understanding the Constitutional Revolution,” 1071.

¹⁰ Similarly, the fact that conservatives control the leadership of the Republican Party in Congress and the White House does not mean that someone like David Souter is not still properly regarded as a Republican—a moderate-to-liberal northeastern Republican in the mold of Susan Collins or (maybe more appropriately) Jim Jeffords.

¹¹ Balkin and Levinson, “Understanding the Constitutional Revolution,” 1075-76.

crucially, of social movements.”¹² The successful entrenchment of these views by victorious parties might be considered one of the principal goals of majoritarian electoral politics.¹³

Balkin and Levinson are essentially right about how Supreme Court appointments determine constitutional change in the United States. My quibble is with their decision to label all judicial appointments as instances of a political phenomenon known as *entrenchment*. Instead, it may be useful to posit a variety of goals that governing coalitions might have when considering how the federal judiciary fits into their political agendas, only one of which might be the goal of using short-term control of key institutions to protect potentially vulnerable policies from electoral politics. One leading scholar of modern judicial appointments has suggested that there are at least three different kinds of agendas that presidents pursue in making judicial appointments: policy agendas, which refer to “the substantive policy goals of an administration, including its legislative and administrative objectives”; partisan agendas, which refer to efforts “to shore up political support for the president or for the party”; and personal agendas, which refer to an effort to “favor a personal friend or associate.”¹⁴ For example, after reviewing the record of federal court appointments under Eisenhower, Sheldon Goldman concluded that “Eisenhower did not consider the federal courts germane to his presidential agenda and his administration” and thus his appointments reflected “partisan” and “personal” considerations rather than “policy” considerations.¹⁵ One might disagree with Goldman’s assessment of Eisenhower’s record and still acknowledge that, in the course of American constitutional history, there have been times when presidents have made appointments with more attention to simple *patronage* considerations than to the use of the judiciary to promote substantive political goals.

Also, if we are attentive to the condition of electoral vulnerability as a feature of political entrenchment, it may be possible to distinguish those circumstances where confident majority parties reconfigure the judiciary so that it is essentially in *alignment* with dominant coalitions in the rest of the national government.¹⁶ Relatedly, we may want a separate category for those times when presidents and senators have focused more on removing judicial barriers to preferred agendas—a strategy of *antientrenchment*—rather than entrenching new agendas in courts.¹⁷ One observable result of both of these alternatives would be that the decision-making bias of courts should be in the direction of

¹² Balkin and Levinson, “Understanding the Constitutional Revolution,” 1077.

¹³ Balkin and Levinson appropriately distinguish their view from Bruce Ackerman’s overly formulaic and ultimately unconvincing conception of constitutional change as a by-product of a certain kind of special electoral politics that qualifies as a “constitutional moment.” Balkin and Levinson, “Understanding the Constitutional Revolution,” 1079-80.

¹⁴ Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan* (New Haven and London: Yale University Press), 3.

¹⁵ Goldman, *Picking Federal Judges*, 153.

¹⁶ This is the main argument developed by Dahl, “Decision-Making in a Democracy.”

¹⁷ See, for example, Michael J. Klarman, “Majoritarian Judicial Review: The Entrenchment Problem,” 85 *Georgetown Law Review* 491 (1997).

upholding national legislation (and thus reduce the appearance of judicial activism). By contrast, one result of successful entrenchment would be a greater likelihood that national legislation would be struck down, since it is a condition of entrenchment that courts become (temporarily, anyway) out of sync with the prevailing constellation of power in the rest of the political system.¹⁸

Finally, during extended periods of divided government, when the political context is not conducive either to a strategy of entrenchment or alignment (especially when the presidency and the senate are controlled by different parties), it may be that partisans in government choose a second-best strategy of simple *compromise*, whereby they moderate their preferences and select what amounts to the median appointee. While successful entrenchments may result in the Court being associated with a particular ideological wing of a party, the politics of compromise appointments may lead to a Court that seems to eschew sweeping declarations of constitutional principles in favor of a more prudential role in the political system.

It also should be emphasized that, even when decision-makers intend a strategy of entrenchment, it is not always the case that the strategy is successful. Perhaps the most famous example of an attempted political entrenchment in American constitutional history is the decision of the outgoing Federalist Party to (in the words of Thomas Jefferson) “retire[] into the judiciary as a stronghold and from that battery all the works of republicanism are to be beaten down and erased.” Balkin and Levinson cite this as an exemplar of their analysis, arguing that “Chief Justice John Marshall kept Federalist principles alive long after the Federalist Party itself had disbanded.”¹⁹ But it is not entirely clear that Marshall’s tenure as Chief Justice is an example of effective entrenchment. The Judiciary Act of 1801 was quickly repealed, with the subsequent approval of the Supreme Court.²⁰ When Congress began targeting judges for impeachment the remaining Federalists on the bench quickly learned that they had to give up on the hope of using their office as a partisan forum.²¹ Over the years, John Marshall’s Supreme Court did not challenge the dominant partisan coalitions in the national government; in fact, it was careful to tailor its decisions in a way that was quite conducive to the evolving preferences of the Virginia Dynasty.²²

More obvious examples of political entrenchment in federal courts (as I define it) would be antebellum efforts by Southern politicians to construct five federal circuits that exclusively covered slave-owning states (thus ensuring a pro-slavery majority on the U.S. Supreme Court) and post-Reconstruction efforts by the Republican Party to transform the

¹⁸ It seems to me that the New Deal reconfiguration of the federal judiciary is better understood either as an example of alignment or antientrenchment (likewise Grant’s focus on removing constitutional barriers to paper money).

¹⁹ Balkin and Levinson, “Understanding the Constitutional Revolution,” 1068.

²⁰ *Stuart v. Laird*, 5 U.S. 299 (1803).

²¹ See Whittington, *Constitutional Construction*.

²² See Mark A. Graber, “Federalist or Friends of Adams: The Marshall Court and Party Politics,” *Studies in American Political Development* 12 (1998): 209 and Michael J. Klarman, “How Great Were the ‘Great’ Marshall Court Decisions?” *Virginia Law Review* 87 (Oct. 1998): 1111.

federal judiciary into a force for the promotion of conservative economic nationalism. In both of these cases entrenchment involved, not simply favorable appointments, but also broader legislative efforts to reorganize and restructure federal courts. Do the efforts of the Democratic Party in the 1960s represent another example?

III. Partisan Entrenchment and the Creation of the New Frontier/Great Society Judiciary²³

No one would mistake the late-1950s Supreme Court, or the federal judiciary more generally, as a bastion of liberal decision making. The Supreme Court's decision in *Brown v. Board of Education*, while controversial in the South and among many establishment lawyers in the ABA and elite law schools, was consistent with the urgings of the solicitor general and was seen by many in the Eisenhower State Department as vital for promoting the "image of American democracy" during the Cold War.²⁴ By the end of the decade the Court attempted to extend some modest due process protections for witnesses called before the House Un-American Activities Committee, but Congress reacted strongly to these experiments and it was not long before the Court was in full retreat.²⁵ There were only four reliable liberals on the Court: Brennan, Warren, Douglas, and Black. Clark, Whittaker, Harlan, and Frankfurter had voting records that were reliably conservative on most issues. Stewart was a moderate Republican with a commitment to desegregation and free speech that was well-known before his appointment by Eisenhower a few years after *Brown*.²⁶ In general, during the Eisenhower administration, the Supreme Court handed down "liberal" decisions in civil liberties cases about 58 percent of the time.²⁷ It was a very different Supreme Court, and a different federal judiciary, by the end of the Johnson administration.

