# INTERRING THE RHETORIC OF JUDICIAL ACTIVISM

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> Judicial activism is a grave threat to the rule of law because unaccountable federal judges are usurping democracy, ignoring the Constitution and its separation of powers, and imposing their personal opinions upon the public. This must stop.[1]

## Introduction

For decades, leaders of the Republican Party have decried "judicial activism" and championed "judicial restraint." For much of that time, Republican politicians have equated judicial restraint with a commitment to judicial deference, asserting that "activist" judges disrespect the will of popular majorities. More recently, as the Republican Party has solidified its control of the federal courts and made its own claims on the Constitution, Republican politicians have tended to define judicial activism in potentially conflicting ways, mixing deference frames with claims about the autonomy of law from mere politics or personal beliefs.

In this Article, I examine these two ways of understanding the Republican rhetoric of judicial activism, and I show that each of them is problematic. First, equating judicial activism with the refusal to show deference to elected officials is inconsistent with much of modern Republican politics and with the views of the four U.S. Supreme Court Justices who are most admired in Republican political circles—Chief Justice John G. Roberts, Jr. and Justices Antonin Scalia, Clarence Thomas, and Samuel A. Alito, Jr. Second, redefining judicial activism as a scarlet letter for judges who follow their personal beliefs instead

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1. Republican National Committee, 2008 Republican Platform, Government Reform, http://www.gop.com/2008Platform/GovernmentReform.htm (last visited June 9, 2009) [hereinafter 2008 Republican Party Platform].

of "the law" invites charges of hypocrisy for switching definitions, and presupposes an unsustainably sharp distinction between constitutional politics and constitutional law—as evidenced by the close correspondence between personal views and legal views among the very people who assert an antinomy between the two.

In short, I argue that Republican rhetoric about judges either rests on a defensible definition of judicial activism that is nonetheless contrary to actual Republican practice, or else rests on an indefensible definition of judicial activism because it mischaracterizes the actual practice of constitutional adjudication in the United States. My analysis suggests that the rhetoric of judicial activism is deployed to condemn particular views on particular issues and not to express a genuine commitment to judicial deference or to the ideal of fidelity to law.

To be sure, the rhetoric of judicial activism has been with us for a long time now, and many commentators in legal or public discourse have criticized it in various ways.[2] But activism talk continues to warrant close inspection because Republican politicians continue to deploy it, including during the 2008 presidential campaign and during the Supreme Court confirmation process of then-Judge Sonia Sotomayor. By all appearances, Republican politicians mean for such rhetoric to be taken seriously. Taking it seriously reveals a disconnect with the reality of Republican practice and a denial of the existence of irreconcilable disagreement about constitutional meaning.

Part II illustrates the rhetoric of judicial activism that has long been present in Republican claims about judges.[3] Among other things, I note the increasing extent to which talk of antidemocratic meddling has shared air time with talk of legal infidelity.[4]

Part III considers the charge that judicial activists fail to show proper deference.[5] I examine the constitutional commitments of the contemporary Republican Party, first by noting the judicial decisions that the party most frequently praises or condemns, and then by ana-

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2. For an overview of the political and academic debate over judicial activism, see STEFANIE A. LINDQUIST & FRANK B. CROSS, MEASURING JUDICIAL ACTIVISM 1–28 (2009). "For the most part," Lindquist and Cross note, "those who decry activist decisions focus on the judiciary's usurpation of political power from the elected branches, especially when judges render those decisions in accordance with their own policy preferences." *Id.* at 1. "[J]udicial activism has become synonymous with judicial decision making that inappropriately crowds out the policy-making prerogatives of the elected branches." *Id.* at 1–2. *See generally* Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195 (2009) (collecting sources that use or analyze the language of judicial activism).

3. *See infra* notes 12–86.

4. *See infra* notes 12–86.

5. *See infra* notes 87–183.

lyzing the judicial practices of Chief Justice Roberts and Justices Scalia, Thomas, and Alito.[6] I inquire whether the positions of those Justices on the axis of judicial nonintervention or intervention are discernibly different from the positions of the four Justices whom the Republican Party has criticized most forcefully—Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer.[7]

Part IV considers a second possible way of understanding the Republican rhetoric of judicial activism: the accusation that judicial activists follow their personal views instead of "the law."[8] I show that this accusation, which is being made with increasing frequency, is profoundly misleading.[9]

Part V anticipates objections that I have let the Democratic Party off the hook.[10] To be clear, I readily acknowledge—indeed, underscore—a number of charges against Democratic politicians, including their failure to talk much about the judicial stakes in national elections. My purpose is not to argue that one party is more candid or consistent than the other as a general matter. I do maintain, however, that various cogent criticisms of the Democrats do not in any way lessen the culpability of Republican politicians for continuing to rail against judicial activism when they do not possess a genuine commitment to judicial deference and when the Constitution does not clearly mean what they say it means.

