

THE PROCESSES OF CONSTITUTIONAL CHANGE: FROM PARTISAN ENTRENCHMENT TO THE NATIONAL SURVEILLANCE STATE

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I. INTRODUCTION: PARTISAN ENTRENCHMENT

Five years ago, we offered a theory of how constitutional change and constitutional revolutions occurred, which we called the theory of “partisan entrenchment.”¹ Much has happened in the subsequent half-decade, and we are grateful for this opportunity to offer an update of our thoughts, together with some amendments to our initial formulation. By far the most important amendment is to draw out in more detail how the development of constitutional doctrine by courts occurs within the broader framework of changes in constitutional regimes, which include changes in institutions, legislation, and administrative regulation. The forces of democratic politics drive these regime changes, and the major actors are not courts but the political branches. Although courts may initially resist these changes, in the long run, they cooperate with them, shape their contours, and legitimate them through the development of constitutional doctrine. In the second half of this essay, we describe an emerging regime of institutions and practices that we call the “National Surveillance State,” which, we think, represents the major constitutional development of our era.

The National Surveillance State responds to the particular needs of warfare, foreign policy, and domestic law enforcement in the twenty-first century. That such a state is emerging has become clear in the wake of 9/11 and debates about the War on Terror. However, it is not limited to the specific problems posed by terrorism, and key elements have been in place for some time. The courts will help set the constitutional contours of the National Surveillance State, but much of their work will consist of statutory interpretation and administrative review. Most of the apparatus of the National Surveillance State will be developed by Congress and particularly by military and civilian bureaucracies within the executive branch. Although in the past several years the Republican Party has had the primary

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1. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045, 1066 (2001).

responsibility for shaping the institutions and practices of the National Surveillance State, both major political parties will participate in its construction. How the National Surveillance State develops will depend on the contingencies of politics and the results of future elections, which, of course, will produce new judicial appointments.² The courts will bless and legitimate these developments, much as they legitimated the rise of the administrative and regulatory state and the national security state in the middle of the twentieth century.

The initial formulation of our theory consisted of four basic points: (1) by installing enough judges and Justices with roughly similar ideological views over time, Presidents can push constitutional doctrine in directions they prefer; (2) partly for this reason the Supreme Court tends, in the long run, to cooperate with the dominant political forces of the day; (3) not all Presidents are equally interested or equally effective in entrenching their views in the judiciary, and Presidents face different opportunities and obstacles that may enhance or limit their success; (4) finally, significant changes in judicial doctrine usually reflect larger institutional changes—like the growth of the administrative state—and broader political forces. We now explain each of these features of our theory in more detail.

First, we have argued that constitutional revolutions occur through “partisan entrenchment,” in which Presidents appoint judges and Justices to the federal judiciary who are thought to share the broad political agenda of the political party led by the President.³ When Presidents are able to appoint enough such judges and Justices, constitutional doctrines start to change. The pace of change is faster if many appointments are made in a comparatively brief period of time. For example, the New Deal revolution was the product not so much of Justice Owen Roberts’s switch in time in 1937 as Franklin D. Roosevelt’s ability to appoint nine New Dealers to the U.S. Supreme Court between 1937 and 1942,⁴ a task made far easier by the

2. As we shall describe, the transition towards the National Surveillance State began during the Clinton Administration in the years immediately after the Cold War, as analysts began to realize that non-state actors such as Al-Qaeda posed serious threats to American national security. See, e.g., Lawrence Wright, *The Looming Tower: Al-Qaeda and the Road to 9/11*, at 237-44 (2006).

3. As we discuss *infra*, Presidents have their own priorities, and they may decide to emphasize some issues at the expense of others when they make appointments.

4. One of Franklin D. Roosevelt’s appointments, Wiley Rutledge, replaced a previous Roosevelt appointee, James Byrnes, who left the U.S. Supreme Court in 1942 after only a year in order to accept appointment as chief of the Office of Economic Stabilization and then, in 1943, as head of the Office of War Mobilization and Reconversion. “In short, FDR let ‘assistant president’ Byrnes manage the home front while FDR managed the war.” Eleanor Roosevelt National Historic Site, <http://www.nps.gov/elro/glossary/byrnes-james.htm> (last visited Sept. 11, 2006). Byrnes had hoped to become FDR’s running mate in 1944, but his antilabor and anti-civil rights positions ruled him out. *Id.* Following service as Secretary of State under President Harry Truman, Byrnes returned home to South Carolina, where he served as its segregationist governor from 1951-1955. Had Byrnes remained on the Court, it would have been far more difficult for Chief Justice Earl Warren to secure a unanimous decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). Byrnes’s replacement, Rutledge, did not sit on the Court that decided *Brown*. He died

fact that Democrats firmly controlled the Senate throughout this period. A Supreme Court restocked with loyal New Dealers quickly reinterpreted the Constitution to give the federal government wide-ranging powers to regulate the national economy.

The practice of partisan entrenchment hardly begins with Roosevelt. The notion that Presidents can promote their constitutional agendas through the judiciary dates back at least to the Midnight Judges Act and John Adams's appointment of John Marshall as Chief Justice. In Marshall's case, however, Adams and the Federalists were attempting to entrench the constitutional views of a party that was about to lose power. Roosevelt, by contrast, sought to stock the courts with like-minded jurists who would cooperate with his policies while he and his party remained in power. Thus, "partisan entrenchment" captures both the idea of preserving a voice when one loses elections and the idea of securing judicial allies who will work with and bolster one's existing political coalition. As we shall see later on, the latter is the best account of President George W. Bush's two Supreme Court appointments.

In any case, Roosevelt's attempt to entrench his policy goals through judicial appointments was hardly an innovation. Indeed, President William Howard Taft's ability to name six Justices in his single term between 1909 and 1913 might well have postponed an earlier Progressive Era shift in jurisprudence that we today might be calling the "Wilson Revolution" rather than the Revolution of 1937. *Hammer v. Dagenhart*, after all, failed by only one vote to uphold the federal child labor act.⁵ (Ironically enough, that vote was provided by Wilson's own appointee, Attorney General James McReynolds, whose appointment some explain by reference to Wilson's desire to get the notoriously irascible McReynolds out of the Cabinet at any cost.)⁶

The Warren Court "revolution" that stretched roughly between 1962 and 1969 offers an interesting variation on partisan entrenchment—a tipping

unexpectedly in 1949 at the age of 55, and was replaced by Sherman Minton, a loyal one-term Democratic Senator from Indiana who lost reelection in 1940 and was appointed by Roosevelt to the U.S. Court of Appeals for the Seventh Circuit in 1941. Although Minton joined the unanimous opinion in *Brown*, his voting record became conservative because he was as deferential to the President and Congress on national security as he was on domestic policy. See N.E.H. Hull, *Sherman Minton*, in *The Oxford Companion to the Supreme Court* 649 (Kermit Hall ed., 2d ed. 2005). Rutledge, on the other hand, though an equally strong proponent of the New Deal, was a far more ardent defender of civil liberties while on the Court; he would probably have voted quite differently from Minton on a number of significant cases that helped to legitimate the developing national security state. See William Crawford Green, *Wiley Blount Rutledge, Jr.*, in *The Oxford Companion to the Supreme Court*, *supra*, at 877-88. The history of this one seat underscores a theme that we emphasize throughout this article—the importance of contingency in constitutional change.

5. 247 U.S. 251 (1918).

6. Scot Powe has suggested in conversation that James McReynolds was a Wilsonian "progressive" on the crucial issue (for the time) of antitrust policy. Mark Graber has also pointed out that McReynolds largely shared Woodrow Wilson's views on race. Hence, Wilson might have had multiple motives for moving McReynolds from the Cabinet to the Supreme Court.

point phenomenon. The liberal Warren Court majority emerged from three sources. The first consisted of liberal holdovers from previous democratic administrations (Hugo Black and William O. Douglas). The second was President John F. Kennedy's ability to replace one of the most conservative Democratic appointees (Felix Frankfurter)⁷ with one of the most liberal (Arthur Goldberg) at roughly the same time that he was able to name the moderately liberal—at least on issues of race and national power—Byron White to replace the hapless Charles Whittaker.⁸ Interestingly enough, Earl Warren and Douglas, who were consulted by Kennedy, advised against the nomination of William Hastie, who would have become the first African-American Justice, because he would be “just one more vote for Frankfurter.”⁹ Goldberg, of course, would leave the Court to go to the United Nations, but he was replaced by the equally liberal Abe Fortas, who served until 1969, when he retired under the cloud of a financial scandal. But the third source of what we think of as “the Warren Court” was Republican President Dwight Eisenhower, who appears to have had no special interest in entrenching a specific political agenda with his appointments; he seemed more concerned with rewarding political favors and pleasing particular constituencies. Thus, he appointed Earl Warren as a reward for political favors during the 1952 presidential campaign.¹⁰ William J. Brennan was the beneficiary of a recess appointment on October 15, 1956, as a means of currying favor with northeastern Catholics in the run-up to the 1956 election.¹¹ Eisenhower is said to have regretted both appointments.

By contrast, President Harry Truman, partisan Democrat though he undoubtedly was, contributed nothing to the canonical “Warren Court.” Truman viewed appointments to the Court as an opportunity to reward friends and cronies—Fred Vinson, Sherman Minton, Harold Burton, and Tom Clark—rather than an important vehicle of carrying out his “Fair Deal” policies. These four appointees, however, all supported the judicial deference to Congress that was integral to the New Deal revolution.¹²

7. Note that before 1937, Felix Frankfurter was a committed New Dealer and hardly a conservative given the constitutional concerns of the day. By 1962, however, the same general philosophy of judicial restraint had made him relatively conservative in the context of the civil rights revolution that was about to burst forth.

8. See Lucas A. Powe, Jr., *The Warren Court and American Politics* 210-12 (2000).

9. *Id.* at 210.

10. See *id.* at 24.

11. See *id.* at 89. Powe quotes Dwight Eisenhower as asking his Attorney General, Herbert Brownell, to find “a very good Catholic” who was also a “conservative Democrat.” *Id.* Ironically, the only vote against his confirmation was provided by a fellow Catholic, Wisconsin's Senator Joseph McCarthy, who may have been far more prescient than Eisenhower about Brennan's likely politics. See *id.* at 90.

12. The most important disappointment President Harry Truman might have experienced from his appointments was the vote of some of them in *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*), 343 U.S. 579 (1952). But, as we argue below, it is far more likely that general support for the Democratic Party and the New Deal was primarily on Truman's mind when he made these appointments earlier in his presidency.

Thus, partisan entrenchment depends on the right mixture of *motive* and *opportunity*. Even the brief history sketched above alerts us to the contingent nature of each of these factors. Eisenhower and Truman, for example, lacked the necessary motive to change constitutional law with their appointments. But even if a President is quite determined to use judicial appointments to change the direction of constitutional doctrine, he may make very little headway if few Supreme Court vacancies occur during his presidency. Jimmy Carter, for example, got no appointments at all, while Richard Nixon was able to make four appointments in the first three years of his presidency. Had Nixon been able to serve out his second term, he would also have had the opportunity to replace William O. Douglas and, therefore, to name a majority of the Court's members.

In addition, replacing a Justice who already shares the same general ideological outlook as the President will make comparatively little difference to constitutional doctrine. Think, in this context, of Goldberg's replacement by Fortas. On the other hand, replacing a Justice who is generally opposed to the President's constitutional agenda is more likely to have a significant effect. In recent times, the most dramatic example is probably the replacement of Thurgood Marshall by Clarence Thomas, which cemented a five person conservative majority on the Court. Perhaps the most important question is whether the new appointment shifts the identity of the median or "swing" Justice whose views control in the most heavily contested cases. Thus, Roosevelt's appointments between 1937 and 1942 moved the "swing" Justice from Owen Roberts to (someone like) Hugo Black or Felix Frankfurter, and the replacement of Frankfurter with Goldberg in 1962 moved the swing Justice from (someone like) Tom Clark to William Brennan. (Clark himself, of course, would be replaced in 1966 by Thurgood Marshall, which further tipped the Court toward the left.)¹³

The recognition of these contingencies, and the "counter-histories" they inspire, shows how much of constitutional change cannot be predicted in advance and how little such change follows law-like regularities. If Franklin D. Roosevelt been able to appoint several Supreme Court Justices in his first term, the struggle over the New Deal might have been less of a fight and more of a gradual transition, and the New Deal itself might have looked different.¹⁴ Had Eisenhower appointed someone more competent than Whittaker, similar to John Marshall Harlan or Potter Stewart, that

13. For a more detailed empirical account of this phenomenon, see Andrew D. Martin, Kevin M. Quinn, & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. Rev. 1275, 1300-04 (2005) (analyzing Supreme Court voting patterns to determine median Justices from 1937 to the present).

14. In this context, we note that among the various differences between our theory and Bruce Ackerman's is that Ackerman views strong opposition by the Court (or some other key actor) as quite important to creating a new constitutional regime that amends the Constitution outside of Article V. Ackerman's explanation of why the New Deal represented a "constitutional moment" depends on the Supreme Court's resistance to Roosevelt's program. See generally Bruce Ackerman, *2 We the People: Transformations* (1998).

Justice might well have served throughout the entire 1960s and 1970s, resigning, like Stewart, only when another Republican President could replace him.¹⁵ Or, if Arthur Goldberg had not succumbed to Lyndon Johnson's entreaties, he would have remained in office for many years (Goldberg died in 1990), and there would have been no appointment of Harry Blackmun (who replaced Fortas upon the latter's resignation). Indeed, had Johnson been able to restrain himself from trying to replace Chief Justice Earl Warren with his close friend Abe Fortas, and then replace Fortas with his Texas crony Homer Thornberry, there might have been no "Burger Court" as such. Instead, the Court might have retained a liberal majority through the early 1970s, when the Court decided a number of important cases including *Milliken v. Bradley*¹⁶ and *San Antonio Independent School District v. Rodriguez*¹⁷ by five to four margins, with all four Nixon appointees voting as a bloc.¹⁸

It should be obvious, then, that our account of "partisan entrenchment" does not assert that the course of constitutional development is predictable and law-like. Quite the contrary, the whole point of the concept of partisan entrenchment is to show how constitutional development is tied to the vagaries of American politics, and, in particular, the politics of judicial appointments. Because American politics, like all politics, is full of contingencies, so too are important aspects of American constitutional development.