²³ See Sheldon Goldman's wonderful *Picking Federal Judges*, where chapter five is entitled "The New Frontier/Great Society Judiciary."

²⁴ Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton: Princeton University Press, 2000).

²⁵ See Walter F. Murphy, *Congress and the Court: A Case Study in the American Political Process* (Chicago: University of Chicago Press, 1962) and C. Herman Pritchett, *Congress versus the Supreme Court, 1957-1960* (Minneapolis: University of Minnesota Press, 1961).

²⁶ Potter Stewart's nomination was opposed by many Southern Democrats in the Senate. Senator Richard B. Russell of Georgia charged that his nomination was "part of a deliberate policy by the Department of Justice to perpetuate some recent decisions of the Court in segregation rulings, which decisions were partly based on amicus curiae briefs submitted by the Department of Justice." See Henry J. Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton*, new and revised edition (Lanham: Rowman and Littlefield Publishers, 1999), 205, citing Congressional Record, 86th Cong., 1st sess., May 5, 1959, p.6693. Voting no on the nomination were senators from Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia (plus one of Florida's senators, Spessard L. Holland). Democratic Senators George Smathers of Florida, Estes Kefauver and Albert Gore of Tennessee, and Lyndon B. Johnson and Ralph Yarborough of Texas joined all Senate Republicans in support of Stewart's appointment. Abraham, *Justices, Presidents, and Senators*, 205, 351.

²⁷ Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002), 220.

In 1961 the Democratic Party took control of both the White House and the Congress for the first time in eight years. At the time Eisenhower left office there were 163 Democratic and 163 Republican federal judges.²⁸ Over the next seven years Congressional Democrats increased the size of the federal judiciary three times. Immediately upon taking office, in July 1961, they added ten new appellate and sixty-three new district court judgeships (with Republican Senator Kenneth B. Keating suggesting that “the present urgency for action ... smacks strongly of patronage politics”).²⁹ In 1966 they added another ten appellate and thirty-five district court judgeships.³⁰ Another adjustment in 1968 created another thirteen circuit court positions.³¹ In other words, between 1960 and 1968 the total number of permanent federal judges was increased by more than a hundred to 432, almost a 33 percent increase in the size of the federal judiciary.³²

The Eisenhower administration had also pushed for an increase in federal judgeships, and modest expansion (amounting to a release of pressure resulting from extended congressional inaction) was authorized by a Republican Congress in February 1954.³³ However, after Democrats regained control of the Congress following the 1954 elections, legislators refused to give the Republican President the opportunity to fill more judicial positions, despite the Judicial Conference’s pleas for as many as seventy new judgeships.³⁴ As a last-ditch effort, Eisenhower’s Attorney General, William P. Rogers, conveyed to Congressional Democrats that the president promised “to fill the posts on a 50-50 basis from the two parties.”³⁵ But in the months before the 1960 presidential election Democrats gambled that they might get an even better deal if they waited to see the result of the election. As explained by Representative Emanuel Celler, chairman of the House Judiciary Committee, “Very frankly I believe they [congressional leaders] contemplated a change in the Executive and the leadership gambled as it were—and

²⁸ Deborah J. Barrow, Gary Zuk, and Gerald S. Gyski, *The Federal Judiciary and Institutional Change* (Ann Arbor: University of Michigan Press, 1996), 62.

²⁹ PL 87-36; Barrow, Zuk, and Gyski, *The Federal Judiciary and Institutional Change*, 54.

³⁰ PL 89-372.

³¹ PL 90-347.

³² Barrow, Zuk, and Gyski, *The Federal Judiciary and Institutional Change*, 45.

³³ *Ibid.*, 51-52; the bill was Public Law 83-294, creating 3 new circuit court positions and 31 district court positions. The fact that there was extended Congressional inaction under a previously unified Democratic government shows that parties in power do not always pursue strategies of partisan entrenchment in the judiciary.

³⁴ Actually, four positions were authorized during this period, three of which reflected the granting of statehood to Alaska and Hawaii. Barrow, Zuk, and Gyski, *Federal Judiciary and Institutional Change*, 52.

³⁵ 15 *Congressional Quarterly Weekly Report* 1206 (1959), cited in Harold W. Chase, *Federal Judges: The Appointing Process* (Minneapolis: University of Minnesota), 74; see also *Federal Courts and Judges*, Hearings before Subcommittee No. 5 of the House Judiciary Committee, 86 Cong. 2 sess. (February 2, 3, and 29, 1960), 51, cited in *ibid.*, 214 (Deputy Attorney General Walsh reassuring Representative Celler that the Democratic nominees would be acceptable to the Democratic Party and would not merely be “Eisenhower Democrats”).

won—that a new administration will make the appointments. That is nothing new in our political history....”³⁶ And so, instead of passing in the Spring of 1960, the expansion was authorized in the Spring of 1961.

As a result of this legislation, the Kennedy administration had the opportunity to appoint a huge number of new federal judges. When the new positions were combined with vacancies in preexisting positions the administration was faced with filling 147 positions. The chairman of the ABA’s Standing Committee on the Federal Judiciary, Bernard Segal, explained to the ABA House of Delegates on August 7, 1962, that “except for Presidents Truman and Eisenhower, this is more vacancies than any President of the United States has had to fill in two entire terms of office.”³⁷ By October 1962 the White House, led by Attorney General Robert F. Kennedy and a Justice Department team made up of Byron White, Nicholas deB. Katzenbach, and Joseph F. Dolan, had received Senate confirmation of 128 of their nominees.³⁸ The administration received two more confirmations before Kennedy’s assassination, bringing the total number of judges appointed by Kennedy to 130.³⁹

It would be implausible to assume that every one of these judges embodied the spirit of the New Frontier. Southern Democratic control of key Senate committees gave that wing of the party disproportionate influence over the fate of the president’s political agenda, and the cultivation of that wing (combined with the practice of senatorial courtesy on lower court appointments) ensured that some federal judgeships would reflect the influence of Dixiecrat patronage. In March 1963 Governor Nelson A. Rockefeller of New York charged that the president had been appointing “segregationist judges” to the federal bench in the South, and the NAACP was critical of some of Kennedy’s judges.⁴⁰ Senate politics also resulted in eleven Republican appointees (six of whom were nominated by JFK but confirmed during Johnson’s administration).⁴¹ Nevertheless, conscious efforts were made to ensure that these federal judges would have a different orientation toward the law than their Republican predecessors. Katzenbach declared that “judicial philosophy is important,” in the sense that (whenever possible) the administration preferred “a judge who is a careful liberal, a good technician, liberal yet cautious.”⁴² More minority groups were represented than was the case with

³⁶ *Federal Courts and Judges*, Hearings before Subcommittee No. 5 of the House Judiciary Committee, 87 Cong. 1 sess. (March 1 and 2, 1961).

³⁷ Cited in Chase, *Federal Judges*, 48. Of the 147 vacancies, 62 were for new district court judges and 10 were for new circuit court judges. The figure also includes the two Supreme Court vacancies filled by Kennedy through October 1962. See *ibid.*, 49.

³⁸ *Ibid.*, 49.

³⁹ *Ibid.*, 77.

⁴⁰ See Goldman, *Picking Federal Judges*, 167. For a strong critique of Kennedy’s southern appointments see Navasky, *Kennedy Justice*, 243-76.

⁴¹ Chase, *Federal Judges*, 78.

⁴² Goldman, *Picking Federal Judges*, 163. Goldman goes on to report that “Justice Department officials did not ordinarily look at the decisions of those who had a judicial record, and ‘there was no saliva test for liberalism,’ according to Joseph Dolan.”