I conclude by suggesting what Americans may have to gain, both instrumentally and noninstrumentally, by interring the rhetoric of judicial activism.[11]

## II. Political Rhetoric

For a long time now, Republican politicians have asserted that, unlike "activist" liberal judges, the jurists they favor practice "judicial restraint" in the sense that they show real respect for the views and

6. *See infra* notes 87–99.

7. *See infra* notes 100–175. It is more controversial to characterize perceptions of Justice Anthony M. Kennedy. As illustrated by many of the cases discussed in this Article, he does not reliably fall within one ideological block or the other. It is relevant in this regard that Kennedy was President Ronald Reagan's third choice to fill Justice Lewis Powell's seat. I omit discussion of Justice Sonia Sotomayor because she joined the Court only recently.

8. *See infra* notes 184–198.

9. *See infra* notes 184–198.

10. *See infra* notes 204–208.

11. *See infra* notes 209–219.

values of popular majorities.[12] "For decades, in fact, the standard conservative view of the Supreme Court has amounted to a critique of liberal 'judicial activism' and a call for 'judicial restraint.'"[13] Such language has not always been used with clarity, "but if judicial restraint means anything in the context of the long conservative critique of the Warren Court and its legacy, it must mean a relative unwillingness to declare constitutional limitations on government, or a relative unwillingness to become involved in heated political questions."[14]

Republican politicians directed charges of activism at the Warren Court and its defenders before coming to power with the election of President Richard M. Nixon in 1968. Moreover, notwithstanding many ensuing changes in the party and the country, they have continued to espouse this rhetoric. Over time, however, the rhetoric of judicial activism has increasingly become associated with multiple, potentially conflicting meanings. The early emphasis on the need for greater judicial deference endures, but it presently exists alongside a second critique of judicial activism: condemnation of judicial lawlessness in pursuit of a personal agenda. According to the latter conception of activism, excessive judicial deference is as much an evil to be avoided as excessive judicial intervention.

During his 1968 presidential campaign, Nixon vowed to appoint "strict constructionists" to the Court.[15] In fleshing out the meaning of that term, he condemned the Warren Court for its enforcement of individual rights in areas such as criminal procedure and school desegregation, blaming the Court for causing a rise in violent crime in the country and compromising the authority of local school boards.[16] For example, at the 1968 Republican National Convention, Nixon reached out to southern delegates by stressing the limited role that he thought the federal courts should play in desegregating public schools:

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12. In this inquiry, I focus on criticisms directed at the judiciary by leaders of the Republican Party. Unless I am quoting others, I tend not to describe those criticisms as "conservative" in order to avoid the problems one encounters in attempting to define "conservatism." For a lucid discussion of this issue, see Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. Colo. L. Rev. 1139, 1181–1209 (2002).

13. Thomas M. Keck, The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism 1 (2004). Professor Keck investigates how "a judicial conservatism born in reaction to the liberal judicial activism of the Warren Court has come to create not judicial restraint but instead its own version of judicial activism." *Id.* at 2.

14. *Id.* at 1.

15. *See, e.g.*, Barry Friedman, The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution 282 (2009) ("Nixon was explicit about what he wanted from his nominees . . . . Repeatedly he insisted that what he sought were 'strict constructionists.'").

16. For a discussion, see Keck, *supra* note 13, at 107–13.

> I want men on the Supreme Court who are strict constitutionalists, men that interpret the law and don't try to make the law. . . . I know there are a lot of smart judges, believe me—and probably a lot smarter than I am—but I don't think there is any court in this country, any judge in this country, either local or on the Supreme Court—any court, including the Supreme Court of the U.S.—that is qualified to be a local school district and to make the decisions as your local school board.[17]

Nixon phrased his opposition to busing in the language of judicial deference to the expertise of local authority, not in the language of opposition to the vision of racial equality that the federal courts were seeking to enforce in the wake of *Brown v. Board of Education*.[18]

The logic of judicial deference continued as a dominant theme in Republican politics during the Reagan era. "Like Richard Nixon before him, Ronald Reagan entered office on a platform that included strong opposition to judicial activism, proclaiming that he would appoint only judges 'who understand the danger of short-circuiting the electoral process and disenfranchising the people through judicial activism.'"[19] The 1980 Republican Party Platform asserted that Reagan, unlike President Jimmy Carter, would appoint judges "who respect and reflect the values of the American people, and whose judicial philosophy is characterized by the highest regard for protecting the rights

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17. *Id.* at 112.