Second, we also pointed out, as have others before us, that the Supreme Court is part of national politics and tends to cooperate with the dominant political forces of its time.¹⁹ The process of partisan entrenchment helps ensure that the Supreme Court remains in sync with the political forces of the day and thus plays its role as the judicial wing of the existing constitutional regime. This is one of two key effects of partisan

15. Moreover, if Eisenhower had appointed more conservative Justices, they might have resisted Johnson's civil rights and Great Society measures and the Supreme Court would not have acted as the judicial wing of the Democratic Party.

16. 418 U.S. 717 (1974).

17. 411 U.S. 1 (1973).

18. Or imagine if Lyndon B. Johnson, perhaps emulating Roosevelt's wartime appointment of the Republican Justice Harlan Fiske Stone as Chief Justice in 1941, had nominated the moderate Potter Stewart or the Republican former Harvard Law School Dean Erwin Griswold, who had been named by Johnson as Solicitor General of the United States in 1967. Such a compromise might have given Johnson enough maneuvering room to nominate another strongly liberal Democrat to fill Abe Fortas's seat.

19. The canonical citation is Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279, 285 (1957) ("[T]he policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."). As Steven Calabresi notes, one might also cite Mr. Dooley's famous remark that "no matter whether th' constitution follows th' flag or not, th' supreme coort follows th' iliction returns." Steven G. Calabresi, *The President, the Supreme Court, and the Founding Fathers: A Reply to Professor Ackerman*, 73 U. Chi. L. Rev. 469, 478 n.42 (2006) (quoting Finley Peter Dunne, *Mr. Dooley's Opinions* 26 (1901)).

entrenchment.²⁰ The other is that judicial appointments from the past act as a sort of “drag” or check on the ambitions of the current President and party in power, at least until that party wins enough elections to entrench its own supporters in the judiciary. These two effects correspond to the two reasons why Presidents entrench: first, to secure future influence even when the party loses power (as in the case of John Adams); and second, to secure a bench likely to assist the President with his current political agenda (as in the case of Franklin D. Roosevelt, and, we believe, George W. Bush).

Thus, the Warren Court, like the Roosevelt Court, worked hand in hand with the Democratic administrations of the time. Far from being countermajoritarian institutions, the New Deal Court and the Warren Court facilitated the goals of the then-existing national political coalition. The New Deal Court did this primarily by reading federal power very broadly and dismissing contrary claims of state regulatory authority. The Warren Court brought regional majorities in the South (which were often “majorities” only because, prior to the 1965 Voting Rights Act, African-American voters were effectively disenfranchised) into line with the nationally dominant liberal political majority. Hence, much of the work of the Warren Court involved striking down state laws that hindered liberal goals while upholding national civil rights and other liberal legislation.

Third, we offered several important caveats to the basic model of partisan entrenchment. One has already been mentioned: Presidents differ in their motivation to view judicial appointments as an important part of achieving their policy agenda. Some Presidents (like Eisenhower and Truman) have sought merely to reward cronies or to please certain regional or demographic constituencies. Even Ronald Reagan, whose Administration was particularly canny in its use of judicial appointments to further Republican policy goals, named Sandra Day O’Connor to the Court in 1981 because Reagan had made a campaign promise to appoint the first woman Justice and because the two southwesterners “clicked” when Reagan met her shortly before deciding to nominate her. These factors resulted in a somewhat more centrist and pragmatic replacement for Justice Potter Stewart than Reagan might otherwise have appointed.

Equally important, and also contingent, is the balance of power in the Senate, which may cause Presidents to moderate their appointment strategies. Significant political obstacles often temper a President’s opportunity to achieve his desires. This may hinder the President’s goals of partisan entrenchment, especially when nominees must gain approval from a Senate not controlled by the President’s own party. (The Senate’s actual or expected resistance, and its effects on whom the President nominates, is one way that the appointment process stays roughly in line with the vector

20. Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, in *The Supreme Court and American Political Development* 138-61 (Ronald Kahn & Ken Kersch eds., 2006); Howard Gillman, *How Political Parties Can Use the Courts to Advance their Agendas: Federal Courts in the United States, 1875-1891*, 96 *Amer. Pol. Sci. Rev.* 511 (2002).

sum of political forces in the country.) Both Richard Nixon and Ronald Reagan had nominees rejected by Democratic-controlled Senates and were therefore forced to send relative moderates to the Senate. Had they dealt with Senates controlled by conservative Republicans, they would have easily succeeded in placing more conservative Justices on the bench. Indeed, when Reagan faced a Republican controlled Senate in 1986, he was able to appoint William Rehnquist to the Chief Justiceship and Antonin Scalia to the Court, whereas a year later, a now-Democratic Senate was able to block Robert Bork's ascension to the Court.

Finally, and crucially, Presidents tend to have a relatively limited field of vision; they appoint judges and Justices because of the key policy and constitutional questions that are salient at the time of confirmation. The most important issues even a few years down the road may be quite different from those that led to the choice of a particular appointee and the President's appointees may disagree among themselves markedly on those issues. What the appointment process entrenches is a set of views reflecting a particular political moment and a particular array of political forces. Sometimes that political agenda and that balance of political forces will last for quite a while, but in other instances, it may shift suddenly, as it did on September 11, 2001.

For example, Richard Nixon's four appointments between 1969 and 1971 were designed to limit the Warren Court's criminal procedure decisions and to rein in court-ordered busing and the constitutionalization of welfare rights. This, the four new Nixon appointees largely achieved. Although Harry Blackmun became more liberal during the 1980s, it is important to remember that he provided the key fifth vote in such conservative decisions as *Milliken v. Bradley*,²¹ *San Antonio Independent School District v. Rodriguez*,²² *United States v. Kras*,²³ and *National League of Cities v. Usery*.²⁴ Blackmun was also, at least early in his career, a reliable vote on behalf of the interests of law enforcement rather than the rights of criminal defendants.

Nixon was not concerned with abortion when he made his Supreme Court appointments. Three of his four appointees voted to recognize such a right in *Roe v. Wade*,²⁵ while the fourth, then-Justice William Rehnquist, was joined by White (a Kennedy appointee) in dissent. Moreover, when Nixon made his four appointments between 1969 and 1971, he almost certainly did not imagine that his nominees might be called upon to decide whether he had to disclose secret taped conversations about the Watergate affair. Similarly, Roosevelt's plethora of nominees—once the first-term dam was breached—were appointed to cement federal regulatory power, and this they did consistently and reliably. When the key questions moved

21. 418 U.S. 717 (1974).

22. 411 U.S. 1 (1973).

23. 409 U.S. 434 (1973).

24. 426 U.S. 833 (1976).

25. 410 U.S. 113 (1973).

to civil rights and civil liberties, they disagreed among themselves, a disagreement reflected in the Roosevelt Administration itself. The longer a Justice stays in office, the more distant becomes the political context that gave rise to his or her nomination. This produces the familiar impression (if not always the reality) that the Justices have “evolved” away from the ideological interests that spawned their appointment. Nominees do not normally disappoint the Presidents who appointed them on the issues that are most salient at the time of appointment. Rather, such disappointment generally occurs vis-à-vis newly salient issues that were not particularly important to the President when searching for a nominee.

Fourth, we emphasize more than ever that partisan entrenchment is primarily a theory about how change occurs in *constitutional doctrine* and that such changes can and do occur throughout a variety of governmental institutions. In our original article we concentrated—as do most legal academics—on the work of courts in general and the Supreme Court in particular. We argued that much constitutional change occurs not through new Article V amendments but through the interpretations of constitutional texts and precedents by Article III judges. But surely this does not exhaust the forms of constitutional change. Even putting aside the most obvious method of change—Article V amendment—both Congress and the President engage in various modes of what Keith Whittington has called “constitutional construction,”²⁶ ranging from the creation of new institutions to the adoption of super-statutes and regulatory schemes to the shifting balance of power between the branches.²⁷

Courts often play a role in these constitutional constructions. Courts may legitimate new constitutional constructions or hold certain institutional innovations unconstitutional; examples of the latter might include the Court striking down the National Recovery Act in *A.L.A. Schechter Poultry Corp. v. United States*,²⁸ congressional vetoes in *INS v. Chadha*,²⁹ and the Presidential line item veto in *Clinton v. City of New York*.³⁰ Courts can uphold or strike down super-statutes or read them broadly or narrowly, and they can also intervene in the balance of power between the branches, as in the famous decision in *Youngstown Sheet & Tube Co. v. Sawyer*.³¹

Nevertheless, much constitutional development (and therefore much constitutional change) occurs outside of judicial case law. Steven Teles has described how the conservative jurisprudence of the present era was fostered by decades of institution building in conservative think tanks, policy institutes, conservative public interest law firms, professional

26. See generally Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (1999).

27. See William N. Eskridge, Jr. & John Ferejohn, *SuperStatutes*, 50 Duke L.J. 1215, 1216 (2001).

28. 295 U.S. 495 (1935).

29. 462 U.S. 919 (1983).

30. 524 U.S. 417 (1998).

31. 343 U.S. 579 (1952).

organizations like the Federalist Society, and constitutional scholarship.³² This institution building helped shape professional legal ideology, generated new ideas and litigation strategies, drove litigation favoring conservative causes through the court system, and created networks for job placement and influence both in government and the private sector. Conservative institution building helped create an agenda of cases that conservative courts would later decide. It nourished a generation of conservative lawyers and intellectuals, often placed in Supreme Court clerkships and influential executive branch positions, who would produce new conservative constitutional arguments and form a talent pool for judicial appointments. George W. Bush's two Supreme Court appointments, John G. Roberts and Samuel A. Alito, are among the results of this long process of conservative institution building.³³

In many areas, the constitutional law enunciated in formal opinions and memoranda issued by the Office of Legal Counsel (OLC) within the Department of Justice (DOJ) is sometimes at least as important as any decision of Article III courts. The most obvious example over the past five years is the OLC's enunciation of the broad scope of presidential power in foreign affairs, leading, in one notorious example, to a crabbed and narrow reading of what constitutes "torture" banned by domestic law and international treaties. The same "torture memo" also offered (to our minds, at least) highly disturbing views about the essentially unconstrained powers that the President enjoys under Article II.³⁴ The OLC has also issued memos absolving the President of obligations to obey existing treaties and

32. Steven M. Teles, *The Evolution of the Conservative Legal Movement* (unpublished manuscript, 2006).

33. See Jo Becker & Dale Russakoff, *Proving His Mettle in the Reagan Justice Dept.*, Wash. Post, Jan. 9, 2006, at A01, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/01/08/AR2006010801165_pf.html; David D. Kirkpatrick, *In Alito, G.O.P. Reaps Harvest Planted in '82*, N.Y. Times, Jan. 30, 2006, at A1, available at 2006 WLNR 1621211.

34. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), in *The Torture Debate in America* 317 (Karen J. Greenberg ed., 2006). The most egregious aspects of this memorandum with regard to the definition of torture were repudiated in Memorandum from Daniel Levin to James B. Comey, Deputy Attorney Gen. (Dec. 30, 2004), in *The Torture Debate in America*, *supra*, at 361. The equally controversial assertions about the President's Article II authority to override domestic and international law were withdrawn rather than repudiated. Versions of the earlier argument, however, have reappeared in later Department of Justice (DOJ) documents involving the propriety of the National Security Agency's (NSA) domestic surveillance program. See Memorandum from Alberto R. Gonzales, Attorney Gen., U.S. Dep't of Justice, to William H. Frist, Majority Leader, U.S. Senate, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006), available at <http://www.fas.org/irp/nsa/doj011906.pdf>. For a reply to the DOJ analysis by fourteen distinguished constitutional lawyers, including Kathleen Sullivan, Richard Epstein, former federal judge and FBI Director William Sessions, and Walter Dellinger, see Marty Lederman, *Scholars' Reply to DOJ "White Paper" on NSA, FISA, the AUMF and Article II*, Balkinization, <http://balkin.blogspot.com/2006/02/scholars-reply-to-doj-white-paper-on.html> (Feb. 2, 2006, 17:08 EST).

international law obligations, and, in a memo whose contents still remain secret, gave its blessing to the President's decision to employ the National Security Administration (NSA) to spy on American citizens beyond the confines of the Foreign Intelligence Surveillance Act of 1978 (FISA). Presidents often change the practical balance of power between themselves and the other branches through their assertions of constitutional authority. In these executive assertions, the constitutional and legal interpretations of the OLC and the DOJ may prove quite important in providing the necessary professional and ideological cover for what the President seeks to do. The OLC, and the DOJ more generally, have been crucial in creating and providing constitutional interpretations justifying the President's robust assertions of Article II power to disregard congressional statutes that he believes hamper his inherent authority as Commander-in-Chief,³⁵ as well as the President's capacious view of the authority vested in him by the September 18, 2001 Authorization for the Use of Military Force.

In the domestic arena, the OLC has also blazed new trails by legitimating federal expenditures that directly aid religious schools.³⁶ Similarly, a thorough analysis of partisan entrenchment would include a study of the Solicitor General's office. Charles Fried, for example, clearly viewed one of his roles as pressing the Reagan Administration's agenda before the

35. See, e.g., President's Statement on H.R. 199, USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 42 Weekly Comp. Pres. Doc. 425 (Mar. 9, 2005), available at <http://www.whitehouse.gov/news/releases/2006/03/20060309-8.html> (declaring that the President may order DOJ officials to withhold information from Congress about how the FBI is using the USA PATRIOT Act to search homes and secretly seize papers notwithstanding statutory requirements if he decides it could impair national security or executive branch operations); President's Statement on H.R. 2863, Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, 41 Weekly Comp. Pres. Doc. 1920 (Dec. 30, 2005), reprinted in 2005 U.S.C.C.A.N. S50, available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html> (stating that "[t]he executive branch shall construe" the Detainee Treatment Act of 2005, prohibiting cruel, inhuman and degrading treatment, "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief"); President's Statement on H.R. 1815, National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 42 Weekly Comp. Pres. Doc. 23 (Jan. 6, 2006), reprinted in 2005 U.S.C.C.A.N. S56, available at <http://www.whitehouse.gov/news/releases/2006/01/20060106-12.html> (announcing that the President will construe provisions which require disclosure of scientific information uncensored "in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties").