Eisenhower's appointments, including twenty Catholics, eleven Jews, five blacks, and three "foreign born" nominees;⁴³ by contrast, "unlike Roosevelt and Truman, Eisenhower did not name even one woman or black to a lifetime judgeship on a court of general jurisdiction."⁴⁴ More specifically, a special effort was made to check the civil rights attitudes of those who were nominated for judgeships in the South—especially important, given that the Justice Department would be bringing cases in those jurisdictions and wanted to ensure that they would receive a sympathetic hearing.⁴⁵ By contrast, Eisenhower's principal overseers on judicial nominations, Henry Brownell, William P. Rogers, and Lawrence E. Walsh, focused mostly on a candidate's feelings about law enforcement, and especially (after 1957) whether they exhibited a useful *antagonism toward* the U.S. Supreme Court with respect to decisions such as *Mallory v. U.S.* (a unanimous decision).⁴⁶

Eisenhower's team also worked more closely with the (then conservative) American Bar Association, which was much less generous toward Kennedy's liberal

⁴³ Chase, *Federal Judges*, 78.

⁴⁴ Goldman, *Picking Federal Judges*, 152.

⁴⁵ Justice Department officials were not starry-eyed about their ability to get progressives in these posts. As Katzenbach explained, "We do not expect to find and to be able to obtain confirmation for a militant civil rights advocate in the South. What southern senator could afford *not* to oppose confirmation? What we seek is to assure ourselves that nominees will follow the law of the land. We are satisfied with that much." Chase, *Federal Judges*, 80-81. In the case of southern circuit court appointments, Goldman reports that "in every instance the administration sought to discover the candidate's views on racial segregation, and in only one instance [Pat Mehaffy of Arkansas, personal counsel to Governor Faubus and supported by Arkansas Democratic senator John McClellan and Senate J. William Fulbright] did the administration knowingly appoint a segregationist." Goldman, *Picking Federal Judges*, 168.

⁴⁶ *Mallory v. U.S.*, 354 U.S. 449 (1957); Chase, *Federal Judges*, 104-105; see also Sheldon Goldman, *Picking Federal Judges*, 126 (while "Rogers did not link changing the course of court decisions to the appointment process," Justice Department officials were "alert to the policy views of candidates on issues of criminal procedure"). It should be noted, however, that there is no evidence that Eisenhower's appointees had a worse record on civil rights issues than Democratic appointees, which is no surprise, given that Brownell, Rogers, and Walsh were more liberal than Eisenhower. Jack Peltason, in *Fifty-Eight Lonely Men* (New York: Harcourt, 1961), 46-51, castigated Eisenhower for contributing to a climate in which local leaders believed they could get away with resisting *Brown* and other unpopular Supreme Court decisions, and also argued that the president's "nonintervention policy has had its impact on the judges as well," who knew they could not count on the president's backing. However, when the Yale Law Journal reviewed the record of Fifth Circuit district court judges on civil rights, they focused their criticism on two Roosevelt appointees, three Truman appointees, and four Kennedy appointees. See the discussion in Chase, *Federal Judges*, 117, citing and reviewing (in addition to Peltason) "Judicial Performance in the Fifth Circuit," 73 *Yale Law Journal* 90 (1963) and Mary Hannah Curzan, *A Case Study in the Selection of Federal Judges in the Fifth Circuit, 1953-1963* (Ann Arbor: University Microfilms, 1968). In fact, Curzan noted (p.60) that "if one takes the total number of civil rights cases decided by all the Eisenhower and Kennedy judges in each year and determines the percentage of those cases that favored the Negro plaintiff, the Eisenhower judges have a more liberal record than do the Kennedy judges." See also Goldman, *Picking Federal Judges*, 128-130.

nominees than his predecessor's conservative ones.⁴⁷ After the ABA rated James R. Browning "unqualified" for a position on the Ninth Circuit, despite experience in private practice, a stint in the Justice Department, and three years as a Supreme Court clerk, the administration went ahead with the appointment largely on the strength of a memo prepared by a Justice Department official (James Rowe) who emphasized Browning's liberalism and the fact that "the Ninth Circuit [is] a weak[,] conservative bench quite out of step with the premises of the New Frontier.... In the great run of cases it does not much matter whether a judge is liberal or conservative if he is a good judge. There are a handful of cases, however ... where the judicial mind can go either way, with probity, with honor, self-discipline and even with precedent. This is where the 'liberal' cast of mind ... can move this nation forward, just as the conservative mind can and does hold it back. This is intangible truth, but every lawyer knows it as reality!"⁴⁸

Johnson (with the assistance of John W. Macy, Jr., chairman of the Civil Service Commission, Attorney General Nicholas Katzenbach, and deputy attorney general Ramsey Clark) could also make controversial appointments, most notably his decision to nominate former Mississippi governor (and segregationist) James P. Coleman for a position on the Court of Appeals of the Fifth Circuit, who was opposed by Senate liberals as well as professors such as Thomas Emerson and Louis Lusky before eventually being confirmed 76 to 8.⁴⁹ At the behest of North Carolina's Democratic senators, Sam Ervin and B. Everett Jordan, Johnson agreed to nominate Woodrow Wilson Jones to a federal district court position, despite the fact that he had been a signatory of the Southern Manifesto and was strongly opposed by the North Carolina NAACP. Examples such as these reflected Johnson's commitment to accommodate senatorial courtesy.⁵⁰ Still, overall his choices reflected a concerted effort to reconstruct the ideological center of gravity of the federal judiciary. Johnson, appointing judges in the wake of the Civil

⁴⁷ Goldman, *Picking Federal Judges*, 114-115. On the ABA's conservatism see Chase, *Federal Judges*, 160-1, citing John R. Schmidhauser, *The Supreme Court* (New York: Holt, Rinehart and Winston, 1960), 77-78 (reviewing the ABA's views on a variety of policies between 1937 and 1960). When Kennedy nominated labor lawyer David Rabinovitz the ABA rated him "not qualified." Civil rights lawyer Constance B. Motley was rated only qualified (the second lowest rating), as were Anthony Celebrezze (HEW secretary and former mayor of Cleveland), Congressman Oren Harris, and George C. Edwards (a Detroit police commissioner who previously served for six years on the Michigan Supreme Court) (see Chase 163). By contrast, when Kennedy appointed the racist William Harold Cox to the district bench in Mississippi (at the behest of the chairman of the Senate Judiciary Committee, James Eastland), the ABA gave him their highest rating, "exceptionally well qualified." Robert Kennedy later explained that Cox personally assured him that he would faithfully follow the law, including the Supreme Court's civil rights rulings. "I was convinced he was honest with me, and he wasn't" (see Goldman, *Picking Federal Judges*, 167).

⁴⁸ Cited in Goldman, *Picking Federal Judges*, 164-65. As Goldman points out, Browning was confirmed without difficulty and became a leading liberal on the Ninth Circuit, earning the praise of Chief Justice Rehnquist for his innovative leadership as chief judge; see William H. Rehnquist, foreword to Arthur D. Hellman, ed., *Restructuring Justice* (Ithaca, N.Y.: Cornell University Press, 1990), xi.

⁴⁹ Chase, *Federal Judges*, 170-172; Goldman, *Picking Federal Judges*, 171.

⁵⁰ Goldman, *Picking Federal Judges*, 171. Goldman notes that Johnson might have felt more comfortable accommodating North Carolina's senators given that the Jones nomination came two weeks after he had named Thurgood Marshall to the Supreme Court.