18. 347 U.S. 483 (1954). The recently revealed Nixon tapes suggest that his concerns were more substantive than procedural:

> On Jan. 23, 1973, when the Supreme Court struck down laws criminalizing abortion in Roe v. Wade, President Richard M. Nixon made no public statement. But privately, newly released tapes reveal, he expressed ambivalence. Nixon . . . saw a need for abortion in some cases—like interracial pregnancies, he said. "There are times when an abortion is necessary. I know that. When you have a black and a white," he told an aide, before adding, "Or a rape."

Charlie Savage, *On Nixon Tapes, Ambivalence over Abortion, Not Watergate*, N.Y. TIMES, June 24, 2009, at A1. Hugh Davis Graham writes,

> On black Americans, Nixon's views were unambiguous. On April 28, 1969, discussing welfare, [Chief of Staff H.R.] Haldeman recorded [in his daily diaries]: "P emphasized that you have to face the fact that the *whole* problem is really the blacks. The key is to devise a system that recognizes this while not appearing to. Problem with overall welfare plan is that it forces poor whites into same position as blacks (p. 53)." Nixon pointed out that "there has never in history been an adequate black nation, and they are the only race of which this is true."

Hugh Davis Graham, *Richard Nixon and Civil Rights: Explaining an Enigma*, 26 PRESIDENTIAL STUD. Q. 93, 98 (1996); *id.* ("Nixon told [Assistant to the President John] Ehrlichman to move fast on developing a constitutional amendment banning school busing for racial balance. 'Feels we should bite bullet now and hard, if its [sic] called racism, so be it!'").

19. LINDQUIST & CROSS, *supra* note 2, at 6–7 (quoting Ronald Reagan, Remarks During a White House Briefing for United States Attorneys, *in* 21 WEEKLY COMP. PRES. DOC. 1276 (Oct. 21, 1985)).

of law-abiding citizens."[20] The first claim seems to be about respect for the values of popular majorities and disrespect for the values of presumably liberal elites whose views were alleged to be over-represented on the federal courts. The second claim, although phrased in the language of rights, actually seems to signal the party's continued endorsement of a narrow view of the rights of criminal defendants, a view that Reagan voiced while he was running for president. The 1980 Platform also expressed implicit disapproval of the Court's substantive due process jurisprudence by calling for "the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life."[21]

Interestingly, the Platform stated a preference for judges "whose judicial philosophy . . . is consistent with the belief in the decentralization of the federal government and efforts to return decisionmaking power to state and local elected officials."[22] There was no overt recognition of the implications that such a commitment would have for the exercise of judicial power—specifically, whether invalidating congressional legislation on federalism grounds might fail to "respect and reflect the values of the American people."[23]

On the campaign trail, Reagan deployed the rhetoric of judicial activism. For instance, he claimed during a presidential debate in Cleveland that he opposed the Equal Rights Amendment, despite being "for equal rights," because "the amendment will take this problem out of the hands of elected legislators and put it in the hands of unelected judges."[24] During his first term, President Reagan contrasted the Court's act of "raw judicial power" in *Roe v. Wade*[25] with the "respect for the sacred value of human life [that] is too deeply engrained in the hearts of our people to remain forever suppressed," even though "the great majority of the American people have not yet made their voices heard."[26] President Reagan thus contrasted the misdeeds of judges who overprotect women's rights with the more enlightened views of the American public regarding fetal life.

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20. Republican National Convention, Republican Party Platform of 1980, http://www.presidency.ucsb.edu/ws/index.php?pid=25844 (last visited June 9, 2009).

21. *Id.*

22. *Id.*

23. *Id.*

24. Governor Ronald Reagan, Presidential Debates Between President Jimmy Carter and Governor Ronald Reagan in Cleveland, Ohio (Oct. 28, 1980), *available at* http://www.presidency.ucsb.edu/ws/print.php?pid=29408 (last visited June 9, 2009).

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

26. Ronald Reagan, *Abortion and the Conscience of the Nation*, 9 HUM. LIFE REV. 7, 7–8 (1983) (quoting Roe v. Wade, 410 U.S. 179, 222 (1973) (White, J., dissenting)).