36. See, e.g., Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Michael D. Brown, Gen. Counsel, Fed. Emergency Mgmt. Agency (Sept. 25, 2002), available at 2002 WL 32100854; <http://www.usdoj.gov/olc/FEMAAssistance.htm> (overruling, in part, Memorandum from Walter Dellinger, Assistant Attorney Gen., Office of Legal Counsel, to John Leshy, Solicitor, U.S. Dep't of the Interior, Constitutionality of Awarding Historic Preservation Grants to Religious Properties, 19 Op. Off. Legal Counsel 267 (1995)).

Supreme Court (including, most famously, its views on *Roe v. Wade*³⁷), regardless of the Court's likely response.³⁸

Indeed, change in formal judicial constitutional doctrine often only comes along after major attempts within other branches, particularly the executive, to transform the status quo. Courts often arrive on the scene only after major institutional changes—like the growth of the regulatory, administrative, and welfare state—have already occurred, and then their major task is to bless and legitimate these institutional changes, while modifying and limiting them in comparatively minor respects. Even though courts may resist these changes at first (in part because they were appointed by political forces representing the preceding regime), in the long run they perform their familiar institutional role of cooperating with the dominant national coalition.

The growth of the administrative state in domestic politics, and the national security state in foreign affairs, are the most salient examples of long-term trends that can only be described as “constitutional.” The courts did not play a central role in constructing them, but rather deferred to decisions occurring elsewhere in the constitutional system, eventually crafting doctrines that rationalized and accommodated these institutional innovations. For example, the constitutional struggle over the New Deal in the mid-1930s offered only a temporary setback to the growth of the administrative and regulatory state; elements of that state had already appeared in the early twentieth century and especially during World War I. Following Roosevelt's appointments to the Supreme Court, the federal courts largely acquiesced in the development of the administrative and regulatory state, creating constitutional doctrines that rationalized its existence. The reason for that acquiescence is connected to the theory of partisan entrenchment: The Democratic Party—which championed the growth of the administrative state—kept winning elections and appointing like-minded judges. Eventually, the Republican Party capitulated to the changes in governmental structure; instead of simply opposing the administrative state in all of its forms, it sought an administrative state that furthered its policy agendas. The next two Republican Presidents, Eisenhower and Nixon, accepted the administrative state as fully normal and did not attempt to roll back the New Deal. Indeed, Nixon helped solidify and expand the welfare state that built on the New Deal. In short, new constitutional developments often do not begin with the courts—rather, Congress and the presidency build new constitutional institutions, and the courts eventually rationalize them. As we explain in the second half of this essay, that is precisely what we think the courts will do with respect to the institutions and practices that characterize the emergent National Surveillance State.

37. 410 U.S. 113 (1973).

38. See generally Charles Fried, *Order and Law: Arguing The Reagan Revolution—A Firsthand Account* (1991).

With these important caveats in mind, we continue to believe that the concept of “partisan entrenchment” helps us understand both why changes in constitutional doctrine occur and how and why the Supreme Court tends, in the long run, to cooperate with the vector sum of forces in national politics. Swing or median Justices often tend to see their role as fostering decisions that do not stray too far from the center of national public opinion. Moreover, the median Justice in a multimember Court, simply because he or she is the median, tends to push the Court’s work back to the center. If the Court as a whole strays too often and too widely from the desires of the dominant forces in national politics (or if the median Justice turns out to be fairly far from the political median), the appointment process soon pushes the Court back into line. The calibration is hardly perfect, and there is almost always at least some tension between the Court and the national political branches, but it may not be much greater than that which exists within any functioning political coalition over time.³⁹

In 2001, we noted that the replacement of Justice Marshall with Justice Thomas in 1991 had formed a new five-person conservative majority on a number of issues, including federalism and religion. We argued that we were on the cusp of what might be an even more significant constitutional revolution in a number of areas, depending on subsequent appointments to the Supreme Court. Finally, we argued that the Supreme Court’s decision in *Bush v. Gore*,⁴⁰ in which the five conservative Justices handed the presidency to George W. Bush, threw a monkey wrench into the entire analysis. The Justices had used their power of judicial review to entrench a President who, in turn, would appoint lower court judges and Supreme Court Justices who would continue the conservative constitutional revolution that they had begun. This judicial bootstrapping or self-entrenchment, we argued, was both unfair and illegitimate. It is one thing for a party returned to power by the voters to entrench its constitutional vision in a series of appointments; it is quite another for that party’s allies in the judiciary to put that party in power so as to replenish itself. Nevertheless, we argued that *Bush v. Gore* was a singular phenomenon, not likely to be repeated (and therefore unlikely to be reversed). As a result, we argued that the future and the scope of the conservative constitutional

39. One factor that may disturb these conclusions is the ever-increasing length that Justices serve on the Supreme Court. “Life tenure” may now have a considerably different meaning than it once did, when Justices tended to retire at an earlier age and appointments were more frequent. See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, in *Reforming the Court: Term Limits for Supreme Court Justices 15* (Roger C. Cramton & Paul D. Carrington eds., 2006). Robert Dahl’s famous argument that the Court’s policy views would stay in rough correspondence to those of the national political coalition was predicated in part on the fact that new appointments to the Court were made roughly every two and a half years or so. However, between Stephen Breyer’s arrival in 1994 and Chief Justice William Rehnquist’s death in 2005, the Court had no vacancies, the longest period of stability since the early nineteenth century.

40. 531 U.S. 98 (2000).

revolution would be determined through ordinary politics. Five years later, we can look back on what we correctly diagnosed and what we missed.

II. THE ELECTION OF 2000 AND THE ELECTION OF 2004

The first, and most obvious, issue concerns the consequences of *Bush v. Gore*. Writing in the middle of 2001, we were concerned that the conservative Supreme Court majority had bootstrapped itself—securing a new set of conservative Supreme Court appointments without fairly winning a presidential election. However, no Justices retired until 2005. In the interim, however, the Republicans not only increased their representation in the Senate in 2002, but also won the presidency and further increased their Senate representation in 2004. This illustrates the important role that the Senate plays in the mechanics of partisan entrenchment. Ironically, liberals would probably have been far better off had Chief Justice William Rehnquist and Justice Sandra Day O'Connor retired in 2001 or 2002, when Democrats controlled the Senate, albeit by one vote, than in 2005, when a far more Republican Senate was able to steamroll the nominations of John Roberts and Samuel Alito.

This does not mean that *Bush v. Gore* had no impact on the fortunes of conservative constitutionalism. For one thing, placing a Republican in the White House gave the Republicans the advantages of incumbency, which, all other things being equal, significantly increased the chances of a Republican winning the White House in 2004. Moreover, Bush was able to appoint various people to policy-making posts in his Administration, including important appointments to the DOJ, OLC, and other legal positions throughout the Administration. Bush appointees, including David Addington, William Haynes, Jay Bybee, and John Yoo, developed policies that justified Bush's assertions of presidential power, articulating a theory which, in its most aggressive forms, approximates what Clinton Rossiter so memorably—and troublingly—labeled “constitutional dictatorship.”⁴¹ Political appointees at the Department of Justice helped bless Tom DeLay's gerrymandering of the Texas districts for the House of Representatives, helping the Republicans maintain control of the House, while rejecting challenges to the racially discriminatory effects of Georgia's requirement that all voters possess specific means of personal identification.⁴²

Moreover, even if George W. Bush had no opportunity to name any Justices in his first term, he was able to nominate 168 district judges and sixty-five appellate judges, of whom eighty-seven percent and fifty-two

41. See Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* 3-14 (1948).

42. See Dan Eggen, *Criticism of Voting Law Was Overruled: Justice Dept. Backed Georgia Measure Despite Fears of Discrimination*, Wash. Post, Nov. 17, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602504.html>; Dan Eggen, *Justice Plays Down Memo Critical of Ga. Voter ID Plan*, Wash. Post, Nov. 18, 2005, at A03, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/17/AR2005111701496.html>.

percent, respectively, were confirmed.⁴³ At least some of these nominees had been blocked by Democrats when they controlled the Senate between 2001 and 2003 but then were successfully confirmed upon the loss of the Senate to Republicans in the 2002 elections. As we pointed out in our previous essay, the lower courts are quite important to the processes of constitutional change. First, the lower federal courts decide virtually all federal cases; fewer than .05% are reviewed by the Supreme Court.⁴⁴ As a practical matter, the willing support of lower federal court judges is necessary for a constitutional revolution to succeed. The Supreme Court simply does not have the time and energy to engage in close monitoring of the “inferior” courts, especially when applying its doctrines requires potentially controversial factual characterizations, or, indeed, any measure of balancing of competing interests. Lower court judges who share what we have termed the “high politics”⁴⁵ of the Supreme Court—fundamental visions as to what constitutes the most desirable political or constitutional order—will be delighted to carry out and further its doctrinal innovations in a wide variety of circumstances; conversely, those nominal “inferior” court judges who reject that politics can find numerous ways to evade, narrow, or distinguish precedents using the various techniques of doctrinal analysis. Constitutional revolutions require the Supreme Court’s willingness to make significant doctrinal changes in particular areas. But they also require support by lower courts (as well as low-level and relatively invisible bureaucrats) who will faithfully implement these doctrinal shifts over time.

Second, lower federal courts help set the agenda for issues that the Supreme Court will later address, as well as entertain new arguments and test the limits of existing doctrines. For example, the U.S. Courts of Appeals for the Fourth Circuit and the D.C. Circuit have proved particularly important testing grounds for cases involving the scope of executive power.⁴⁶ If, as we shall argue in a moment, increased executive power is

43. See Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. Rich. L. Rev. 871, 904-05 (2005).

44. See David S. Law & Sanford Levinson, *Why Nuclear Disarmament May Be Easier to Achieve than an End to Partisan Conflict Over Judicial Appointments*, 39 U. Rich. L. Rev. 923, 927 (2005).

45. Balkin & Levinson, *supra* note 1, at 1062.

46. Although, as it turned out in the Jose Padilla litigation, the administration may have taken the lower federal courts too much for granted. See *Padilla v. Hanft*, 432 F.3d 582, 583 (4th Cir. 2005) (refusing to allow the transfer of Padilla to civilian law enforcement custody after holding him for three years as an enemy combatant because of “an appearance that the government may be attempting to avoid consideration of our decision by the Supreme Court”). The author of the opinion, Judge J. Michael Luttig, who had been a stalwart defender of the administration’s claims of power to conduct the War on Terror and a potential Supreme Court pick, stated that the government’s “actions have left . . . the impression that Padilla may have been held for these years, even if justifiably, by mistake” and that “the principle in reliance upon which it has detained Padilla for this time,” the President’s “authority to detain enemy combatants who enter into this country for the purpose of attacking America . . . can, in the end, yield to expediency with little or no cost to its conduct of the war against terror.” *Id.* at 587. Some six months later, after President Bush nominated John G. Roberts and Samuel A. Alito to the Supreme Court, Judge Luttig

one of the key elements of the emerging constitutional revolution, having ideological allies of the President on these courts is quite important to the success of that revolution. One explanation for the increasing acrimony over judicial nominations to the lower federal courts is that members of both parties recognize the importance of capturing or maintaining control of those courts. Moreover, during the past quarter century, Presidents from both parties have increasingly chosen Supreme Court Justices from the federal appellate courts. Democrats probably opposed some of Bush's lower court appointments in his first term (Miguel Estrada is one obvious example) because they did not want to give a "free pass" to well-credentialed nominees who would clearly be on "short lists" for the Supreme Court itself. It would be more difficult to explain why someone confirmed overwhelmingly to be on a circuit court is later thought unfit for promotion to the Supreme Court.

In any event, the fight over lower court nominees and the struggle over Senate filibusters that it spawned are hard to understand without recognizing the partisan bitterness that followed the contested election of 2000 and George W. Bush's rapid turn to the hard right upon taking the oath of office. Even so, Senate Democrats were rarely, if ever, willing to advert to *Bush v. Gore*. Although one of us (Levinson) testified before a Senate subcommittee on September 4, 2001 about judicial nominations, he was cautioned, prior to his oral testimony, not to bring up *Bush v. Gore*, which he had referred to in his written testimony as "a stinking pig in the parlor."⁴⁷ Still, Democrats were able to stave off some of the most ideological appointments between June 2001 and January 2003 because they controlled the Senate during that period. The Republicans' recapture of the Senate in the 2002 elections changed the balance of power; thereafter, Democrats offered only limited resistance. Bush treated his victory in 2004—whether one calls it an "election" or a "reelection" depends on one's view of *Bush v. Gore*—as a mandate to renominate some of the most controversial lower court candidates, such as Janice Rogers Brown and Priscilla Owen, as well as to make a few fairly aggressive recess appointments. He also nominated two strongly conservative judges, John G. Roberts and Samuel A. Alito, to the Supreme Court. In every way, then, the election of 2004 reinforced the Republican Party's existing strategy of partisan entrenchment. Democrats were simply routed in their attempt to block that entrenchment.

resigned his federal judgeship to take a job as a senior vice-president and general counsel at the Boeing Corporation. See Jerry Markon, *Appeals Court Judge Leaves Life Appointment for Boeing*, Wash. Post, May 11, 2006, at A11, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/05/10/AR2006051000929_pf.html.

47. See *The Judicial Nomination and Confirmation Process: Hearings Before the S. Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 107th Cong. 166 (2001) (statement of Sanford Levinson, Professor of Law, University of Texas School of Law).

The President's second term appointments of John Roberts, Harriet Miers (which was later withdrawn), and Samuel Alito fit our model of partisan entrenchment fairly well. They are appointments designed to further the President's key constitutional goals—in this case, the maximization of presidential power. Miers, who had been the President's counsel and helped develop many of the President's policies, was particularly likely to read executive power broadly. Roberts and Alito also fit fairly well into the President's constitutional agenda. To be sure, significant elements of the Republican faithful opposed the Miers nomination and ultimately sank it. But that is because they saw it as an example of cronyism rather than as a true partisan entrenchment. They did not trust Bush when he said that Miers would further the goals of the Republican revolution. Moreover, they wanted candidates with strong qualifications and clear conservative views so that they could aggressively take the fight over judicial philosophy to liberal Democrats in the Senate.