Rights Act of 1964, was even more insistent than Kennedy on thoroughly exploring his nominees' record on civil rights; "want this on every judge" was his general written instruction, and presidential papers reveal consistent notes on the civil rights views of potential candidates.⁵¹ Johnson also made a serious effort to recruit African-Americans into the federal judiciary—an unprecedented five percent of all his judicial appointments.⁵² Toward the end of his presidency, when opposition to Johnson became more vocal, the president became more insistent that judges be loyalists to him personally and to the goals of his administration.⁵³

Even when Kennedy and Johnson were forced to accommodate Senators in making certain lower court appointments, they nevertheless attempted to find judges who would not be obstructionist in the face of clear Supreme Court directives. As Katzenbach explained it, they took steps to ensure that even more conservative appointees would "follow the law of the land."⁵⁴ This made the appointment of Supreme Court justices a critical factor in reconstructing the overall decision-making bias of the federal judiciary. Presidents do not always have this opportunity, but with four acceptable liberals on the Court at the time of Kennedy's inauguration the White House was in a position either to fortify that wing or undermine it.

Despite the fact that Kennedy nominated a candidate who would eventually earn a reputation for judicial conservatism, the evidence is clear that these Democratic presidents were interested in appointing justices who would represent the more liberal wing of their party. When in March 1962 the conservative Eisenhower appointee Charles Whittaker informed the White House of his intention to retire from the Court the initial assumption was that Kennedy would appoint Secretary of Labor Arthur J. Goldberg, who had been promised the seat on at least "a half dozen" occasions.⁵⁵ However, Kennedy concluded that he could not yet afford to part with his Labor secretary, who was actively managing negotiations between U.S. Steel and the Steelworkers' Union. Attention then turned to Judge William Henry Hastie, the first black appointed to the federal circuit bench and one of only two black circuit court judges (the other being Thurgood Marshall, who was serving a recess appointment on the Second Circuit while awaiting a delayed Senate confirmation). Ironically, though, the nomination of this potentially historic candidate was sidetracked in part because the White House was explicitly trying to accommodate the liberal wing of the Court. Opposition came from Chief Justice Earl Warren and Justice William O. Douglas, who thought that Hastie was not liberal enough; this, combined with Dolan's assessment that the nomination would alienate Southern Democrats in the Senate and "blow everything we've got going on the Hill" was enough to shift the focus to a less controversial candidate, Kennedy loyalist Byron White, whose reputation and legal credentials would ensure no political problems for the

⁵¹ Ibid., 170.

⁵² Ibid., 196.

⁵³ Ibid., 172.

⁵⁴ Chase, *Federal Judges*, 81.

⁵⁵ David Alistair Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* (Chicago and London: University of Chicago Press, 1999), 72.

administration.⁵⁶ Five months later, when Felix Frankfurter announced his retirement plans in August 1962 after suffering a stroke, Kennedy focused exclusively on Goldberg, who had completed his primary mission to prevent a nationwide steel strike.⁵⁷

By all accounts, Johnson assumed as early as 1964 that his first Supreme Court appointee would be his close friend and advisor Abe Fortas. The president was so insistent on making the appointment that he famously schemed to convince the Court's newest justice, Goldberg, to step down and accept the position of U.N. Ambassador. While Johnson was single-minded about his choice of Fortas he did ask Katzenbach to prepare a memo reviewing all possible options, and in that memo Katzenbach emphasized the importance of appointing a Democrat (in order to avoid giving the Republicans a fourth seat on the Court), the advantages of considering a Jewish nominee, and the president's desire to appoint "an open-minded, judicious liberal." When Fortas proved resistant to the president's overtures the White House arranged for the intervention of Justice Douglas, who was one of Fortas' original mentors at Yale. Fortas was eventually "ambushed" into accepting the nomination, and he quickly joined the Warren-Douglas-Brennan wing of the Court.⁵⁸

Johnson was also single-minded about appointing Thurgood Marshall to the Supreme Court. After appointing him solicitor general to replace the retiring Archibald Cox, Johnson designed a political maneuver that he hoped would force conservative justice Tom Clark from the bench (a much better exchange than the Fortas-for-Goldberg deal, which maintained but did not increase the Court's newly-constructed liberal majority). The plan was for LBJ to name Clark's son, Ramsey Clark, as attorney general (replacing Katzenbach, who left to become undersecretary of state) and thus create a perceived "conflict of interest." As Johnson told Ramsey Clark, "if my judgment is that you become attorney general, he [Tom Clark] would have to leave the Court. For no other reason than the public appearance of an old man sitting on his boy's case. Every taxi driver in the country, he'd tell me that the old man couldn't judge fairly what his old boy is sending up (laughter)."⁵⁹ Johnson was especially delighted that Marshall would be a completely reliable "liberal...chalk it up there 100 percent of the time." Ramsey Clark suggested that Marshall might be a liberal on civil rights but more moderate on criminal

⁵⁶ Yalof, *Pursuit of Justices*, 76-80; Goldman, *Picking Federal Judges*, 166; Abraham, *Justices, Presidents, and Senators*, 209. (The source on Warren's and Douglas' views was Robert Kennedy.) Paul Freund was also seriously considered, but he was adamantly opposed by Robert Kennedy, possibly because Freund turned down an offer to become solicitor general in part because he did not want to serve under the president's brother. Goldman reports that Hastie's voting record became more liberal by the mid-1960s.

⁵⁷ Yalof, *Pursuit of Justices*, 80-81. In his career White ended up voting mostly with Stewart, which suggests where the moderate center of both parties was located in the early 1960s.

⁵⁸ Yalof, *Pursuit of Justices*, 81-85; Abraham, *Justices, Presidents, and Senators*, p.215. After Fortas reiterated his refusal to accept the nomination, Johnson caught him just before the president was scheduled to announce plans to escalate the war in Vietnam. "I'm going to send your name to the Supreme Court, and I'm sending fifty thousand boys to Vietnam, and I'm not going to hear any argument on either of them."

⁵⁹ Phone conversation between Ramsey Clark and Lyndon Johnson, Tape No. K67.01, 1/25/67, 8:22 p.m., PNO:6, LBJL, cited in Yalof, *Pursuit of Justices*, 88.

justice (“he reflects an older generation’s attitude”) but Johnson didn’t think so. “I think we’d have to put Marshall on the Court.... And my judgment is with Hugo Black, Bill Douglas, the Chief, Abe Fortas ... they’ll just have a field day,” not just on civil rights but on a range of constitutional issues, including the rights of criminal defendants. (Johnson quipped, “They wouldn’t send a man to the penitentiary by God for raping a woman if you had a photograph of him.”)⁶⁰ Just as planned, when Johnson announced the appointment of Ramsey Clark, the new attorney general’s father immediately announced that he would resign from the Court at the end of the current term.