The 1984 Platform devoted substantially more space to the judiciary. The demand for judicial deference was explicit and vehement, even to the point of threatening to strip the federal courts of their subject matter jurisdiction.[27]

> [J]udicial power must be exercised with deference towards State and local officials; it must not expand at the expense of our representative institutions. It is not a judicial function to reorder the economic, political, and social priorities of our nation. The intrusion of the courts into such areas undermines the stature of the judiciary and erodes respect for the rule of law. Where appropriate, we support congressional efforts to restrict the jurisdiction of federal courts.
>
> We commend the President for appointing federal judges committed to the rights of law-abiding citizens and traditional family values. We share the public's dissatisfaction with an elitist and unresponsive federal judiciary. If our legal institutions are to regain respect, they must respect the people's legitimate interests in a stable, orderly society. In his second term, President Reagan will continue to appoint Supreme Court and other federal judges who share our commitment to judicial restraint.[28]

Notwithstanding this asserted commitment to judicial deference, the Platform subsequently endorsed property rights, speech rights in the context of campaign activity, and the constitutional rights of the unborn.[29]

During his second term, President Reagan continued to condemn judicial activism, stressing the need for judicial deference to popular majorities *and*, notably, judicial lawlessness in pursuit of personal views about what the law should be.[30] In a 1986 interview, for example, in response to questions about the Court's enforcement of individual rights in the areas of abortion, school prayer, and busing, the President declared that he felt "very strongly about those social issues," and that his Supreme Court nominees—Antonin Scalia and William Rehnquist—would "interpret the law and not write the

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27. For a discussion of Reagan-era jurisdiction-stripping bills concerning school prayer and abortion, see RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 277 (6th ed. 2009).

28. Republican National Convention, 1984 Republican Platform, http://www.presidency.ucsb.edu/ws/index.php?pid=25845 (last visited June 9, 2009).

29. *Id.*

30. For purposes of this inquiry, it is not necessary to establish exactly when this second understanding of judicial activism first emerged in Republican rhetoric about judges. It is evident, however, that the language of Republican mobilization during the 1960s, 1970s, and 1980s tended to criticize judges who failed to defer to electorally accountable government officials, and that at some point the second conception of judicial activism also became prominent—to the point where, eventually, Republican politicians felt substantially more free than their predecessors did to condemn judges who practiced judicial deference.

law."[31] He insisted that "[w]e've had too many examples in recent years of courts and judges legislating. They're not interpreting what the law says and whether someone was violated or not. In too many instances they have been actually legislating by legal decree what they think the law should be."[32]

Reagan's Vice President, George H. W. Bush, echoed Reagan's judicial rhetoric in his own presidential campaign. During a presidential debate in Los Angeles in October 1988, Bush stated that he would "appoint people to the Federal Bench that will not legislate from the Bench, who will interpret the Constitution."[33] Similarly, during his 1992 acceptance speech at the Republican National Convention in Houston, President George W. Bush said that "Clinton and Congress will stock the judiciary with liberal judges who write laws they can't get approved by the voters."[34]

The writings of influential Republican judges and academics during the 1970s and 1980s were consistent with the rhetoric of Republican presidents and party platforms. Then-Justice Rehnquist rejected "the notion of a living Constitution."[35] Such a notion, he feared, potentially empowered individuals to persuade "one or more appointed federal judges to impose on other individuals a rule of conduct that the popularly elected branches of government would not have enacted and the voters have not and would not have embodied in the Constitution."[36] In a similar vein, Raoul Berger famously decried "government by judiciary."[37]

Others, such as Judge Robert Bork and Justice Scalia, stressed that "originalist" constitutional interpretation would cause courts to defer to assertions of governmental authority.[38] As Keith Whittington ob-

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31. Jack Nelson et al., *Interview Text: Reagan's Thoughts on Arms Talks, "Star Wars"*, L.A. TIMES, June 24, 1986, at 18.

32. *Id.*

33. Vice President George H.W. Bush, Presidential Debate at the University of California in Los Angeles (Oct. 13, 1988), *available at* http://www.presidency.ucsb.edu/ws/print.php?pid=29412 (last visited June 9, 2009).

34. George H.W. Bush, Remarks Accepting the Presidential Nomination at the Republican National Convention in Houston (Aug. 20, 1992), *available at* http://www.presidency.ucsb.edu/ws/print.php?pid=21352 (last visited June 9, 2009).

35. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 703 (1976).

36. *Id.* at 706.