However much a crony of the President Miers was, her nomination did not involve any abandonment of the presidential strategy of partisan entrenchment. President Bush may have felt (incorrectly, as it turned out) that the "stealth nomination" of a relatively unknown woman would lead to an easier confirmation. The problem, however, was that stealth nominees are most likely to succeed when their qualifications are judged impeccable. As Lee Epstein and Jeffrey Segal have pointed out, Senators are least likely to vote against a Supreme Court nominee when the nominee's qualifications are generally considered outstanding.⁴⁸ When a nominee's qualifications are judged as suspect or wanting, however, Senators are less likely to vote for the candidate the more the nominee's perceived ideology differs from their own.⁴⁹ Hence, stealth nominees perceived to have weak qualifications lose support not merely from members of the opposition party, but also from the President's own party because devoted partisans cannot be sure that the nominee's views are congruent with their own.

Lack of firm public commitments about prominent legal issues of the day may make a stealth candidate more, rather than less, attractive to members of the opposition. Indeed, many Democrats might ultimately have supported Miers: Her positions on abortion, homosexuality, and affirmative action were quite uncertain, and she had even made campaign contributions to Al Gore in 1988. Instead, members of President Bush's own conservative base sank the Miers nomination because they did not trust him sufficiently to pick someone whose views were as conservative as theirs. Many conservatives had felt betrayed by an earlier stealth nominee, David Souter, nominated by President Bush's father. (At the time of his

48. See Lee Epstein & Jeffrey Segal, *Advice and Consent: The Politics of Judicial Appointments* 103 (2006).

49. Jack M. Balkin, *Is the Miers Nomination in Trouble? Some Data from Epstein and Segal's Advice and Consent*, Balkinization, <http://balkin.blogspot.com/2005/10/is-miers-nomination-in-trouble-some.html> (Oct. 6, 2005, 07:31 EST) (citing Lee & Epstein, *supra* note 48).

nomination, Souter's credentials were widely judged to be very good, and so, in accordance with Epstein and Segal's model, he faced relatively little opposition.) Souter, whose views were almost completely unknown in 1990, has turned out to be far closer to the Justice he replaced, William J. Brennan, than anyone imagined at the time; thus, many conservatives were unwilling to take a similar chance with Miers. Democratic support only added to their suspicions. Hardcore members of the President's conservative base wanted a nominee who stood forthrightly for conservative constitutional principles and who would champion these views in a confirmation battle. Many, no doubt, were looking for a nominee who might provoke the Democrats to filibuster, which in turn would allow Republicans to engage in the so-called "nuclear option" that would eliminate the filibuster for judicial nominations.

III. THE BUSH ADMINISTRATION'S SYMBOLIC AGENDA

More interestingly, the Miers example counsels us to be careful in describing Bush's appointment agenda. The constitutional agenda that a President seeks to entrench is an amalgam of the different interests in his coalition along with his own. The contemporary Republican Party, like Franklin D. Roosevelt's Democratic Party, is an alliance of disparate groups with competing agendas. Much of the public discussion of the three nominees focused on the likelihood that they would vote to overturn *Roe v. Wade* or cut back on legal protection for gay and lesbian rights. However, as we have explained elsewhere, it is altogether unclear that the collective political interests of the Republican Party are furthered by overruling *Roe* or even *Lawrence v. Texas*, as opposed to hollowing out the right to reproductive choice and strictly limiting any further extensions of *Lawrence*.

Social and religious conservatives may care deeply about abortion and genuinely wish its criminalization. But this remains a minority position in the United States.⁵⁰ Overruling *Roe* might alienate those elements of the Republican coalition who view themselves as moderates, business conservatives, or suburban "country-club" conservatives who want low taxes and little government regulation of their businesses but otherwise support abortion rights for themselves, their wives, or their children. Moderate Republican women, in particular, have been able to stay with the

50. In a CNN opinion poll conducted from August 30 to September 2, 2006, forty-five percent of those polled said they would favor "a law in your state that would ban all abortions except those necessary to save the life of the mother." PollingReport.com, Abortion and Birth Control, <http://www.pollingreport.com/abortion.htm> (last visited Sept. 17, 2006). A Pew Research poll taken from July 6 to 19, 2006 found that forty-six percent of those polled wanted abortion legal only in cases of rape, incest, or threat to life, or not at all. *Id.* However, a *Los Angeles Times* poll taken from April 8 to 11, 2006 found that only thirty-five percent of those polled approved of South Dakota's new law banning abortion except to save a woman's life, and an NBC News/*Wall Street Journal* poll taken from December 9 to 12, 2005 found that sixty percent of the public opposed overturning *Roe v. Wade*. *Id.*

party for many years secure in the knowledge that the federal courts would stymie any attempts by social and religious conservatives in the Republican Party to implement the full level of their hostility to *Roe*. There is also a vocal constituency within the Party (exemplified by the Cato Institute) that defines itself as libertarian and thus is hardly sympathetic to attempts by the state to regulate fundamental aspects of individual private choice. Assuming that the President and his political strategists hope to keep the Republicans in power for the indefinite future, it would hardly be surprising that the President did not regard overturning *Roe* as a high priority in his Supreme Court nominees; quite the contrary, there is now probably a “reverse litmus test” for Supreme Court Justices: uphold the formal right to abortion, but whittle away at it slowly.⁵¹

If *Roe* is not the crucial issue, what *does* explain Bush’s choice of candidates like Roberts, Miers, and Alito? Many (including ourselves in 2001) had expected that a key agenda item for Republicans would be federalism, the return to a view of states as more autonomous and protected against intrusions from the federal government. A major theme of our earlier article was the Rehnquist Court’s increasing success in changing the contours of the constitutional doctrines regarding state’s rights. We hypothesized that, with a few more conservative appointments, important elements of the “New Deal Settlement”—which delegated broad powers to the federal government to regulate in the public interest—might be under attack. There seemed to be good reason for such fears. As an excellent recent article by Cornell Clayton and J. Mitchell Pickerill demonstrates, the national Republican Party, particularly after 1980, attempted to make federalism a “cleavage issue” between the two major parties.⁵² Republican Party platforms from the Reagan years onwards enunciated what Clayton and Pickerill call “fixed federalism,”⁵³ demanding firm judicially enforceable limits on federal power, in contrast to the Democrat’s emphasis on “flexibl[e]” federalism.⁵⁴ The 1980 Republican platform pledged to appoint judges “whose judicial philosophy is characterized by the highest regard for . . . the decentralization of the federal government and efforts to return decisionmaking power to state and local elected officials.”⁵⁵ By 1984, when Ronald Reagan was running for reelection, the party’s platform stated that “[o]ur Constitution . . . provides for a federal system. . . . In that system, judicial power must be exercised with deference towards State and local officials.”⁵⁶ Promoting state and local prerogatives was a major

51. See Jack M. Balkin, *The Reverse Litmus Test*, Balkinization, <http://balkin.blogspot.com/2005/07/reverse-litmus-test.html> (July 10, 2005, 01:07 EST).

52. Cornell W. Clayton & J. Mitchell Pickerill, *Guess What Happened on the Way to Revolution? Precursors to the Supreme Court’s Federalism Revolution*, 34 *Publius: J. of Federalism* 85, 100 (2004).

53. *Id.* at 105.

54. *Id.* at 103.

55. *Id.* at 102.

56. The Am. Presidency Project, Republican Party Platform of 1984 (Aug. 20, 1984), <http://www.presidency.ucsb.edu/showplatforms.php?platindex=R1984>.

theme of an important document prepared within the Justice Department in 1988; it announced goals that the DOJ hoped could be achieved by 2000 through a concerted litigation strategy that sought to present innovative states' rights arguments to favorably disposed judges, most appointed by the Republicans themselves.⁵⁷

And, of course, by 2001, such cases as *New York v. United States*,⁵⁸ *Printz v. United States*,⁵⁹ *Seminole Tribe of Florida v. Florida*,⁶⁰ *Alden v. Maine*,⁶¹ *City of Boerne v. Flores*,⁶² *United States v. Lopez*,⁶³ *United States v. Morrison*,⁶⁴ *Kimel v. Florida Board of Regents*,⁶⁵ and *Board of Trustees of the University of Alabama v. Garrett*⁶⁶ had provided ample reason to believe that the federalism revolution was underway and would only proceed further if George W. Bush, courtesy of the Supreme Court, was able to make new appointments to the Court. We were certainly not alone in expressing such views. In 1997, Federalist Society founding father and Northwestern law professor Steven Calabresi wrote an enthusiastic article in the *Wall Street Journal* heralding "A Constitutional Revolution"⁶⁷ following such decisions as *Lopez*, *Printz*, and *Boerne*. One can only assume conservatives like Calabresi were optimistic about George W. Bush's ascension to the presidency in 2000, believing that the Court was about to go much further in reining in—or at least significantly cutting back on—the New Deal settlement. This did not happen, however, and one cannot explain the failure to achieve either Calabresi's hopes or our fears simply by the fact that Bush had no opportunity to alter the Court's composition during his first term. We do not wish to say that no further changes in federalism doctrine are in the offing: We may see, either through statutory construction or through new constitutional doctrine, new limits on environmental protection.⁶⁸ Nevertheless, after cases like *Nevada Department of Human Resources v. Hibbs*,⁶⁹ *Tennessee v. Lane*,⁷⁰ and

57. See generally 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). See also Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 Ind. L.J. 363, 398 (2003). Judicial appointments were part of the same concerted strategy; Republicans hoped to establish partners in the judiciary who would be receptive to their arguments.

58. 505 U.S. 144 (1992).

59. 521 U.S. 898 (1997).

60. 517 U.S. 44 (1996).

61. 527 U.S. 706 (1999).

62. 521 U.S. 507 (1997).

63. 514 U.S. 549 (1995).

64. 529 U.S. 598 (2000).

65. 528 U.S. 62 (2000).

66. 531 U.S. 356 (2001).

67. Steven G. Calabresi, Op-Ed., *A Constitutional Revolution*, Wall St. J., July 10, 1997, at A14.

68. See *Rapanos v. U.S. Army Core of Eng'rs*, 126 S. Ct. 2208 (2006) (plurality opinion) (interpreting the Clean Water Act not to reach certain wetlands which have only a minimal hydrological connection to navigable waters).

69. 538 U.S. 721 (2003).

Gonzales v. Raich,⁷¹ it seems fairly clear, at least as of 2006, that the “federalism revolution” has been substantially slowed, if not stopped in its tracks. There will be no return to what Douglas Ginsburg once called “the Constitution in Exile”—a pre-New Deal Constitution with sharply limited federal powers.⁷²

The reason why things did not turn out as we feared flows from one of our own basic assumptions, even if, alas, we did not pay sufficient attention to it. The dominant national political coalition, now controlled by Republicans, simply did not want a serious rollback of the scope of federal power created in the wake of the New Deal. As Clayton and Pickerill suggest, Republicans, since their capture of Congress in 1994 and, even more so, since their recapture of the presidency in 2001, have “advocate[d] federal control over more policy areas,” even as Democrats now “advocat[e] even greater devolution of policymaking power.”⁷³ This is an example of what one of us (Balkin) calls “ideological drift”—the changing political valence of political and legal arguments as they are repeated in ever new political and social contexts.⁷⁴ In fact, political parties’ commitment to federalism throughout American history has often been opportunistic, premised on the current constellation of political forces. National politicians of both parties are most likely to support federalism (1) when it allows them to punt controversial issues back to state and local governments, thus avoiding responsibility; and (2) when they lack substantial control over the national political process. Conversely, they prefer national solutions when they have sufficient clout to impose them. Thus, it is hardly surprising that Republicans, upon controlling both Congress and the presidency for the first time in almost seventy-five years, would find national power increasingly attractive. Republicans sought to use the national government to favor their own projects and to promote their own regulatory agendas like tort reform, selective tax cuts, and partial privatization of Social Security.

Republican hegemony has not produced smaller government, but rather “big government conservatism,” which included the No Child Left Behind Act,⁷⁵ a Medicare drug benefit,⁷⁶ as well as hefty doses of pork for the favored constituents of the Republican Party, administrative regulations

70. 541 U.S. 509 (2004).

71. 545 U.S. 1 (2005).

72. See Douglas H. Ginsburg, *Delegation Running Riot*, Regulation, Winter 1995, at 83 (reviewing David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People through Delegation* (1993)), available at <http://www.cato.org/pubs/regulation/reg18n1f.html>.

73. Clayton & Pickerill, *supra* note 52, at 114 n.83 (citing Paul Peterson, *The Changing Politics of Federalism*, in *Evolving Federalism: The Intergovernmental Balance of Power in America and Europe* 25 (2003)).

74. J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 Conn. L. Rev. 869 (1993).

75. 20 U.S.C. §§ 6301-6600 (2002).

76. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066 (codified in scattered sections of 26 and 42 U.S.C.).

benefiting specific industries, and tax cuts, tax cuts, and more tax cuts. The national political coalition dominated by Republicans did not seek a weakened federal government with judicially enforced limits, but rather one that could use all of the constitutional powers of the post-New Deal era selectively to benefit its own favored groups and interests. One need only think of proposals for nationwide bans on human cloning and stem-cell research, the federal statute criminalizing partial-birth abortions, or the unsuccessful attempt by the Bush Administration to invalidate Oregon's Dignity-in-Death Act through an unusually expansive interpretation of a federal statute.⁷⁷

A recent *New York Times* story, aptly titled "'Silent Tort Reform' Is Overriding States' Powers," is especially illuminating.⁷⁸ Stephen Labaton writes that "[a]cross Washington, federal agencies that supervise everything from auto safety to medicine labeling have waged a powerful counterattack against active state prosecutors and trial lawyers."⁷⁹ Labaton notes that "[i]n the last three decades, the state courts and legislatures have been vital avenues for critics of Washington deregulation. Federal policy makers, having caught onto the game, are now striking back."⁸⁰

The important point to recognize about federal deregulation is that, like federal regulation, it generally requires a national rule that can only be justified by expansive claims of federal authority to regulate commerce or to tax or spend for the general welfare. Similarly, the Social Security reforms and private investment accounts championed by the Bush Administration require the robust constitutional powers that came with the New Deal. Then-Senator Robert Dole, perhaps having read the Republican Party platforms, might have begun each day's Senate sessions during the early 1990s with a reading of the Tenth Amendment. However, the Republican commitment to federalism in practice has been largely symbolic, if not completely bogus; or, to be somewhat more nuanced, it may easily be overridden in order to serve political interests in pleasing wealthy contributors and business allies who chafe at the exercise of state autonomy.