Johnson’s final opportunity to fortify the liberal bloc on the Supreme Court came in June 1968 when Earl Warren conveyed his intention to retire. This sort of “strategic retirement” is a common way for justices to influence the Court’s constitutional policymaking; Warren knew that his constitutional agenda would be better protected if the selection emerged from a Democratic president (and Senate) than if it came from a Republican president, and by the spring of 1968 Democrats had every reason to be worried about whether they would be able to hold onto the White House.⁶¹ (Warren sent word that he wanted to meet with the self-proclaimed lame-duck president on June 11, less than a week after Robert Kennedy was assassinated.) Once again Johnson considered his top adviser Fortas, who had continued to be a loyal servant of the present (by attending meetings and drafting speeches and executive orders) even after joining the Court. As David Yalof put it (citing the recollections of Joseph Califano), “Johnson viewed the Court as a means both of perpetuating his social reforms and of upholding various legislative compromises he had reached on controversial issues ranging from aid for parochial schools to consumer, health, and environmental legislation. Who better to protect the president’s legacy than Fortas, who had played a key role in drafting much of that legislation in the first place?”⁶²

To take over Fortas’ spot as an associate justice Johnson quickly focused on his old friend Judge William “Homer” Thornberry of the U.S. Court of Appeals for the Fifth Circuit and a “political clone of LBJ: a moderate-liberal Texan ... who supported civil rights for minorities and liberal protections for free speech.”⁶³ However, despite Johnson’s intention to have his agenda retreat into the judiciary, the opportunities for political entrenchment were diminishing. Presidents historically have a more difficult time with Senate confirmation during the fourth year of their term. Compounding that conventional problem was Johnson’s headstrong decision (against the advice of Secretary of Defense Clark Clifford and White House special counsel Larry Temple) simultaneously to nominate two old personal friends. Republicans from outside their own Senate leadership (led by Robert Griffin of Michigan and George Murphy of California) circulated a petition in the Senate cloakroom opposing any action on the

⁶⁰ Yalof, *Pursuit of Justices*, 89, 239fn100.

⁶¹ More generally, there is a partisan “generational” pattern to replacement appointments on district and circuit courts since the New Deal, in the sense that Roosevelt and Truman appointees typically left the bench under Kennedy and Johnson, and the appointees of Kennedy and Johnson tended to retire under Carter. See Barrow, Zuk, and Gryski, *Federal Judiciary and Institutional Change*, 20.

⁶² Yalof, *Pursuit of Justices*, 91.

⁶³ *Ibid.*, 92.

nominations before the November elections. Proceedings went forward anyway, and opponents assaulted Fortas with criticisms of controversial Warren Court rulings, allegations of impropriety with respect to Fortas' ongoing relationship to the president, and revelations that Fortas had improperly accepted a huge lecture fee (\$15,000) for participating in several college seminars (arranged by his former law partner). When Democrats were unable to kill a filibuster (led by Republicans but also supported by Georgia's powerful Democratic Senator Richard B. Russell, who felt betrayed when Ramsey Clark temporarily held up a federal judgeship that Russell sponsored), Fortas asked Johnson to withdraw his nomination.⁶⁴ In mid-October Johnson threw in the towel, announcing that Warren's replacement would be determined by the winner of the upcoming presidential election.⁶⁵

As it turns out, even with the failure produced by this final overreaching, Democratic efforts to transform the federal judiciary in the 1960s were remarkably successful. Kennedy inherited a federal judiciary that was evenly split between Republicans and Democrats. By the end of Johnson's administration over 70% of judges in this enlarged judiciary were appointed by Democratic presidents—more than 39% by Johnson himself.⁶⁶ In 1970 a Republican was in the White House and Democrats controlled the House and Senate by margins of 57% and 56% respectively; that same year, Democrats made up 63% of circuit court judges and 66% of district court judges.

Moreover, even with the need to accommodate senatorial courtesy during the appointment process, these judges turned out to have remarkably liberal voting records. One study, examining the "percentage of liberal decisions rendered by district court appointees" of various twentieth century presidents found Kennedy's appointees reaching more liberal outcomes than Eisenhower appointees; Johnson's judges were significantly more liberal.⁶⁷ A study of court of appeals decisions between 1961 and 1964 found that

⁶⁴ Goldman, *Picking Federal Judges*, 171-2; Bruce Allen Murphy, *Fortas* (New York: Morrow, 1988), 337-59; Abraham, *Justices, Presidents, and Senators*, 218; John Massaro, "L.B.J. and the Fortas Nomination for Chief Justice," *Political Science Quarterly* 97 (Winter 1982-1983):4. The federal judge was Alexander Lawrence, and Clark's concern was that Lawrence had given an allegedly racist speech in the 1950s.

⁶⁵ Yalof, *Pursuit of Justices*, 93-94. The episode demonstrates that the politics of entrenchment can be exceedingly complicated, requiring difficult strategic decisions. For example, the entrenchment thesis might be criticized on the grounds that Kennedy and Johnson spent too much time accommodating senatorial courtesy and compromise on certain nominees. However, had Johnson heeded the advice of those recommending a less bold course of action (for example, by nominating a moderate Republican for the lower court position, someone like Albert Jenner, who was chairing the ABA's Standing Committee on the Federal Judiciary), his efforts at ensuring a lasting liberal entrenchment on the Supreme Court would have been even more successful.

⁶⁶ Barrow, Zuk, and Gryski, *Federal Judiciary and Institutional Change*, 62.

⁶⁷ Robert A. Carp and Ronald Stidham, *The Federal Courts*, 4th ed. (Washington, D.C.: CQ Press, 2001), 99. More generally, when comparing Democratic and Republican district court judges between 1932 and 1998, these authors found that Democratic judges reached significantly more liberal decisions when issues involved the right to privacy, affirmative action, local economic regulation, race discrimination, women's rights, freedom of religion, criminal convictions, freedom of expression. On other issues (Indian rights, state habeas corpus pleas, union members v. unions, rent control or excess profits) the differences between these categories of judges was much less pronounced. *Ibid.*, 134. For

“the Democrats appear relatively more ‘liberal’ than Republicans in cases which involve what might be called ‘economic liberalism’” but “equally ‘liberal’ on the criminal and civil liberties categories”;⁶⁸ however, after the Kennedy and Johnson appointees had a chance to establish their record, the effects of liberal entrenchment on decisions across the board became more pronounced. In particular, Johnson court of appeals judges had the highest liberalism score on issues relating to civil liberties and criminal procedure, compared to all other judges categorized by appointing president; Nixon’s judges had the lowest liberalism scores on these issues.⁶⁹

Similar changes were also apparent in the Supreme Court. Between 1958 and 1962 due process claims represented around 21 percent of the Supreme Court’s docket; this rate grew to 31 percent during the 1968 through 1972 terms. Similarly, between 1958 and 1962 equality claims represented five percent of the Court’s docket, compared to 12 percent between 1968 and 1972. As a percentage of the Supreme Court’s overall docket civil liberties claims skyrocketed in the latter part of the 1960s, while claims over federal regulation and economic matters declined dramatically.⁷⁰ A Supreme Court that, under Eisenhower, handed down “liberal” decisions in civil liberties cases 58 percent of the time now voted liberal in approximately 75% of cases during the Johnson administration. This is no surprise, given that Kennedy and Johnson justices were significantly more liberal than the justices they replaced.⁷¹

IV. Partisan Entrenchment and the Politics of Constitutional Change

What Powe calls “History’s Warren Court”—the Court that would usher in modern liberal constitutional jurisprudence—came into being in 1962 precisely because of Kennedy’s commitment to Warren’s constitutional vision, and it persisted throughout the decade because Johnson also aligned himself with the Court’s liberal wing.⁷² White and Goldberg together might have constituted the fifth and sixth votes for a solid liberal majority, but White was much less reliable on criminal procedure and civil liberties than he was on civil rights, and so it was the New Frontiersman Goldberg who (initially) became the pivot point for constitutional change. His 89 percent liberal voting record

a thorough review of the literature on how party affiliation influences judicial voting behavior see Daniel R. Pinello, “Linking Party to Judicial Ideology in American Courts: A Meta-Analysis,” *Justice System Journal* 20 (1999):219-254.

⁶⁸ Sheldon Goldman, “Voting Behavior on the United States Courts of Appeals, 1961-1964,” *American Political Science Review* 60 (June 1966):374-383, 381.