37. *See generally* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

38. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 170–71 (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989). "Contrary to the plan of the American government," Robert Bork asserted, "the Supreme Court has usurped the powers of the people and their elected representatives." ROB-

serves, "The originalist Constitution, as these writers imagined it, was primarily concerned with empowering popular majorities."[39] Likewise, as Reva Siegel explains, these "originalists believed that originalism would promote democratic values indirectly, by disciplining judicial interpretation and thus limiting the reach of constitutional law."[40]

The 1996 Republican Party Platform insisted that the Constitution "has been scorned by liberal Democrats and the judicial activism of the judges they have appointed."[41] The party clamored for judicial deference to popular majorities, limits on individual rights, and an end to the judicial imposition of personal views in the name of the law:

> Some members of the federal judiciary . . . . make up laws and invent new rights as they go along, arrogating to themselves powers King George III never dared to exercise. They free vicious criminals, pamper felons in prison, frivolously overturn State laws enacted by citizen referenda . . . .
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> . . . .
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> The federal judiciary, including the U.S. Supreme Court, has overstepped its authority under the Constitution. It has usurped the right of citizen legislators and popularly elected executives to make law by declaring duly enacted laws to be "unconstitutional" through the misapplication of the principle of judicial review. Any other role for the judiciary, especially when personal preferences masquerade as interpreting the law, is fundamentally at odds with our system of government in which the people and their representatives decide issues great and small.[42]

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ERT H. BORK, SLOUCHING TOWARD GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 109 (1996).

39. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 602 (2004).

40. Reva B. Siegel, Heller *& Originalism's Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1406 (2009).

41. Republican National Convention, Republican Party Platform of 1996, http://www.presidency.ucsb.edu/ws/print.php?pid=25848 (last visited June 9, 2009) [hereinafter 1996 Republican Party Platform].

42. *Id*. Similar language appeared in the 2000 Republican Party Platform:

> Many judges disregard the safety, values, and freedom of law-abiding citizens. At the expense of our children and families, they make up laws, invent new rights, free vicious criminals, and pamper felons in prison. They have arbitrarily overturned state laws enacted by citizen referenda, utterly disregarding the right of the people and the democratic process.
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> The sound principle of judicial review has turned into an intolerable presumption of judicial supremacy. A Republican Congress, working with a Republican president, will restore the separation of powers and reestablish a government of law. There are different ways to achieve that goal—setting terms for federal judges, for example, or using Article III of the Constitution to limit their appellate jurisdiction—but the most important factor is the appointing power of the presidency. We applaud Governor Bush's pledge to name only judges who have demonstrated that they share his conservative beliefs and respect the Constitution.

The Republican Party thus compared the federal courts to the British King who was on the receiving end of the Declaration of Independence. That comparison reflected the vigor with which the party was pushing its demand for judges to get out of the way. Yet at the same time, the party continued promising to "restore the force of the Tenth Amendment and, in the process, renew the trust and respect which hold together a free society."[43] This was a promise that seemed to entail, among other things, the exercise of judicial power in order to limit federal power.

Like Presidents Nixon, Reagan, and George H. W. Bush before him, then-Governor George W. Bush forcefully espoused the rhetoric of judicial activism when he ran for president. During a presidential debate in Boston in 2000, Governor Bush adopted Nixon's language in stating that he would appoint judges "who will strictly interpret the Constitution and not use the bench for writing social policy."[44] According to Bush, "[T]he judges ought not to take the place of the legislative branch of government. . . . I don't believe in liberal activist judges. I believe in strict constructionists."[45] Although not stated explicitly, the primary implication seems to be that activist judges protect nonexistent rights, whether by failing to show proper deference to the elected branches or by lawlessly pursuing personal views of the public good. Judges who do not limit the discretion of legislatures do not "take the place of the legislative branch of government."[46]

Similarly, during his reelection campaign, President George W. Bush described himself as "a person who believes in judicial restraint, as opposed to judicial activism that takes the place of the legislative branch."[47] And in his 2004 acceptance speech at the Republican National Convention in New York City, Bush declared that he "support[s] the protection of marriage against activist judges."[48] In a subsequent presidential debate in St. Louis, he again echoed President Nixon when he insisted that his nominees to the bench "would be

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Republican National Convention, Republican Party Platform of 2000, http://www.presidency.ucsb.edu/ws/print.php?pid=25849 (last visited June 15, 2009) [hereinafter 2000 Republican Party Platform]. For a discussion of the import of the last sentence in the above quotation, see *infra* note 185 and accompanying text.

43. 1996 Republican Party Platform, *supra* note 42.

44. President George W. Bush, Presidential Debate in Boston (Oct. 3, 2000), *available at* http://www.presidency.ucsb.edu/ws/print.php?pid=29418 (last visited June 9, 2009).