We have no doubt that a majority of the current Court is capable of rendering federalism decisions that will please parts of the conservative base. But we would be surprised if any of their decisions would fundamentally cut back on national power in truly important policy areas. The lesson we draw from the past five years is that the Rehnquist Court's federalism revolution was part of the Republicans' "symbolic agenda"—that is, constitutional claims that pleased its conservative base—but that

77. This was, of course, struck down by a majority of the Court in *Gonzales v. Oregon*, 126 S. Ct. 904, 925-26 (2006).

78. Stephen Labaton, 'Silent Tort Reform' Is Overriding States' Powers, *N.Y. Times*, Mar. 10, 2006, at C5, available at http://www.nytimes.com/2006/03/10/politics/10legal.html?_r=1&pagewanted=print&oref=slogin.

79. *Id.*

80. *Id.*

there was not, in fact, a serious and principled commitment to using constitutional doctrine to restore genuine state autonomy, much less the degree of autonomy that existed before the New Deal. Thus, we might distinguish between the “symbolic agenda” of the Republican Party—the symbolic rhetoric about what the Constitution means—from the “material agenda”—that is, the actual reforms that the presidential and congressional wings of the Party seek to achieve through judicial appointments and legislation.

Levinson’s colleagues Ernest Young and Lynn Baker have pointed out that any serious attack on national power would require drastic changes in preemption and conditional federal spending doctrines.⁸¹ Moreover, both have suggested that political liberals might come to appreciate some of the merits of decentralized government as conservatives attempt to use national power in decidedly illiberal ways. Though their argument is not without merit, we generally do not share their overall pro-federalism politics, and we were fearful in 2001 that the Supreme Court’s installation of George W. Bush might portend the adoption of some of Young’s and Baker’s views by the federal courts. We were wrong. The Court has not become more “anti-preemption” in its reading of federal statutes, nor has it indicated any willingness to cut back on the legitimacy of placing conditions on federal spending. As suggested earlier, had we paid more attention to the theoretical presuppositions of our own model, we should have assumed that the Republicans, once in power, would work to maintain their power, using whatever resources of the national government were available to them. And, of course, there is no reason to believe that a Republican-appointed Court would fail to cooperate with the Washington-based Republican majority. Many of the Rehnquist Court’s limitations on federal power involved legislation like the Violence Against Women Act passed by Democratic Congresses prior to 1994 and about which the Republican controlled Congress cared little.⁸² Now that the Republicans have controlled Congress for a decade, they are unlikely to wish that a conservative Supreme Court will knock down their legislative achievements, whether it be the No Child Left Behind Act, the Medicare Prescription Drug, Improvement, and Modernization Act, or the Solomon Amendment.⁸³

The Supreme Court’s commitment to federalism and to limited federal government combines robust sloganeering with relatively minor practical effects. The most important result of the federalism decisions seems to

81. See, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 Duke L.J. 75, 154-55 (2001); Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 Colum. L. Rev. 1911 (1995); Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 Sup. Ct. Rev. 1, 66-79.

82. Neal Devins, *The Majoritarian Rehnquist Court*, 67 Law & Contemp. Probs. 63, 63 (2004); Barry Friedman & Anna Harvey, *Electing the Supreme Court*, 78 Ind. L.J. 123, 125 (“[I]t was not until the Court had allies elsewhere in the federal government that it began systematically to strike statutes enacted by past Congresses.”).

83. 10 U.S.C.A. § 983 (West Supp. 2006).

have been limiting the use of federal civil rights laws for damage awards against state governments under the Eleventh Amendment. Certainly this protects states to some degree, but it does very little to stem the growth of the federal government. Nor, in fact, has it helped secure the fiscal security of state governments, for the largest fiscal burdens on states do not come from damage awards in federal civil rights suits.⁸⁴ So if federalism is not the linchpin of the Bush Administration's constitutional agenda—and therefore does not explain the President's choice of candidates like John Roberts and Samuel Alito—what else might it be?

Perhaps, as we suggested in 2001, it is a desire to eviscerate racial and ethnic preferences, and to eliminate “affirmative action” in all of its forms and venues.⁸⁵ But this, too, did not occur during the Rehnquist Court years. To be sure, Justice Anthony Kennedy is now the Court's swing vote, and he dissented in *Grutter v. Bollinger*,⁸⁶ which upheld the University of Michigan Law School's affirmative-action plan. We may venture to guess that Chief Justice Roberts and Justice Alito are no great champions of affirmative action. Even so, we caution against the easy assumption that *Grutter* will be overturned in the near future, although it is certainly possible that the Court will narrow it in future cases. The reason, once again, concerns the makeup of the Republican coalition. Important elements of the establishment, ranging from big business to the military, are not at all opposed to affirmative action; indeed, for various reasons, they have even embraced it. Sixty-five major corporations collaborated in an amicus brief in *Grutter* strongly defending the need for affirmative action to ensure competition in an increasingly globalized marketplace.⁸⁷ Moreover, a number of high-level former officers and Defense Department officials submitted an amicus brief emphasizing affirmative action's role in producing an effective military consisting of multiple races and ethnicities who had to live and work together.⁸⁸ Both of these briefs were cited prominently in Justice O'Connor's opinion in *Grutter*.⁸⁹ It is quite possible

84. See David A. Super, *Rethinking Fiscal Federalism*, 118 Harv. L. Rev. 2544, 2605-14 (2005) (arguing that the interaction of federal regulations with the business cycle, and not the Court's federalism doctrines, are the greatest determinant of fiscal burdens on states). “The Court,” Super explains, “has expanded states' immunity from suits, largely in areas where the state actions raise civil rights concerns, but little evidence suggests that liability for such conduct was a major burden on states' fiscs.” *Id.* at 2604.

85. Balkin & Levinson, *supra* note 1, at 1061.

86. 539 U.S. 306, 387-95 (2003) (Kennedy, J., dissenting).

87. Brief for 3M et al. as Amici Curiae Supporting Respondents at 5, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (arguing that “the skills and training need[ed] to succeed in business today demand exposure to widely diverse people, cultures, ideas and viewpoints”); Brief of General Motors Corp. as Amicus Curiae Supporting Respondents at 3-4, *Grutter*, 539 U.S. 306 (No. 02-241).

88. See Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents at 5, *Grutter*, 539 U.S. 306 (No. 02-241) (arguing that “a highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principal mission to provide national security”).

89. *Grutter*, 539 U.S. at 330-31.

that Solicitor General Theodore Olson, who represented the United States in opposition to Michigan's affirmative action program, lost his case in *Grutter* at the beginning of his argument, when he could not offer a convincing response to the military's claims that the United States' military academies needed race-conscious affirmative action in admissions because national security demanded a "highly qualified, racially diverse officer corps."⁹⁰

One may well doubt that the University of Michigan Law School would have prevailed in the absence of support from such establishment entities as the military and Fortune 500 companies. There is no reason to believe that the support of these organizations will evaporate in the foreseeable future. By now Justice Kennedy may be too publicly committed to striking down affirmative action to affect a graceful retreat. However, Chief Justice Roberts and Justice Alito have not yet spoken on the subject. Even if they would have joined the dissenters in *Grutter* as an initial matter, overturning the case would require renouncing *stare decisis* in a very recent decision on a highly charged matter and would risk provoking political turmoil within the GOP's own increasingly restive coalition. A more likely scenario, as with *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, would be a series of decisions that chip away at the edges of *Grutter*. When we say that affirmative action is part of the Bush Administration's "symbolic agenda," we do not mean to suggest that Republican opposition to affirmative action is not strongly felt or sincere. We mean only that, for various political reasons, making most affirmative action unconstitutional has not been a key goal of the Bush Administration's Supreme Court appointments. And, of course, if a Democrat prevails in 2008 and makes two new Supreme Court appointments (a replacement for John Paul Stevens merely preserves the status quo), then affirmative action should be safe for some years against judicial invalidation.

In the area of gay rights, we can tell a similar story. Movement conservatives suffered a stinging defeat in *Lawrence v. Texas*, where both Justices Kennedy and O'Connor voted to strike down Texas's ban on same-sex sodomy.⁹¹ Because Kennedy remains the swing Justice, the Republicans need an additional appointment if they hope to overturn *Lawrence*. The President used the Musgrave Amendment⁹² (which would ban gay marriage on both the state and federal levels) to rally his conservative base in the 2004 election. But the long term trend is toward greater tolerance for homosexuals in public life.⁹³ Whatever constitutional

90. Transcript of Oral Argument at 18-28, *Grutter*, 539 U.S. 306 (No. 02-241), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-241.pdf (discussing the military brief); Brief for Julius W. Becton, Jr. et al., *supra* note 90, at 5.

91. 539 U.S. 558, 562-80, 580-85 (2003).

92. H.R.J. Res. 56, 108th Cong. (2003).

93. For a summary of recent shifts in public opinion, see the discussion in Michael J. Klarman, Brown and Lawrence (and Goodridge), 104 Mich. L. Rev. 431, 443-45 (2005); see also Gallup Brain, Gallup Poll Social Series: Values and Beliefs, May 5-7, 2003, <http://brain.gallup.com/documents/questionnaire.aspx?STUDY=P0305030> (noting

revolution the Bush Administration might desire, it is unlikely to include returning to the days when gays and lesbians had no rights that heterosexuals were bound to respect. Led by the Vice-President, most Republicans have manifested love and esteem for their gay and lesbian children, significant others, relatives, and workplace associates. Gay rights will make progress no matter what the Court does, given that every poll demonstrates increasing tolerance for nonheterosexuals by the relatively young who are destined to play an ever greater role in our future polity. It is possible, perhaps even likely, that the Supreme Court will offer no further positive assistance than it provided in *Lawrence*. But if Michael Klarman's theory of backlash politics is correct as applied to the politics of sexual orientation, the Court may well do far more for the cause of gay rights if it simply stays out of the area in the next decade than if it comes directly to the aid of the movement.⁹⁴

IV. THE BUSH ADMINISTRATION'S MATERIAL AGENDA

This brings us, at long last, to what we believe is the deeper agenda of the Bush Administration and, therefore, the constitutional politics that its appointments are trying to entrench. One key element of that agenda concerns religion. Unlike federalism, we believe that the Bush Administration's commitment to changing the constitutional boundaries between church and state is especially important. Moreover, previous Republican appointments have already borne considerable fruit. The changes in constitutional doctrines involving religion have come closer than any others in the last fifteen years to deserving the name "revolutionary."

There has been a distinct and genuine move from the Warren and early Burger Court's general hostility to government support of religion to a new theory of "neutrality" symbolized by the 2002 decision in *Zelman v. Simmons-Harris*.⁹⁵ The Court now places relatively few barriers in the way of state or federal funds going to religious schools or other religious organizations so long as the purpose is not a naked preference for religious versus secular organizations. Some advocates believed—some with horror, some with joy—that this portended a full 180 degree turn, in which the Supreme Court would define "neutrality" as *requiring* support for religious education so long as nonreligious education received support. Thus many conservative religionists—most of them Christian, but some of them Orthodox Jews—no doubt hoped that the Court would strike down the State of Washington's refusal to let Joshua Davey major in devotional theology,

overwhelming movement toward decriminalization of sodomy from 1986 when *Bowers v. Hardwick* was decided, and 2003, when the Supreme Court decided *Lawrence v. Texas*); see also Paul R. Brewer, *The Shifting Foundations of Public Opinion About Gay Rights*, 65 J. Pol. 1208, 1208-09 (2003) (noting a substantial reduction during the 1990s in the percentage of Americans who regard same-sex relations as wrong). Support for gay rights increases in younger populations. See Klarman, *supra*, at 445, 484-89.

94. See Klarman, *supra* note 93, at 472-82.

95. 536 U.S. 639 (2002).

though he could major in practically anything else, if he wished to take advantage of a \$1500 scholarship program offered by the state.⁹⁶ Yet Chief Justice Rehnquist's opinion in *Locke v. Davey*, delivered over the angry dissent of Justices Scalia and Thomas, made clear that the current Court will leave the resolution of such issues to the political branches.⁹⁷ Given the 7-2 vote in *Locke*, the arrivals of Roberts and Alito on North Capitol Street would make no difference, although an additional Bush nominee replacing the secularist John Paul Stevens might portend more revolutionary shifts of doctrine.

Similarly, it is impossible to estimate the shelf life of the Court's twin—and many would say incoherent—decisions in *McCreary County v. ACLU*⁹⁸ and *Van Orden v. Perry*⁹⁹ regarding government-supported displays of religion in the public square. In these two cases, the Court struck down a publicly supported display of the Ten Commandments in Kentucky, but upheld one in Texas. Justice Kennedy was in dissent in *McCreary County*, and in the plurality in *Van Orden*. Given that he is the new swing Justice, this means that *Van Orden*, which gave local governments far greater leeway to place religious iconography in public places, probably represents the wave of the future. One can nevertheless imagine a wide range of different possible directions for Establishment Clause and Free Exercise doctrine, depending on remaining opportunities for President Bush to make appointments before his term expires in January 2009, the results of the 2006 elections (which might shift control of the Senate or weaken the Republican majority there), and, perhaps most importantly, the winner of the 2008 presidential election. It is worth noting, however, that a Democratic appointment replacing Justice Stevens in 2009 would likely preserve the current status quo that features Kennedy as the swing Justice, while replacing Stevens with a strong conservative would have a much more significant impact on the jurisprudence of the religion clauses, and much else besides.

It is interesting to contrast the Rehnquist Court's decisions on religion with its decisions in the area of sexual autonomy: gay rights and abortion. In the former area, but not the latter, the Court largely supported the constitutional agenda of religious conservatives. We note in passing that if the new Supreme Court upholds the Partial-Birth Abortion Act of 2003,¹⁰⁰ the practical effect will mostly be symbolic, as very few of these procedures are performed each year. *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁰¹ did far more to limit *Roe v. Wade*¹⁰² and the practical scope of abortion rights.