⁶⁹ Sheldon Goldman, “Voting Behavior on the United States Courts of Appeals Revisited,” *American Political Science Review* 69 (June 1975):491-506. For example, Goldman pointed out that Nixon’s judges had the lowest liberal score in criminal procedure and civil liberties cases, while Johnson’s judges had the highest liberal scores in both those categories (footnote 24).

⁷⁰ Susan E. Lawrence, *The Poor in Court: The Legal Services Program and Supreme Court Decision Making* (Princeton: Princeton University Press, 1990), 113; Richard L. Pacelle, Jr., “The Dynamics and Determinants of Agenda Change in the Rehnquist Court,” in Lee Epstein, ed., *Contemplating Courts* (Washington, D.C.: CQ Press, 1995), 251-74, 257.

⁷¹ Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, 220-21.

⁷² Powe, *Warren Court and American Politics*, 207.

was second only to Douglas'. This fifth vote majority continued when Goldberg was replaced by Fortas (a protégé of Douglas), who voted with Warren 83-92 percent of the time, and was fortified in 1967 when Marshall replaced Clark.⁷³

Powe is essentially correct that, during this period, the Court was (by design) “a functioning part of the Kennedy-Johnson liberalism of the mid and late 1960s.”⁷⁴ Kennedy, who had to face questions about the separation of church and state during his presidential campaign, actively supported the Court’s school prayer decisions. The justices declared the poll tax unconstitutional only after Congress encouraged the Justice Department to challenge those laws in federal court. The justices turned back legal challenges to the Vietnam War, and allowed (by a vote of 7-1) for the prosecution of protestors who burned their draft cards.⁷⁵ In *New York Times v. Sullivan* the Court shielded the national press against harassing lawsuits from Southern officials and thus helped ensure a favorable media climate for passage of the Civil Rights Act of 1964. In reviewing civil rights legislation the Court provided forceful declarations of congressional power, thus “extending an offer to Congress to become a full partner” with the Court to promote the vision of the Great Society.⁷⁶

This partnership was partially reciprocated in 1965, when the Johnson administration created the Legal Services Program as part of the Office of Economic Opportunity, as an adjunct of the War on Poverty. The goal of the office was to give the poor greater access to courts—and, by so doing, give the justices greater opportunities to advance a more liberal agenda.⁷⁷ The LSP’s Supreme Court docket raised a wide variety of legal issues, including constitutional questions involving claims of equal protection, due process, the first amendment, criminal procedure, and access to courts.⁷⁸ When the Court first decided a case in favor of welfare recipients it was in a lawsuit sponsored by the LSP; similarly, the landmark case *Shapiro v. Thompson* (1969), striking down residency requirements for welfare recipients, was also made possible by that program.

⁷³ Ibid., 211-212. Of course, by the time of Marshall’s arrival, Justice Black had entered the phase of his career when his liberalism was much less reliable (to say the least), and this meant that there was still a tenuous five-person liberal majority on the Court in 1967.

⁷⁴ Powe, *The Warren Court and American Politics*, 490.

⁷⁵ *U.S. v. O’Brien*, 391 U.S. 367 (1968).

⁷⁶ Powe, *Warren Court in American Politics*, 189-90, 265; Mark A. Graber, “Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship,” 27 *Law and Social Inquiry* 309 (2002), 311.

⁷⁷ The office had its genesis in an influential Yale Law Journal article written by Edgar S. and Jean C. Cahn, “The War on Poverty: A Civilian Perspective,” *Yale Law Journal* 73 (1964):1317. Edgar Cahn received an appointment as a special assistant to Sargeant Shriver, who was heading the president’s task force on poverty. The LPS lasted nine years. In July 1974 Congress passed the Legal Services Corporation Act, creating the entity which replaced the LSP. Lawrence, *The Poor in Court*, 12fn29, 24-25.

⁷⁸ Lawrence, *The Poor in Court*, 59-61, 93-94. This political commitment continued even after LSP started to establish a record. When in 1967 Republican George Murphy introduced an amendment that would have severely curtailed LSP’s appellate work, it was defeated in the Senate by a vote of 52-36. Ibid., 116.

More generally, during its nine-year tenure, the LSP sponsored 164 cases before the Supreme Court, 119 of which were accepted for review. The eighty cases that received plenary consideration represented 7 percent of all written opinions handed down by the Supreme Court during this era.⁷⁹ The LSP's success rate also inspired other liberal organizations dedicated to civil rights and liberties to beef up their litigation so as to "take full advantage of a favorable judicial climate."⁸⁰ Not to be outdone, the justices, on their own initiative, also made the Court more accessible to certain categories of litigants, not just by nationalizing bill of rights protections but also through self-conscious adjustments in standing requirements.⁸¹

As a general matter it should be easy to accept that much of the Court's constitutional decision making during this period cannot be understood without situating the Court in the larger context of 1960s Democratic Party politics. But it would also be misleading to leave the impression that the newly reconstructed federal judiciary was merely a harmonious partner with New Frontier and Great Society Democrats. To show a political relationship between the Court and the dominant political coalition is not to argue that the justices followed the instructions of party leaders. Even when the justices were upholding features of the Democratic agenda they were also articulating specific doctrines of constitutional law, and nobody in the White House or the Senate was instructing the justices on the precise formulation of the constitutional tests associated with (for example) school prayer, seditious libel, or the scope of Congress' authority to pass civil rights legislation. In this respect the justices often acted on their own initiative and not as a mere agent or partner.

In fact, one of the features of political entrenchment in an institution that has extremely broad policy-making jurisdiction is that the appointees' ideological disposition will inevitably manifest itself in ways that were not considered by the appointing parties. Sometimes this leads to decision making that presidents and senators did not anticipate but also do not oppose; other times it leads to unanticipated problems for the governing coalition. The liberals were central in establishing the specific legal rationale for *Reynolds v. Sims* (1964) (with Harlan dissenting and Clark and Stewart concurring). Solicitor General Cox was pushed by the Kennedy White House to advocate a fairly

⁷⁹ Ibid., 9-10, 98. LSP lawyers received the most support (in descending order) from Justices Douglas, Marshall, Brennan, Fortas, Warren, and White, and relatively less support (still in descending order) from Justices Stewart, Blackmun, Powell, Harlan, Rehnquist, Burger, and Black. Ibid., 99-100, 106. For a review of the influence that LSP had on the development of law, including constitutional law, see *ibid.*, 123-147.

⁸⁰ Karen O'Connor and Lee Epstein, "Beyond Legislative Lobbying: Women's Rights Groups and the Supreme Court," *Judicature* 67 (1983):134, 138. Conversely, as Republican presidents retooled the federal judiciary to make it more conservative, conservative public interest litigation increased. See Karen O'Connor and Lee Epstein, "The Rise of Conservative Interest Group Litigation," *Journal of Politics* 45 (May 1983):432.