45. *Id.*

46. *Id.*

47. LINDQUIST & CROSS, *supra* note 2, at 18.

48. George W. Bush, Remarks Accepting the Presidential Nomination at the Republican National Convention in New York City, 40 WEEKLY COMP. PRES. DOC. 1797, 1800 (Sept. 2, 2004), *available at* http://www.presidency.ucsb.edu/ws/print.php?pid=72727.

strict constructionists. We've got plenty of lawmakers in Washington, DC. Legislators make law. Judges interpret the Constitution."[49] Moreover, at a debate in Tempe, Arizona, he explained that he had proposed a constitutional amendment that would have banned gay marriage because he "was worried that activist judges are actually defining the definition of marriage."[50] The President was "deeply concerned that judges are making those decisions and not the citizenry of the United States," and that "we'll end up with marriage being defined by courts. And I don't think that's in our Nation's interest."[51]

The 2004 Republican Platform explicitly appealed to the values and democratic authority of the American people:

> In the federal courts, scores of judges with activist backgrounds in the hard-left now have lifetime tenure. Recent events have made it clear that these judges threaten America's dearest institutions and our very way of life. In some states, activist judges are redefining the institution of marriage. The Pledge of Allegiance has already been invalidated by the courts once, and the Supreme Court's ruling has left the Pledge in danger of being struck down again—not because the American people have rejected it and the values that it embodies, but because a handful of activist judges threaten to overturn commonsense and tradition. And while the vast majority of Americans support a ban on partial birth abortion, this brutal and violent practice will likely continue by judicial fiat. We believe that the self-proclaimed supremacy of these judicial activists is antithetical to the democratic ideals on which our nation was founded.[52]

The party thus placed front and center what "the American people" have or have not "rejected"; the considered views of "the vast majority of Americans"; and "the democratic ideals on which our nation was founded."[53] The 2004 Platform suggested use of jurisdiction stripping "in instances where judges are abusing their power by banning the use of 'under God' in the Pledge of Allegiance or prohibiting depictions of the Ten Commandments, and potential actions invalidating the Defense of Marriage Act (DOMA)."[54] The Platform further "condemn[ed] judicial activists and their unwarranted and unconstitutional restrictions on the free exercise of religion in the public

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49. President George W. Bush, Presidential Debate in St. Louis, Missouri (Oct. 8, 2004), *available at* http://www.presidency.ucsb.edu/ws/print.php?pid=72776 (last visited June 9, 2009).

50. President George W. Bush, Presidential Debate in Tempe, Arizona (Oct. 13, 2004), *available at* http://www.presidency.ucsb.edu/ws/print.php?pid=63163 (last visited June 9, 2009).

51. *Id.*

52. Republican National Convention, 2004 Republican Party Platform: A Safer World and a More Hopeful America, http://www.presidency.ucsb.edu/ws/print.php?pid=25850 (last visited June 15, 2009) [hereinafter 2004 Republican Party Platform].

53. *Id.*

54. *Id.*

square."[55] In 2003 and 2005, Republicans in Congress introduced several jurisdiction-stripping bills, which passed the House but did not progress in the Senate.[56]

In nominating John Roberts for a seat on the Supreme Court, President Bush stated that Roberts would "strictly apply the Constitution and laws, not legislate from the bench."[57] Similarly, in nominating Samuel Alito to the Supreme Court, the President said that Alito "understands that judges are to interpret the laws, not to impose their preferences or priorities on the people."[58] In a radio address a few months later, the President stressed then-Judge Alito's record, which "shows that he strictly and fairly interprets the Constitution and laws and does not try to legislate from the bench or impose his personal preference on the people."[59] As with several of the other statements recorded above, the primary image conveyed by the President's words is that of judges who interfere inappropriately with what popular majorities want to do; judges who decline to impose constitutional limits on the discretion of popular majorities are not well described as "legislat[ing] from the bench" or "impos[ing] their preferences or priorities on the people."

In campaigning for president, Senator John McCain made full-throated use of the rhetoric of judicial activism. For example, in May 2008, he delivered remarks on his judicial philosophy at Wake Forest

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55. *Id.*

56. *See, e.g.*, James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 Nw. U. L. Rev. 191, 192 (2007). Professor Pfander notes,

> The House of Representatives has considered and adopted a wide range of jurisdiction-stripping legislation in the last few years. Touching such subjects as gay and lesbian marriage, the Pledge of Allegiance, and official acknowledgment of God by public officials, the bills follow a consistent pattern: They deny the lower federal courts jurisdiction over certain controversial issues of constitutional law, and forbid the Supreme Court from exercising appellate jurisdiction over those same issues.

*Id.* (footnote omitted); *see also* 2004 Republican Party Platform, *supra* note 53, at n.1 (discussing the details of the bills); Fallon et al., *supra* note 27, at 277 (discussing the House's passage in 2004 of the Marriage Protection Act and the Pledge Protection Act).

57. George W. Bush, Address to the Nation Announcing the Nomination of John G. Roberts, Jr., to Be an Associate Justice of the United States Supreme Court, 41 Weekly Comp. Pres. Doc. 1192, 1192 (July 19, 2005), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2005/07/20050719-7.html.