96. *Locke v. Davey*, 540 U.S. 712, 715-16 (2004).

97. *Id.* at 720.

98. 545 U.S. 844 (2005).

99. 545 U.S. 677 (2005).

100. 18 U.S.C. § 1531 (Supp. III 2003).

101. 510 U.S. 1309 (1994).

102. 410 U.S. 113 (1973).

The victory of religious conservatives on religious issues but not on issues of sexual autonomy makes considerable sense. The country has become increasingly overtly religious but at the same time it has become increasingly tolerant of homosexuality. The country is not ready to embrace gay marriage—this is still a winning wedge issue for Republicans—but in a relatively short period of time the idea that individual states might create civil unions for gay couples has traveled from the positively unthinkable and revolutionary to the politically possible. Indeed, while announcing his support for the Musgrave Amendment banning same-sex marriage, President Bush admitted in an interview that he did not object to states creating civil unions for gay couples.¹⁰³ In addition, a consistent majority of the public does not wish to see *Roe* overturned (nor, as we have explained earlier, do many members of the Republican Party).

Put another way, the conservative revolution in the federal courts has adopted and promoted some of the goals of social and religious conservative movements but not others. It has promoted greater public support for religion but not the substantive constitutional demands of religious conservatives in the area of sexuality. This is an example of a larger point: Social movements succeed in changing the Constitution when they gain friends in the courts, but their interests are usually balanced with and coopted by other interests (including political parties) with which they associate.¹⁰⁴ Religious and social conservatives have been an important part of the winning coalition of Republicans in the past three decades, and they have been rewarded with judicial appointments friendly to their aims—Justices Scalia and Thomas in the Supreme Court and Judge Michael McConnell in the lower federal courts. But the vector sum of forces within the Republican Party has tended to push an agenda of tax cuts, selective deregulation, and increased presidential power over many of the cultural issues that are particularly important to religious and social conservatives.

This brings us to what we believe is the most important part of the Bush Administration's constitutional agenda—the enhancement of presidential power. We believe that both the Roberts and Alito nominations—and much else—can best be understood by reference to this overarching goal. This could not, we believe, have been easily predicted in 2001, when we wrote our original article. It appears glitteringly obvious now, five years later.

In discussing the causes of constitutional change, we have repeatedly emphasized the importance of contingency. Nowhere is contingency more important than when new issues suddenly emerge on the constitutional agenda, propelled either by new social movements, changes in technology, disaster, or war. Few in 1969 would have predicted that abortion would move to the center of the Court's attention in only four short years. Even

103. See Gary Langer, *A Question of Values*, N.Y. Times, Nov. 6, 2004, at A19; *Bush's Gay Union Stance Irks Conservatives*, MSNBC.com, Oct. 26, 2004, <http://www.msnbc.msn.com/id/6338458/>.

104. See generally Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 Suffolk U.L. Rev. 27 (2005).

more to the point, we did not anticipate in the middle of 2001 that the key constitutional issue of our time would come to be national security, particularly executive power.

The final version of our 2001 piece on the conservative constitutional revolution went to the printers on September 7, 2001. Needless to say, like most Americans, we did not predict 9/11, the War on Terror, and the Afghanistan and Iraqi wars. The September 11 attacks have changed a great deal in American politics, whether or not that change has resulted in the right policies for responding to the threat of terrorism. Whatever else may be said about September 11, it was the political answer to George W. Bush's (and Karl Rove's) prayers. In one instant, there was no longer any serious questioning about the legitimacy of his presidency due to the shenanigans in Florida and the Supreme Court's decision in *Bush v. Gore*.¹⁰⁵ Instead, Bush's early leadership following September 11 helped identify what would soon become a consistently winning issue for the Bush Administration and its political allies—the need for strong executive leadership in what was quickly christened the “War on Terror.”

This war was the answer to a genuine dilemma facing the Republican Party (not to mention George W. Bush). For many years leading up to America's victory in the Cold War, the Republican Party kept its disparate and warring factions together by a common commitment to low taxes, deregulation of business, and anticommunism. This remained true even after social and religious conservative movements joined the coalition in the 1970s and 1980s. But the demise of communism following 1989 was a mixed blessing for the Republican Party. It gained its central goal of defeating the communist menace but lost a conspicuous foreign enemy to fight against. Just a year after George H. W. Bush's triumphal war in Iraq, Bill Clinton won the presidency by promising “peace dividends” and reminding voters that “it's the economy, stupid.” Bush *père* seemed surprisingly unsuited to the domestic politics of a post-Cold War world. Clinton, of course, trounced Bob Dole in 1996, and Al Gore won a plurality of the vote in 2000 (and, in the eyes of many, the election as well). Many observers attributed Bush's victory as a repudiation of the “immorality” attached to the Clinton Administration. Foreign policy seemed distant from most Americans' minds.

The early months of George W. Bush's presidency were difficult in many respects. With anger over the 2000 election still festering, Bush began without the traditional “honeymoon” period; he enjoyed the support of only 55.8% of the American public in the first six months of his presidency that ended on July 19, 2001.¹⁰⁶ This level of support placed him in the forty-ninth percentile of American Presidents since Harry Truman.¹⁰⁷ In early

105. 531 U.S. 98 (2000).

106. Jeffrey M. Jones, *Bush Finishes 19th Quarter in Office on Low Note*, Gallup Poll, Oct. 21, 2005, <http://www.galluppoll.com/content/?ci=19363>, available at http://www.astrid-online.it/Cartella-p/Elezioni-U/GALLUP-NS_21_10_05.pdf.

107. *Id.*

June 2001, Vermont Senator Jim Jeffords left the Republican Party in disgust at the new Administration's rightward turn. Jefford's defection cost the Republicans control of the Senate, which, among other things, made confirmation more difficult for Bush's federal court appointees.

As already noted, September 11 transformed the political calculus, including George Bush's stature and legitimacy. Bush skyrocketed to an eighty-six percent approval rating in the first full quarter following September 11, which placed him in the ninety-ninth percentile of first term Presidents.¹⁰⁸ Equally important, the September 11 attacks created a new idea and a new ideal for the Republican faithful to rally around: keeping America safe from the threat of terrorism.

One can be confident that any president, including Al Gore, would have emphasized the need for executive power in circumstances like the aftermath of September 11. After all, Bill Clinton was no shrinking violet in his assertion of unilateral power to send American troops to Haiti, to engage in war in the South Balkans, or to fire American missiles at Sudan and Afghanistan. As James Madison might have predicted, almost all Presidents seem devoted to the aggrandizement of their institutional power once they obtain the office. This suggests that Presidents—especially during times of war—will seek to nominate judges, and especially Justices, who will be sympathetic to their assertions of executive power.

But Madison might also have predicted that members of Congress would be equally eager to have their institution serve as a "check and balance" to such presidential ambitions. As Madison famously put it, the separation of powers guaranteed that "[t]he interest of the man . . . [would] be connected with the constitutional rights of the place,"¹⁰⁹ so that congressmen and senators would, by the nature of their offices, resist incursions into their power and check presidential aggrandizements that might disturb the constitutional system and threaten liberty.

Here Madison was utterly wrong.

A central feature of American constitutionalism not fully understood by the founders is that party loyalty can trump institutional interest when the party is relatively ideologically homogenous. In some ways the framers *did* understand this possibility inasmuch as they regarded political parties as "factions" potentially united to serve "private interests" against the "public interest." A truly virtuous person would avoid the blandishments of party and would stand above such attachments. For better and, possibly, for worse, this is simply not the way that American politics developed. As Daryl Levinson has pointed out, the Madisonian hope that the ambition of the person would be tied to the ambition of the office—and thus that Republican congressmen would check a Republican President during time

108. *Id.*

109. The Federalist No. 51 (James Madison).

of war—has proved unavailing.¹¹⁰ The separation of powers does the least work in checking the misuse of power when one party has won the “constitutional trifecta”—that is, it controls all three branches of government.¹¹¹ Thus, it has become part of the *Republican* constitutional agenda—and not only the President’s agenda—to give the President all the tools and discretion he needs to prosecute the War on Terror successfully.¹¹² It should go without saying that part of that constitutional agenda includes plenary power by Congress to pass legislation it deems helpful to conducting the War on Terror—that is, as long as it assists the President and does not interfere with his asserted prerogatives as Commander-in-Chief. Indeed, in a short space of time, the scope of presidential authority to combat terrorism has become perhaps the central constitutional question of our era.

V. THE RISE OF THE NATIONAL SURVEILLANCE STATE

One of the most important developments in American constitutionalism is the gradual transformation of the United States into a National Surveillance State. This National Surveillance State is characterized by a significant increase in government investments in technology and government bureaucracies devoted to promoting domestic security and (as its name implies) gathering intelligence and surveillance using all of the devices that the digital revolution allows.

Government agencies like the NSA can collect, collate, and analyze vast amounts of conversations, e-mails, and Internet traffic between individuals within the United States and foreign countries, and, it now appears, substantial amounts of such communications within the United States.¹¹³ A series of technological developments have made this data collection and data mining possible. High-speed computers, lower costs of

110. Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 Harv. L. Rev. 915, 956-58 (2005).

111. On the importance of the “constitutional trifecta,” see Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 Yale L.J. 1407, 1455 (2001).

112. Which party controls Congress tells us much about the degree of genuine oversight of the executive branch that Congress is likely to conduct. The presence or absence of such oversight is an essential part of our “constitutional order,” and one cannot be at all confident that Congress will behave in a way that we believe the Constitution demands. As we note above, there is little reason to expect adequate oversight in “unified” governments where the same party—Republican or Democratic—control both the presidency and Congress. Although Yale political scientist David Mayhew is skeptical that “divided” governments produce less important legislation than “unified” ones, he concedes that the degree of oversight is directly related to whether the government is “unified” or “divided.” See David R. Mayhew, *Divided We Govern* 223-26 (2d ed. 2002).

113. See Charles Babington & Dan Eggen, *Gonzales Seeks to Clarify Testimony On Spying*, Wash. Post, Mar. 1, 2006, at A08, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/28/AR2006022801587.html>; Leslie Cauley, *NSA Has Massive Database of Americans’ Phone Calls*, USA Today, May 11, 2006, at 1A, available at 2006 WLNR 8071299; Eric Lichtblau & James Risen, *Spy Agency Mined Vast Data Trove, Officials Report*, N.Y. Times, Dec. 24, 2005, at A1, available at 2005 WLNR 24919471.

telecommunication and computer storage, and complex mathematical algorithms allow computers to “recognize” patterns in speech, telephone contact information, e-mail messages, and Internet traffic that might indicate possible terrorist or criminal activity. Government officials can combine all of this information with vast amounts of consumer data collected by the government and the private sector. Various private companies now employ business models based on collecting, collating, and analyzing consumer data from a wide variety of sources; they then sell this data and analysis to other private parties and to the government.

The National Surveillance State arose from a number of different features whose effects are mutually reinforcing. The most obvious causes are changes in how nations conduct war and promote their national security. As Philip Bobbitt has eloquently explained, the geopolitical demands of war and foreign policy often provide the impetus for changes in domestic political arrangements, because the way that the state faces the world outside is often reflected in the way that it faces its citizens.¹¹⁴

With the United States a likely target for future terrorist attacks, electronic surveillance, data mining, and the construction of what Daniel Solove has called “digital dossiers,”¹¹⁵ have become increasingly important. Terrorist organizations can form loosely connected, geographically amorphous collectivities that present formidable threats to the United States; they can employ weapons of mass destruction or, as in the case of the September 11 attacks, relatively low-tech weaponry with suicidal zeal. New digital communications technologies allow terrorist organizations to band and disband at will, hide their identities, encrypt their communications, transfer funds and resources, and gather allies in many different places around the world. Traditional, geographically organized adversaries in the form of nation-states have fixed locations that the United States can threaten in order to deter attacks. Terrorist organizations, because they lack such fixed addresses, cannot be similarly deterred. They must be stopped as soon as their activities and plans can be identified. This necessitates constant surveillance and processing of vast amounts of information because of the expected costs of making even a single mistake in failing to identify a threat.

We caution, however, that the National Surveillance State is not simply a product of the September 11 attacks. Nor is it necessarily a product of war. To begin with, it is by no means clear that the “War on Terror” is a war in the traditional sense. It is not even a long-term engagement with a small group of identifiable adversaries as in the Cold War. Rather, what people now call the “War on Terror” is a sustained set of interlocking strategies for dealing with new forms of global threats and new technologies of attack by

114. See Philip Bobbitt, *The Shield of Achilles: War, Peace, and the Course of History* 69-74 (2002).

115. Daniel J. Solove, *The Digital Person: Technology and Privacy in the Information Age* 1-2 (2004).

a host of different organizations, some sponsored by nation-states, and others acting more or less on their own.¹¹⁶

Equally important to the rise of the National Surveillance State are new technologies of surveillance, data storage, and computation that arrived on the scene in the latter part of the twentieth century. These would have been produced whether or not the United States was attacked on September 11, 2001. As soon as these technologies became widely available, it was inevitable that governments would seek to employ them, both to enjoy their advantages and to counter the dangers of the same tools in private hands.

In particular, the Internet and digital information technologies have created new opportunities for crime and new vulnerabilities for the general public, for financial institutions, and for government itself. The digitally networked environment makes possible new types of crimes, like breaches of electronic security and electronic identity theft, while facilitating more traditional crimes like embezzlement, theft, and conspiracy. The digital age has altered the technologies of crime and, concomitantly, the way that the state can respond to crime.

Focusing on war as the primary cause of the National Surveillance State overlooks the fact that surveillance technologies that help the state track down terrorists can also be used to track and prevent domestic crime. Once the state has these technologies in place for collecting foreign intelligence, it can use the same technologies to protect its people from crime, attacks on the information infrastructure, and virtually any other domestic problem. After the state compiles data on its citizenry—or purchases it from the private sector—it can use the information to promote a wide range of governmental policies, ranging from the delivery of health care services to tracking down deadbeat dads and people who have failed to pay their license renewal fees and state property taxes. Increased use of information in governance makes governments and those who control information flows more powerful, which makes the information ever more valuable to governments; this causes governments to invest even more heavily in the collection, storage, and collation of data. These tendencies are spurred on by technological advances that increasingly lower the cost of telecommunications, surveillance technology, data storage, and computation power. Thus, although the transition to the National Surveillance State has been accelerated by the September 11 attacks and the Bush Administration's proclaimed War on Terror, its rise is overdetermined by a host of different technological and bureaucratic imperatives.