⁸¹ The obvious examples are *Flast v. Cohen*, 392 U.S. 83 (1968) (relaxing taxpayer standing to allow for greater Supreme Court review of establishment clause claims and other bill of rights protections) and *Sierra Club v. Morton*, 405 U.S. 727 (1972) (adjusting the concept of "injury in fact" to allow environmental groups to challenge government action that allegedly harmed the environment). On the politics associated with changes in standing requirements see Karen Orren, "Standing to Sue: Interest Group Conflict in the Federal Courts," *American Political Science Review* 70 (1976):723-741.

egalitarian conception of reapportionment reform, but even he was surprised at the sweeping nature of the decision. (One of the victorious plaintiffs remarked, “[w]e would have been satisfied with less than we got,” and Anthony Lewis wrote in *The New York Times* that “even some liberal-minded persons, admirers of the modern Supreme Court, find themselves stunned.”) In the wake of the decision the House (over the objections of the chairman of the Judiciary Committee) passed a jurisdiction-stripping bill, but liberal senators successfully filibustered similar efforts, and by 1968 all the fuss had passed.⁸² Similarly, the new liberal majority allowed Brennan to turn his dissenting opinion in *Braunfeld v. Brown* (1961) into a majority opinion in *Sherbert v. Verner* (1963), thereby rewriting the constitutional standard governing protections for religious freedom.⁸³

Maybe most notoriously (within the canonical history of American constitutional development), the new liberal majority took the lead in constitutionalizing the regulation of marital privacy and contraceptive use. The Court inherited by JFK ducked the issue in *Poe v. Ullman* (1961), but by 1965 there was plenty of support for jumping into the fray—even if there was no consensus among the justices over the proper constitutional justification for striking down Connecticut’s antiquated ban on contraceptives. The significance of *Griswold v. Connecticut* lay not so much with the development of any coherent constitutional test, but with the signal that the Court was now in the business of resolving disputes over infringements on personal freedoms. This was not a move that either Black or Stewart considered appropriate, but there was a bipartisan consensus among the other justices that it was proper for the Court to provide protections against state intrusions into certain intimate decisions. Even the typically-restrained Harlan agreed that the Court should use the due process clause to protect the unenumerated freedom of married couples to use contraceptives. For all the ink that would be spilled in subsequent decades about the appropriateness of such a role for the Court, the decision in *Griswold* itself was notably uncontroversial at the time, and the commitment to judicial protection for personal liberties remains bipartisan to this day.⁸⁴

However, not all of the Court’s initiatives proved as uncontroversial, or as benign for the Great Society coalition. After the well-regarded *Gideon v. Wainwright* in 1963, the Court’s criminal procedure decisions proved extremely unpopular.⁸⁵ In *Escobedo v. Illinois* (1964) a bare liberal majority (over the dissents of Harlan, Stewart, White, and Clark) threw out an interrogation on the grounds that the suspect was questioned outside

⁸² *Reynolds v. Sims*, 377 U.S. 533 (1964); Powe, *Warren Court and American Politics*, 246-7, 252-4. Opponents eventually had to satisfy themselves by giving the justices a pay raise that was \$3,000 less than that given to the rest of the federal judiciary. (Powe comments that “the justices loss of part of a pay raise was more than compensated for by the losses suffered by their opponents as ‘Goldwater Freshman’ poured into both the House of Representatives and state legislative chambers across the country.”)

⁸³ *Sherbert v. Verner*, 374 U.S. 398 (1963).

⁸⁴ *Poe v. Ullman*, 367 U.S. 497 (1961), *Griswold v. Connecticut*, 381 U.S. 479 (1965). As Michael J. Klarman points out, *Griswold* is another example of the Court imposing a national political consensus on “regional outliers.” “Rethinking the Civil Rights and Civil Liberties Revolutions,” *Virginia Law Review* 82 (1996):1-67. See also Powe, *Warren Court and American Politics*, 372 (“the South was an outlier on segregation; the Northeast on contraception; and the Court was tolerating no outliers”).

⁸⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

the presence of his lawyer, despite Escobedo's repeated requests to see his lawyer (who was in the station house trying to see his client). Goldberg's opinion was interpreted as a slap in the face of police efforts to get suspects to confess.⁸⁶ Complaints about liberal judges undermining law enforcement did not do Barry Goldwater much good, but the argument gained political traction after the urban rioting of 1965 and after public opinion began responding to rising crime rates. The decision in *Miranda v. Arizona* (1966) seemed to confirm the warnings of Court critics. This time, the five liberals imposed sweeping new police reforms on the nation. (In Powe's words: "*Gideon* required five backward states to change their laws and behavior. *Mapp* required half the states to change theirs. *Miranda* required *all* the states to change theirs.")⁸⁷ The decision worked against Democrats in the mid-term 1966 elections, where the question of urban riots, "crime in the streets," and "law and order" framed many races. Undeterred, the Court hammered away at its agenda, ruling in 1967 that the government could not order a lineup for a suspect without the presence of defense counsel.⁸⁸ By 1968 many congressional Democrats were looking for cover and found some by passing the Omnibus Crime Control and Safe Streets Act, which (among other things) attempted to overturn a number of the Court's criminal procedure decisions.⁸⁹ Still, the Court's criminal procedure liberalism was successfully used against the Democrats by Richard Nixon as part of his "law-and-order" presidential bid in 1968. As candidate Nixon put it, certain judges had "gone too far in weakening the peace forces as against the criminal forces."

Because of the Fortas fiasco (which was made possible, in part, by Southern Democratic opposition to Warren Court liberalism), Nixon was able to mitigate the influence of the Kennedy and Johnson years on the U.S. Supreme Court. For his first appointment to the Court, replacing Chief Justice Warren, Nixon chose someone who was arguably the most prominent critic of the Warren Court in the federal judiciary, chief judge of the D.C. Circuit Warren Burger. Nixon's efforts to dis-entrench liberalism on the U.S. Supreme Court continued with the nominee chosen to replace the retiring Fortas, South Carolinian Clement Haynsworth Jr. of the U.S. Court of Appeals for the Fourth Circuit, but Senate Democrats defeated the nomination. There was a similar fate awaiting Georgian G. Harrold Carswell, when the Senate, for the first time in American history, turned down a second consecutive presidential nomination for the Supreme Court. The result of these battles was that Nixon was forced to turn to the more moderate Harry Blackmun, who ended up voting in a liberal direction on civil liberties issues more than half the time and who supported the liberal position on civil rights more than 61% of the time.⁹⁰ Within a few years Black and Harlan retired and were replaced by Lewis Powell (37% pro-civil liberties voting record) and William Rehnquist (21.8% pro-civil

⁸⁶ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

⁸⁷ Powe, *Warren Court and American Politics*, 394; *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁸⁸ *U.S. v. Wade*, 388 U.S. 217 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967).

⁸⁹ The act included provisions that attempted to repeal *Miranda* and *Wade*. An effort to strip the Court's jurisdiction in state-based confession cases failed.

⁹⁰ It was not long before Harlan and Black were replaced by Powell and Rehnquist. Overall Nixon's judicial appointees had "liberal" voting records hovering around 30%, compared to the almost 70 percent averages of the justices they replaced.

liberties voting record).⁹¹ More generally, a Democratic Congress was extremely stingy about authorizing new judgeships for a Republican president, and unlike virtually every president since Grant, he left the White House with the judiciary still under the control of the opposition party.⁹²

After Nixon the Court no longer had the sort of reliable liberal majority that characterized the heyday of the Warren Court; only Douglas, Brennan, and Marshall remained from that group. But to a considerable extent the constitutional innovations of the 1960s remained alive even after changes in the Court's personnel. While the entrenchment of a majority of liberal *judges* did not survive for long, the entrenchment of liberal *constitutional policies* continued for some time, at least in many areas of the law. This was because Warren Court liberals were not merely deciding case outcomes; they were constructing a series of "jurisprudential regimes"—that is, constitutional doctrines, standards, and tests that framed the ways in which justices approached the issues in particular cases—and most of these jurisprudential regimes were acceptable to the Court's new majorities.⁹³ The liberal justices' innovations in free speech jurisprudence survived. Expanded protections for free exercise of religion were embraced by Burger in *Wisconsin v. Yoder* (1973), and Brennan's approach in *Sherbert* remained the prevailing framework for analyzing free exercise claims for a quarter century, until a more conservative Court rolled back special protections for religious liberty in *Employment Division v. Smith* (1988).⁹⁴ In the area of the establishment clause the unanimous decision in *Lemon v. Kurtzman* built upon (and even expanded) the more separationist approach advocated by the liberals in the 1960s.⁹⁵ Maybe most notably, the innovative right to privacy (or freedom of choice over certain intimate decisions) was expanded in *Eisenstadt v. Baird* (1972) and *Roe v. Wade* (1973)—with Burger dissenting in the former but not the latter.⁹⁶ The entrenchment of these 1960s precedents was successful enough that, by the mid-1980s, it could be said that the Burger Court was "the counter-revolution that wasn't."⁹⁷

⁹¹ See Segal and Spaeth, *Supreme Court and Attitudinal Model Revisited*, 322.