58. George W. Bush, Remarks Announcing the Nomination of Samuel A. Alito, Jr., to Be an Associate Justice of the Supreme Court of the United States, 41 Weekly Comp. Pres. Doc. 1625, 1626 (Oct. 31, 2005), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2005/10/20051031.html.

59. George W. Bush, The President's Radio Address, 42 Weekly Comp. Pres. Doc. 74, 75 (Jan. 14, 2006), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2006/01/20060114.html.

University in Winston-Salem, North Carolina.[60] Those remarks amounted mostly to an attack on judicial meddling in the political process. Although "the framers knew exactly what they were doing, and the system of checks and balances rarely disappoints," McCain identified "one great exception in our day":

> [T]he common and systematic abuse of our federal courts by the people we entrust with judicial power. For decades now, some federal judges have taken it upon themselves to pronounce and rule on matters that were never intended to be heard in courts or decided by judges. With a presumption that would have amazed the framers of our Constitution, and legal reasoning that would have mystified them, federal judges today issue rulings and opinions on policy questions that should be decided democratically. Assured of lifetime tenures, these judges show little regard for the authority of the president, the Congress, and the states. They display even less interest in the will of the people.[61]

"Often," McCain continued, "political causes are brought before the courts that could not succeed by democratic means, and some federal judges are eager to oblige."[62]

As an example of a case in which "the expressed will of the voters is disregarded by federal judges," McCain discussed the Supreme Court's invalidation of the juvenile death penalty in *Roper v. Simmons*,[63] the result of which was to "brush off the standards of the people themselves and their elected representatives."[64] McCain also discussed the Ninth Circuit's invalidation of voluntary recitations of the words "under God" in the Pledge of Allegiance in public schools,[65] criticizing Michael Newdow's constitutional claim and the Ninth Circuit's agreement with "litigious people [who] seek to rid our country of any trace of religious devotion."[66] With no sense of awkwardness, McCain sandwiched in between those criticisms his disapproval of the Court's display of deference to popular majorities in *Kelo v. City of New London*, a case in which the Court upheld the authority of local governments to allow economic development takings.[67]

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60. Press Release, Senator John McCain, Remarks by John McCain on Judicial Philosophy (May 6, 2008), *available at* 2008 WLNR 8446630.

61. *Id.*

62. *Id.*

63. 543 U.S. 551 (2005).

64. Remarks by John McCain on Judicial Philosophy, *supra* note 61.

65. Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2003), *rev'd sub nom*. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (declining to decide the merits and reversing the judgment of the Ninth Circuit on grounds of prudential standing).

66. Remarks by John McCain on Judicial Philosophy, *supra* note 61.

67. 545 U.S. 469 (2005).

McCain contrasted "judicial activism" with "real activism in our country," which "is democratic. Real activists seek to make their case democratically—to win hearts, minds, and majorities to their cause."[68] In sharp contrast, "activist lawyers and activist judges follow a different method. They want to be spared the inconvenience of campaigns, elections, legislative votes, and all of that. They don't seek to win debates on the merits of their argument; they seek to shut down debates by order of the court."[69]

Speaking directly about his potential opponents in the general election, McCain noted that then-Senators Obama and Clinton "are both lawyers themselves, and don't seem to mind at all when fundamental questions of social policy are preemptively decided by judges instead of by the people and their elected representatives."[70] McCain vowed "to restore humility to the federal courts" by appointing judges with "a proven commitment to judicial restraint," judges who "understand that there are clear limits to the scope of judicial power."[71]

In sum, although there have been substantial changes in conservative political mobilization, the Republican electoral coalition, and the country since the 1960s,[72] the theme of judicial deference to legislative majorities has often dominated Republican rhetoric about the appropriate exercise of judicial authority. Calls for greater judicial respect for the political process characterized the language of conservative mobilization before the Republican Party took control of the presidency and, generally, the federal courts, and this rhetoric has remained prominent in Republican political discourse about judges ever since.

It is evident from this brief account, however, that an exclusive focus on judicial deference does not capture the complexity and potential conflict in the judicial rhetoric of Republican politicians. At times, activism talk seems to have as much to do with judges who are guided by their merely personal views as it has to do with judges who disrespect popular majorities. Some of the quotations discussed above can be construed as charges of legal infidelity, not necessarily as failures to defer. For example, the accusation that judges are "legislating from the bench" and "imposing personal views" may imply a failure to show proper deference,[73] but it may also suggest lawlessness in pursuit

68. Remarks by John McCain on Judicial Philosophy, *supra* note 61.

69. *Id.*

70. *Id.*

71. *Id.*

72. For an analysis of those issues, see generally, for example, KECK, *supra* note 13.

73. *See, e.g.*, Kathleen M. Sullivan, *Consent of the Governed*, N.Y. TIMES, Feb. 5, 2006 ("In promising that the justices he appoints 'will not legislate from the bench and will strictly inter-

of a personal agenda.[74] Indeed, it can be difficult to disentangle the two claims.