The National Surveillance State poses two distinct dangers to our constitutional system. The first danger is that the Executive's power to conduct war will displace the area previously assumed to fall within the

116. For important critiques of the rhetoric of "war" in this regard, see Philip B. Heymann, *Terrorism Freedom, and Security: Winning Without War* 6 (2003) and Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (2006).

criminal justice system. Increasingly, the Executive can choose to treat dangers within the United States as matters of war and national security rather than as matters of criminal justice. The latter, but not the former, come with a series of traditional civil liberties protections that constrain and check the Executive. In this way, the government can create a parallel law enforcement structure that routes around the traditional criminal justice system with its own rules for surveillance, apprehension, interrogation, detention, and punishment. Because it is not subject to the oversight and restrictions of the criminal justice system, the government may be increasingly tempted to use this parallel system for more and more things. It may argue that the criminal justice system is outmoded and insufficiently flexible to deal with the types of security problems it now faces. However, the more that the government routes around the criminal justice system, the more it institutionalizes the parallel system as the method of choice.

The current controversy over warrantless domestic surveillance provides an example. By acting outside of the Foreign Intelligence Surveillance Act of 1978¹¹⁷ and telecommunications privacy laws, the government makes it far more likely that the information it gleans from monitoring phone calls (and data mining phone records) cannot be used to justify traditional judge-issued warrants, and the evidence produced cannot be introduced in ordinary criminal trials.¹¹⁸ Similarly, evidence derived from coercive interrogations or interrogations involving cruel, inhumane, and degrading treatment normally cannot be introduced in ordinary criminal trials. Thus, if the government attempts to use the criminal justice system after having used the parallel system, it faces a significant disadvantage in its ability to prove its case. Given this disadvantage, the government may increasingly choose to expand and defend the parallel system of intelligence, interdiction, incarceration, interrogation, and punishment.¹¹⁹ As the

117. Pub. L. No. 95-511, 92 Stat. 1783 (codified in scattered sections of 50 U.S.C.).

118. The Department of Justice, however, has not conceded this point. See U.S. Dep't of Justice, Responses to Joint Questions from House Judiciary Committee Minority Members 14 (Mar. 24, 2006), available at http://www.house.gov/judiciary_democrats/responses/dojnsaminresp32406.pdf ("Because collecting foreign intelligence information without a warrant does not violate the Fourth Amendment and because the Terrorist Surveillance Program is lawful, there appears to be no legal barrier against introducing this evidence in a criminal prosecution.").

119. The government's treatment of Jose Padilla—whom it detained for several years without any of the protections of the Bill of Rights—may provide a second example. Although the government initially claimed that Padilla had plotted to detonate a radioactive "dirty bomb" in Chicago, he was finally indicted for an unrelated conspiracy. See Superseding Indictment, *United States v. Hassoun et al.*, (No. 04-60001-CR) (S.D. Fla. Nov. 17, 2005) (on file with the Fordham Law Review); Associated Press, *Padilla Indictment Avoids High Court Showdown*, MSNBC.com, Nov. 22, 2005, <http://www.msnbc.msn.com/id/10152846>; Mark Sherman, *Padilla Indicted After Three Years*, ABC News, Nov. 23, 2005, <http://abcnews.go.com/Politics/print?id=1340398>. The government may have tried to keep Padilla out of the criminal justice system as long as it could in part because much of the evidence of a bombing plot was probably illegally obtained from the perspective of the criminal justice system. For example, it may have been elicited through coercive interrogation or cruel, inhumane, and degrading treatment of

methods of war encroach on the criminal law, and the needs of national security encroach on domestic criminal law enforcement, the government will be increasingly tempted to take the path of least resistance—and least accountability—and choose to treat individuals within the United States as subject to intelligence, interdiction, incarceration, interrogation, and punishment under the aegis of national security rather than criminal procedure.

The second danger of the National Surveillance State is not that the criminal justice system will increasingly be displaced by a parallel track of military and national security enforcement, but that the criminal justice system will become increasingly like the parallel track. That is, it will lose the civil liberties protections, checks and balances, and oversight by independent actors (e.g., judges) that we normally associate with the criminal process in the United States. Consider the NSA's warrantless surveillance program once again. Suppose that courts would hold that domestic surveillance outside of the requirements of FISA cannot be introduced at criminal trials. If so, then why not simply ask Congress to amend FISA so that the NSA's searches are legal and the evidence can be admitted in criminal trials? After all, the federal courts have given Congress a fairly wide berth to determine how to draw the boundaries of foreign intelligence.¹²⁰ A second example is the Bush Administration's increasing use of indefinite detention of material witnesses, administrative warrants, and National Security Letters. The government already had authority to detain individuals as material witnesses—the Bush Administration simply used the power more frequently and for longer periods than people expected. Administrative warrants were already authorized in a small number of cases before September 11; the 2001 USA PATRIOT Act expanded their use and authorized a system of National Security Letters that the FBI has employed with increasing frequency in a wide variety of situations with only remote connections to the goal of preventing terrorism.¹²¹ These strategies modify previous understandings of the criminal justice system and allow the Executive to detain suspects and engage in surveillance without the usual civil liberties limitations, checks, and oversight.

persons held by the CIA or other intelligence operations. See Phillip Carter, *Tainted by Torture*, Slate, May 14, 2004, <http://www.slate.com/id/2100543/>. Similar problems may complicate even the conspiracy prosecution that the federal government finally brought. See Warren Richey, "Alternative" CIA Tactics Complicate Padilla Case, Christian Sci. Monitor, Sept. 15, 2006, at 1, available at <http://www.csmonitor.com/2006/0915/p01s02-usju.html>.

120. See *In re Sealed Case*, 310 F.3d 717 (Foreign Intel. Surv. Ct. of Rev. 2002); see also *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973). But cf. *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc) (noting the importance of judicial scrutiny to safeguard against illegal domestic surveillance of persons not associated with foreign countries).

121. Dan Eggen, *FBI Sought Data on Thousands in '05*, Wash. Post, May 2, 2006, at A04, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/01/AR2006050101388.html>.

The NSA's data mining programs suggest yet another example of this trend. Although—as far as we are aware—the NSA employs its data mining operations solely to identify threats to national security, there is no reason in theory why the same technologies could not be harnessed to aid domestic criminal law enforcement. Once databases of all phone calls made in the United States are compiled, they can be combined with consumer data derived from private organizations like ChoicePoint (to take only one well known example). This allows governments to produce rich digital dossiers that might be employed either by the nation's national security agencies or its criminal law enforcement divisions. The information that is useful to the one will increasingly be useful to the other. Governments, knowing this, have incentives to modify existing privacy restrictions so that they can employ data mining for more and more features of everyday law enforcement. As William M. Arkin wrote recently in his Washington Post weblog, "[T]omorrow, there could be an illegal immigrant tax and pay record monitoring tip-off system, a sexual predator and pornography attention algorithm, a drug dealing and buying behavior inconsistency profile."¹²² If the information gleaned from the government's national security wing is transferred over to its law enforcement wing (and shared with state and local law enforcement authorities), criminal law enforcement will be transformed into increasing surveillance of ordinary Americans to prevent not only the most serious threats to national security, but also everyday crimes, including perhaps misdemeanors and administrative infractions. Finally, the government will be tempted to move increasingly from investigation and arrest after crimes occur to surveillance, prevention, and interception before crimes occur. After all, if we can keep our citizens safe from Al Qaeda using the most advanced information technologies, which will become increasingly inexpensive to use and implement, why not use the same technologies to protect our citizens from ordinary crimes, whether major or minor? And if we can use the tools of the National Surveillance State to prevent threats to national security from coming to fruition, why not use the same technologies to head off criminals, both dangerous and petty, before they have a chance to act?

The twin dangers of national security displacing the criminal justice system and the criminal justice system becoming increasingly like the national security system are not simply inevitable consequences of the September 11 attacks. They are long-term tendencies driven by the confluence of technological advances, the changing crime scene, and America's foreign policy and national security interests. These changes are not limited to how the state conducts war, at least as war has been traditionally conceived. Rather, these changes in technology threaten to

122. William M. Arkin, *A Seamless Surveillance Culture*, Early Warning blog, Wash. Post, http://blog.washingtonpost.com/earlywarning/2006/05/a_seamless_surveillance_cultur.html (May 15, 2006, 08:22 EST).

transform the ways that democratic governments interact with their citizenry on a routine basis.

We do not doubt that similar concerns have led the Bush Administration to cut corners on international and domestic law concerning detention and interrogation of prisoners. However, the development of increasingly elaborate systems of surveillance is far more characteristic of the kinds of government policy necessitated by technological change. Torture and prisoner mistreatment have been around as long as warfare itself—what is new is the harnessing of digital technologies to produce a Leviathan-like information processing machine.

From a constitutional perspective, the National Surveillance State will probably shift institutional power and authority from Congress to the presidency. There is no serious possibility of completely forestalling this shift, which, after all, can be said to have been underway at least since the beginning of World War II. Indeed, the political sociologist Harold Lasswell first defined the “garrison state” in 1941 as one in which “the specialists on violence are the most powerful group in society.”¹²³ By 1961, in his famous “farewell address,” President Eisenhower, himself one of the most distinguished military officers of World War II, warned his fellow citizens of the potential dominance of a “military-industrial complex” that was transforming American politics.¹²⁴ Rather, the only questions are how much more executive aggrandizement will occur and whether new institutions can be adapted to prevent the inevitable risks that will accompany the shift toward ever-increasing surveillance.¹²⁵

The first is the risk of harm to individual privacy and civil liberties. The second is the inevitable dangers of concentrating too much power in one

123. Harold D. Lasswell, *The Garrison State*, 46 Am. J. Sociology 455, 455 (1941).

124. It is certainly worth pondering Eisenhower’s words, delivered some forty-five years ago:

[The] conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence—economic, political, even spiritual—is felt in every city, every State house, every office of the Federal government. We recognize the imperative need for this development. Yet we must not fail to comprehend its grave implications. Our toil, resources and livelihood are all involved; so is the very structure of our society.

In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial [sic] complex. The potential for the disastrous rise of misplaced power exists and will persist.

We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted. Only an alert and knowledgeable citizenry can compel the proper meshing of the huge industrial and military machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.

Dwight D. Eisenhower, President, Farewell Radio and Television Address to the American People, 60 Pub. Papers 1035, 1038 (Jan. 17, 1961), available at <http://www.yale.edu/lawweb/avalon/presiden/speeches/eisenhower001.htm>.

125. For a readable introduction to some new forms of surveillance, see Jeffrey Rosen, *The Naked Crowd: Reclaiming Security and Freedom in an Anxious Age* (2004).

branch of government without accountability and transparency. The third risk, which stems from the second, is the danger of informational insularity, in which the executive is unable or unwilling to acknowledge and assimilate new information that requires it to reshape and redirect its plans. Some years ago Irving Janis coined the term “groupthink” to refer to institutional tendencies toward insularity, and recent work in behavioral psychology has reinforced these concerns.¹²⁶ One advantage of a system of separated powers, especially if one of the competing institutions includes strong individuals from the opposition political party, is that the other branches, because of their natural competition, consistently force new information and impose hard-learned lessons on the others. From this perspective, a constitutional system is also a system of information gathering and a system of learning. But if one branch—the presidency—need pay no attention to the others, or can thoroughly dominate them through appeals to party loyalty, as was largely the case during the first six years of the Bush Administration, then it will not be forced to confront the recalcitrant information about the world that the other branches have the incentive and the opportunity to provide.

The National Surveillance State arises from a real concern: the enhanced need for processing information about the outside world and reacting appropriately to it given the changes in foreign affairs and warfare. The danger is that the concentration of power in this new state will prove particularly inept at processing the relevant information. The intelligence failures in the run-up to the Iraq war are an obvious and worrisome example.

The need for the National Surveillance State arises from war and foreign policy, but its consequences will reverberate throughout domestic politics. Courts will play a role in determining the boundaries of this emerging constitutional construction, but for the most part, we predict, they will legitimate and bless it, much as they legitimated and blessed the administrative state, the welfare state, and the national security state in previous years. As we shall note below, there is no particular reason to view the debate over the National Surveillance State as truly “partisan.” For better or for worse, there may be no meaningful division between the Democratic and Republican Parties with regard to the imperatives for, and the broad outlines of, the National Surveillance State. The difference between the two major political parties, we think, will consist of fairly marginal disputes about how best to implement the new forms of governance, what kinds of accountability and transparency mechanisms are built into the new institutional framework, and how the balance between efficacy and civil liberties is struck. Still, even if some form of the National

126. See Irving L. Janis, *Group Think: Psychological Studies of Policy Decisions and Fiascoes* 7-9 (2d ed. 1983); see also Jeffrey J. Rachlinski, *Heuristics, Biases, and Governance*, in *Blackwell Handbook of Judgment and Decision Making* 567-84 (Derek J. Koehler & Nigel Harvey eds., 2004).

Surveillance State is in our future, a great deal turns on the details of what kind of state it becomes.

Two observations are worth making. First, like all Presidents, Ronald Reagan, George H.W. Bush, and Bill Clinton sought to enhance their powers in military and foreign affairs, including controversial and more-or-less unilateral uses of the U.S. forces. But they almost certainly did not select Supreme Court Justices based on the current agenda of enhancing presidential power to fight terrorism. Therefore, it is less surprising than it should have been that a Supreme Court stocked almost entirely by Republican-appointed Justices, and led by Justice O'Connor, rejected the current administration's most extreme claims of executive power in *Hamdi v. Rumsfeld*.¹²⁷ Like *Roe v. Wade*—another decision that was not on the radar screen of the Presidents when they appointed the Justices who decided it—the lineup of Justices in *Hamdi* cross-cut partisan and ideological divisions. Clinton appointee Stephen Breyer joined with Reagan appointee Sandra Day O'Connor to legitimate the President's power to detain enemy combatants, offering a broad reading of the September 18, 2001 Authorization for the Use of Military Force (AUMF).¹²⁸ Republican appointees Justices Scalia and Stevens vigorously objected, arguing that Congress could not do this unless it officially suspended the writ of habeas corpus.¹²⁹

In contrast to his predecessors, President Bush did have the War on Terror very much in mind when he made two Supreme Court appointments following the *Hamdi* decision, and he was able to replace two of the Justices who formed the *Hamdi*¹³⁰ plurality. His choices reflect this. Just a week before his nomination, then-Judge John G. Roberts joined in the D.C. Circuit's *Hamdan v. Rumsfeld* decision, which upheld the President's power to try suspected enemy combatants before military tribunals and rejected the application of the Geneva Conventions to the constitution of these tribunals.¹³¹ That decision seemed to send a clear signal to the White House that Roberts could be trusted to uphold presidential prerogatives. Likewise, Samuel Alito had been one of the architects of the presidential "signing statement strategy" that embraced the broadest possible conception of unilateral presidential power.