⁹² Nixon got close, though; 49.5% of federal judges were appointed by Republican presidents at the time of his departure. (When Ford left the percentage of Republican federal judges was 54.2). The only other president since Grant who left office with a judiciary that was under the control of the other party was Cleveland, whose terms came amidst periods of Republican domination. Congressional Democrats in 1969 did respond to caseload pressures and authorize a relatively small number of new judgeships (64, fewer than the number recommended by the Judicial Conference), but then kept the judiciary at that level until after Carter was elected, when 152 new judgeships were authorized (PL 95-486). Barrow, Zuk, and Gyski, *Federal Judiciary and Institutional Change*, 23, 68-71, 84.

⁹³ On the idea of "jurisprudential regimes," see Mark J. Richards and Herbert M. Kritzer, "Jurisprudential Regimes in Supreme Court Decision Making," *American Political Science Review* 96 (2002):305.

⁹⁴ *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Employment Division v. Smith*, 485 U.S. 660 (1988).

⁹⁵ *Lemon v. Kurtzman*, 403 U.S. 602 (1971); see *Abington School District v. Schempp* 374 U.S. 203 (1963) (creating the "secular purpose and primary effect").

⁹⁶ *Eisenstadt v. Baird*, 405 U.S. 438 (1972) and *Roe v. Wade*, 410 U.S. 113, (1973)

⁹⁷ Vincent Blasi (ed.), *The Burger Court: The Counter-Revolution That Wasn't* (New Haven: Yale University Press, 1986).

On the other hand, Nixon's reconstructed Court was able to rollback some of the Warren Court's revolution in criminal procedure. For example, in *Harris v. New York* (1971), the *Miranda* dissenters joined forces with Burger and Blackmun in holding that confessions excluded under *Miranda* could be used to impeach a defendant's trial testimony; other exceptions to *Miranda* (and to the exclusionary rule) would follow.⁹⁸ The requirement that lineups be done in the presence of counsel was gutted when Nixon appointees (over dissents by Brennan, Douglas, and Marshall) ruled that this right did not attach prior to indictment.⁹⁹ Over the years similar steps were taken in other areas of criminal procedure to reign in the vision of due process advanced in the mid-1960s. However, even in this area of the law, some of the Warren Court's innovations were quite long-lasting, including the fundamental holding in *Miranda* itself, which was reiterated by the Rehnquist Court as late as 2000.¹⁰⁰

V. Conclusion

Because of their embrace of the liberal wing of the Supreme Court, Kennedy and Johnson set in motion an important constitutional legacy. The decisions of that era fundamentally changed constitutional law in many areas, and a good number of those changes persisted well after the liberals no longer constituted a majority on the Court. It may not be overstating it to say that those decisions framed constitutional politics, and constitutional theory, in the United States for a generation.

There were a number of factors that allowed 1960s constitutional decision making to persist even after Republican appointees changed the Court's composition. The Congress remained under the control of the Democratic Party and this prevented the appointment of justices who may have been more inclined to rollback Warren-era precedents. Precedents such as *Reynolds v. Sims*, *Sherbert v. Verner*, or *New York Times v. Sullivan*, while revolutionary at the time, were largely accepted by the late 1960s (or at least had become uncontroversial) and thus were easy enough for new justices to embrace (or at least tolerate). Largely changes in the political system—such as the women's movement—provided a political context whereby the liberalization of certain constitutional norms was increasingly acceptable to moderates in both parties.

Still, it is unlikely that liberal constitutionalism would have emerged without the efforts of Kennedy and Johnson to create reliable liberal majorities on the Supreme Court. Their appointments turned over the authorship of path-breaking opinions to the most liberal justices every appointed; thus, rather than grudging or constrained accommodation of constitutional change, the Court took the lead and offered a full embrace. In the language of New Institutionalist scholarship, these developments highlight the role of sequencing and dynamics of path dependency on the specific shape of constitutional change. If Nixon had won the 1960 election, or if Kennedy and Johnson preferred to marginalize the judiciary by fortifying the Harlan-Frankfurter wing of the

⁹⁸ *Harris v. New York*, 401 U.S. 422 (1971).

⁹⁹ *U.S. v. Ash*, 413 U.S. 300 (1973)

¹⁰⁰ *Dickerson v. U.S.*, 530 U.S. 428 (2000).

Court, then it is difficult to imagine a scenario whereby similar precedents have an opportunity to earn the respect or toleration of later Court majorities. Then again, all such imagined alternative histories are matters of speculation. In the actual history of American constitutional development in the 1960s the changes in our constitutional practices came about because of choices made by those who appointed the justices.

The political consequences of these efforts were less straightforward than Democrats would have preferred. Kennedy and Johnson certainly created a partner in promoting many features of Great Society liberalism. The Court also took the lead in other policy areas that were broadly acceptable to the party. At the same time, the justices articulated constitutional views that proved politically damaging to the Democrats, both in 1966 and 1968. It is, if you will, a “non-equilibrium” account of political change, as well as one that incorporates unintended consequences.

Nevertheless, there is reason to believe that parties consider the potential unanticipated consequences of partisan entrenchment in the judiciary to be outweighed by the advantages of having sympathetic decision makers in relatively insulated policy-making institutions. After all, one of the explicit goals of the Reagan Justice Department was to use judicial appointments, not simply to reverse some of the more unwelcome features of the modern judicial liberalism, but also to institutionalize key features of the political agenda of the New Right, including a rollback of the scope of federal power over commerce and civil rights and an expansion in the idea of state sovereignty. The Office of Legal Policy under Reagan prepared a 199-page guide to judicial appointments, entitled *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation*, which was premised on the assumption that “There are few factors that are more critical to determining the course of the Nation, and yet more often overlooked, than the values and philosophies of the men and women who populate the third co-equal branch of the national government—the federal judiciary.”¹⁰¹ The Reagan and Bush I White Houses appointed four of the five justices who are now known as the “federalism five” and elevated the fifth to the position of Chief Justice.¹⁰² As we turn our efforts to understanding American constitutional development in the years since the Warren Court, we may again find that it is as important to pay attention to the decisions made by power holders outside the judiciary as it is to examine the constitutional vision and institutional circumstances of the justices themselves.

¹⁰¹ Office of Legal Policy, U.S. Dep’t of Justice, Report to the Attorney General, *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation* (1988), at v, cited in Dawn E. Johnsen, “Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change,” *Indiana Law Journal* 78 (Winter/Spring 2003):363.

¹⁰² See Johnsen, “Ronald Reagan and the Rehnquist Court on Congressional Power”; see also Dawn Johnsen, “Tipping the Scale,” *Wash. Monthly*, July/Aug. 2002, at 15.