As it turned out, however, the addition of Roberts and Alito was not sufficient to change the result in *Hamdan v. Rumsfeld*¹³² when it reached the Supreme Court. The Court reversed the D.C. Circuit and held that the President's military commissions were not authorized by AUMF and were contrary to the Geneva Conventions. As one might have predicted, Justice Alito supported the President's basic position, joined by Justices Scalia and

127. 542 U.S. 507 (2004).

128. *See id.* at 509-39.

129. *Id.* at 554-79.

130. *Id.* at 509.

131. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006).

132. 126 S. Ct. 2749

Thomas. Chief Justice Roberts, who had joined the D.C. Circuit's decision below, recused himself; but even had he participated, that would not have been enough to carry the day for the Bush Administration.

This brings us to our second point. The National Surveillance State, which we believe is gradually emerging, has been constructed during a period in which Republicans hold all the levers of power. But we do not regard it as purely a Republican product. To be sure, President Bush has taken a strong—we would even say objectionably strong—position in favor of executive secrecy and domestic surveillance. But one should not forget that the Clinton Administration had already been concerned with terrorism as an emerging phenomenon, both from international sources, as in the World Trade Center bombing in February 1993 and the attack on the U.S.S. Cole in October 2000, and domestically, as in the Oklahoma City bombing of April 1995. The Clinton Administration was quite willing to sacrifice civil liberties in the process; in particular, it supported the Antiterrorism and Effective Death Penalty Act of 1996,¹³³ which placed severe restrictions on habeas remedies for criminal defendants. The Act was passed in April of 1996. By the end of July, following bombings at the Atlanta Olympic games and the crash of TWA Flight 800 (neither of which, it ultimately turned out, had anything to do with international terrorism), Clinton called for yet more legislation. “We need to keep this country together right now. We need to focus on this terrorism issue,” he stated during a July 30 news conference.¹³⁴ Interestingly enough given later developments, conservative Utah Republican Senator Orrin Hatch expressed “some problems with the President’s proposals to expand wiretapping.”¹³⁵ Indeed, the Clinton impeachment and the weakening of presidential power that almost inevitably accompanies divided government¹³⁶ may only have delayed by a few years a longer-term concentration of power in the Executive to deal with emerging problems of war and national security, regardless of who inhabited the White House.

Moreover, whichever party held the White House during the September 11 attacks would be compelled to show its commitment to responding to the threat of terrorism, accelerating the development of the National Surveillance State. Following the September 11 attacks, politicians of both parties rushed to pass the USA PATRIOT Act, which contained a list of reforms that law enforcement officials had sought for some time, but which had been held back by a combination of legislative inertia and concerns over civil liberties. The September 11 attacks provided both intelligence and law enforcement bureaucracies the opportunity to propose these

133. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of U.S.C.).

134. *President Wants Senate to Hurry with New Anti-terrorism Laws*, CNN.com, July 30, 1996, <http://www.cnn.com/US/9607/30/clinton.terrorism/>.

135. *Id.*

136. Of course, the impeachment itself can be understood only against the background of a highly partisan divided government.

changes anew in the political climate most favorable for their passage. If the Democrats had controlled the presidency after the 2000 election, they would have felt every bit as compelled to demonstrate their seriousness about responding to the threat of terrorism—as well as the growing threats to cybersecurity. In responding to the September 11 attacks, Democrats would have been egged on by the Republicans, who would still have held at least one house of Congress, and possibly both. The Democrats would likely have had strong incentives to get tough on terrorism, and they would be repeatedly pressed by Republicans, who would stand ready to accuse them of weakness at the merest hint of vacillation. Thus, a military campaign against the Taliban, efforts to sweep up Al Qaeda operatives, and many of the USA PATRIOT Act's reforms would probably have occurred under either party's leadership.

Some details, we think, would probably have been quite different. It is likely that a President Gore would not have been so hasty to invade Iraq. Moreover, judging from previous political history, the Democrats would likely have a larger contingent of supporters concerned about possible dangers to civil liberties; this would be reflected not only in their institutional reforms and executive actions but also in Democratic judicial appointments. (Even so, the Republican coalition contains a significant libertarian strain that also cares about government surveillance. As the opposition party, they might have used this issue to attack a Democratic Administration.) As is true today, the two parties would have had to approach the American public with their respective visions for how to deal with the threat of terrorism, and the Republicans would probably have tried to outflank the Democrats as being tougher on national security and less concerned about civil liberties.

Thus, the 2000 election probably did make a difference in terms of the type of National Surveillance State that emerged. However, given that the Republicans controlled the White House for this crucial period, we suspect that the next Democratic President will likely retain significant aspects of what the Bush Administration has done. There are two reasons for this. The first is path dependency: Certain choices, once made, change political realities in ways that are often difficult to undo without enormous cost. The second is far more interesting (and perhaps more troubling): By staking out such aggressive positions on executive power and by changing expectations about what Presidents can do and can keep secret, the Bush Administration has created a wide space for future Presidents of both parties. Future Presidents may find that they enjoy the discretion and lack of accountability created by Bush's unilateral gambits. Hence, they will not waste much time or political capital trying to expose what Bush did while in office. To the contrary, they may try to take advantage of the climate of secrecy and presidential unilateralism that he created. After all, blowing the whistle on what the previous Administration did makes it more difficult for them to do similar things in the future. Moreover, if future Presidents appear to be even a little less aggressive than the press has portrayed Bush to be, they

will appear quite moderate in comparison. Even a few concessions to Congress and the judiciary will make them seem like devoted servants of the rule of law in comparison to the reputation of the Bush Administration, even though their powers are, from the perspective of an earlier time, considerably augmented. If the various misdeeds of the Bush Administration ever come to light and come to justice, it will not be because later Presidents expose them out of the goodness of their hearts, but because Congress and the judiciary reassert themselves, and more people risk their careers by leaking information. Without such courage, much of what Bush and his subordinates did in the past several years will never be fully known, and, indeed, Bush's reputation will be burnished by later Presidents following his example.

We may make a partial analogy with the regulatory and administrative state and the national security state that arose between 1932 and 1952. Democrats—the party that pushed for the growth of the regulatory and administrative state—were in power during most of this period. They also oversaw the conduct of World War II, which led to the formation of the national security state. Thus, Democratic victories during these years shaped the path of the administrative and national security state. Had Republicans won elections during these years, they might have slowed down the growth of these institutions, or diverted them to different agendas. We note, however, that no Republican candidate for the presidency after Alf Landon's disastrous candidacy in 1936 ran on a platform of undoing the New Deal and, following World War II, the Republicans proved just as devoted to the anticommunist cause as the Democrats, if not more so. As Stephen Skowronek has pointed out, a major historic function of Dwight Eisenhower, the first Republican to take the presidency in twenty years, was to consolidate the New Deal rather than to lead an attack on it, just as, from the perspective of history, we can recognize Richard Nixon far more as a consolidator of Lyndon Johnson's Great Society than a true critic.¹³⁷ Because the Democrats controlled the government during a crucial period of institution building and constitutional formation, they created a new status quo and a new set of constitutional assumptions against which both parties had to act. Although Ronald Reagan did attempt to transform American politics in important ways, the basic institutions and commitments of the New Deal and the welfare state escaped relatively unscathed. The federal government grew under his watch, as it has under George H.W. Bush and George W. Bush. Although Bill Clinton consolidated the Reagan Revolution, particularly through his support for welfare reform, his 1996 prediction that “the era of big government is over” proved evanescent. Big government is still with us, as evidenced by the Bush Administration's Medicare proposals, its No Child Left Behind Act, and its budget-busting fiscal policies.

137. Stephen Skowronek, *The Politics Presidents Make* 46-47 (1993).

The emerging National Surveillance State will be a long-term project of American constitutional development in which both major parties will participate, and many of its details are yet to be constructed. However, as a result of the election of 2000, the Republicans got the first crack at implementing many of its distinctive features, and this will shape the terrain on which constitutional politics will be played in the future. The difference between the parties—and thus their respective constitutional agendas—will concern how particular balances will be struck between civil liberties and national security and which stakeholders will be comparatively benefited. The parties—and their respective judicial appointees—will disagree heatedly about civil liberties and presidential power, but they will do so within the basic parameters of the emerging National Surveillance State that has been produced by the dialectical interactions of American politics.

Partisan differences do little to explain the now more than half-century drift of power to wartime Presidents, and the future drift that we expect to occur in the ongoing construction of the National Surveillance State. Although the liberal wing of the Democratic Party is often associated with strong support for civil rights, it was, after all, the “New Deal Court” that upheld Franklin D. Roosevelt’s round-up of Japanese resident aliens and Japanese Americans during World War II¹³⁸ and, perhaps, even more to the point, the questionable procedures of the “Nazi saboteurs trial” in *Ex parte Quirin*.¹³⁹ In hindsight, the *Steel Seizure* case,¹⁴⁰ which limited executive authority, must be understood as more the exception than the rule. Indeed, from a contemporary perspective, what that case really established was that where the President and Congress agree on a course of action in foreign policy, the Court will offer almost no resistance to the resulting concentration of power. Only where Congress has reasonably and clearly *not* authorized aggressive uses of presidential power will the Court consider stepping in. For example, in *Dames & Moore v. Regan*,¹⁴¹ the Court unanimously upheld, based on claims of national security, what some might regard as the fiat taking of property, in part because it thought that Congress supported what the President wanted to do. Democrats and Republicans alike—from William J. Brennan to William H. Rehnquist—have all supported increasing presidential power. And although the next Democratic appointments to the Supreme Court will no doubt draw the lines differently from their Republican counterparts in some respects, they too, will probably let the President do much of what he wants in constructing a National Surveillance State to fight terrorism and prevent crime, especially if they believe that Congress is willing to go along for the ride.¹⁴² If we are correct that the National Surveillance State represents an

138. See *Korematsu v. United States*, 323 U.S. 214 (1944).

139. 317 U.S. 1 (1942).

140. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

141. 453 U.S. 654 (1981).

142. See, e.g., Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, in

emerging constitutional regime, the two parties will mostly fight over the contours of that regime, rather than the legitimacy of the regime itself. Which party wins will make a considerable difference on some issues, particularly those concerning civil liberties, but it will be a constitutional struggle waged against a larger background of constitutional agreement about the need for increased presidential power and increased surveillance.

VI. CONCLUSION: THE POLITICAL BACKGROUND OF PARTISAN ENTRENCHMENT

Our theory of partisan entrenchment offers one perspective on how constitutional transformation occurs and how constitutional regimes are forged. It views this process from the standpoint of changes in judicial doctrine. But judicial doctrine must be understood against the background of larger political forces that that doctrine either furthers or resists. As we noted before, an important feature of constitutional change involves constitutional constructions by the political branches that create regimes like the New Deal, the national security state, the civil rights revolution of the 1960s and, as we predict, the National Surveillance State. Thus, we must distinguish two kinds of constitutional change. The first are changes in *governing regimes* that involve the construction of new laws and institutions by the political branches. The second are changes in *judicial doctrine*, which are produced by courts appointed through the processes of partisan entrenchment. The second kind of change—the major concern of partisan entrenchment—must be understood against the first. All other things being equal, courts tend to cooperate with and legitimate the constitutional innovations of the political forces that entrench them; conversely, they tend to resist the constitutional innovations of parties opposed to those same forces.

The New Deal is a classic example of the interaction between partisan entrenchment in the judiciary and constitutional construction by the political branches. Between 1932 and 1936, the federal judiciary, which had been entrenched by the Republican Party, mostly resisted the Democrats' proposed construction of the regulatory and welfare state, striking down key legislation and rejecting Congress's assertions of constitutional power to regulate the national economy in the public interest. After the Democrats repeatedly won congressional and presidential elections, Roosevelt entrenched New Dealers in the federal judiciary. Beginning in 1937, the Supreme Court started to validate the construction of the new regime; by the early 1940s, in *United States v. Darby*¹⁴³ and *Wickard v. Filburn*,¹⁴⁴ a unanimous court stated, in effect, that Congress would enjoy more or less *carte blanche* to regulate the national economy as

The Constitution in Wartime: Beyond Alarmism and Complacency 161-97 (Mark Tushnet ed., 2005).

143. 312 U.S. 100 (1941).

144. 317 U.S. 111 (1942).

it saw fit. Once the Republican Party acquiesced to that change, the new regime was firmly in place. The two parties then fought within the parameters of the new constitutional regime. Subsequent Republican appointees like John Marshall Harlan and Potter Stewart mostly respected the New Deal settlement.

Partisan entrenchment, in short, has two equally important effects. It helps hold off, for a time, proposed constitutional innovations by political opponents when the entrenching party loses power, and it helps the party that gains power create a cooperative judicial environment that is more likely to legitimate its own constitutional innovations. Through judicial appointments, parties can fight over the contours of the existing constitutional regime, pushing it in one direction rather than another. Thus, partisan entrenchment is particularly useful for explaining differences in doctrinal developments with regard to issues where the parties disagree strongly within a given constitutional regime. However, if a party is mobilized toward constitutional change, stays in power long enough, and is able to entrench enough like-minded jurists, it can do far more than nudge the constitutional regime in its favored direction; it can substantially reshape aspects of the constitutional order, and the judiciary that it appoints and entrenches will help legitimate and rationalize those changes. In this case, partisan entrenchment helps explain why judicial revolutions tend to follow and bless political ones.