Other recent examples can be read both ways. In defending his nomination of Harriet Miers for a seat on the Supreme Court, President George W. Bush mixed a deference frame with talk about the autonomy of law from mere politics or personal beliefs:

> She shares my belief that judges should strictly interpret the Constitution and laws, not legislate from the bench. She understands that the role of a judge is to interpret the text of the Constitution and statutes as written, not as he or she might wish they were written. And she knows that judges should have a restrained and modest role in our constitutional democracy.[75]

Similarly, in speaking at a Federalist Society event near the end of his presidency, President George W. Bush stated that "the proper role of judges" is "to apply the laws as written, and not to advance their own agendas" because "elected officials, not appointed judges," are supposed "to represent the popular will."[76] Criticizing the Democratic Party's "concept of a 'living Constitution'" because it "gives unelected judges wide latitude in creating new laws and policies without accountability to the people," Bush touted the insistence of his party "that the Constitution means what it says."[77] He contrasted "judges who would faithfully interpret the Constitution" with judges who "invent laws or dictate social policy."[78] And he endorsed Chief Justice Roberts's statement during his Supreme Court confirmation hearing that "[j]udges are like umpires."[79]

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pret the Constitution,' Bush has faithfully recited the mantra that conservatives regularly use to signal their belief that the Supreme Court should defer to democratic decision making.").

74. Professors Lindquist and Cross write,

> The trouble with identifying activism in the sense implied by the phrase "legislating from the bench" . . . is that some decisions may be so clearly legally justified that no observer would complain about the Court's action. . . . The true complaint is about striking down legislation as unconstitutional when it is done to further judges' personal policy preferences.

LINDQUIST & CROSS, *supra* note 2, at 39.

75. George W. Bush, The President's Radio Address, 41 WEEKLY COMP. PRES. DOC. 1523, 1524 (Oct. 8, 2005), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2005/10/20051008.html.

76. George W. Bush, Remarks to the Cincinnati Chapter of the Federalist Society in Cincinnati, Ohio, 44 WEEKLY COMP. PRES. DOC. 1303, 1303 (Oct. 6, 2008).

77. *Id.* at 1304.

78. *Id.*

79. *Id.* at 1305. "Judges and Justices are servants of the law, not the other way around," Roberts said. "Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of Judge John G. Roberts, Jr.). For a

Likewise, although Senator McCain focused on alleged judicial failures to respect the popular will in his remarks on judicial philosophy that were discussed above,[80] he also stressed "a series of judicial opinions and edicts wandering farther and farther from the *clear* meanings of the Constitution, and from the *clear* limits of judicial power that the Constitution defines."[81] McCain wanted "a nominee for the Court [who] will dare to be faithful to the *clear* intentions of the framers and to the *actual* meaning of the Constitution."[82]

More recently, Senator Jeff Sessions of Alabama, the ranking Republican on the Senate Judiciary Committee, has been framing the issue of appropriate judicial conduct as a matter of fidelity to law, not as a matter of judicial deference. According to Sessions, Republicans "consider activism as a threat to the rule of law. I use [Utah GOP Sen. Orrin] Hatch's definition of activism: a judge who allows their personal views to override their commitment to the law."[83] Sessions apparently believes that the judges he approves of follow "the law" while the judges he disapproves of follow "their personal views."

The charge that certain judges *allow* personal views to trump legality may differ in subtle but important ways from the charge that certain judges *impose* their personal views on the public. The latter construction—imposing personal views—seems to contemplate a flight from legality only in the direction of too much intervention. A judge who commits legal error by declining to enforce an individual right does not impose her views on the public. As far as the judge is concerned, the public remains free to do what it wishes. By contrast, the former construction—allowing personal views to guide decisions—seems to communicate disapproval of departures from law in the direction of both too much intervention and too little.[84] Senator Sessions himself focused on the need for *greater* judicial intervention

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critique of the umpire analogy, see generally Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701 (2007). During her Supreme Court confirmation hearing, then-Judge Sotomayor made similar statements. *See, e.g.*, Sotomayor Pledges "Fidelity to the Law", CNN, http://www.cnn.com/2009/POLITICS/07/13/sotomayor.hearing/index.html?iref=hpmostpop (last visited July 15, 2009) ("In the past month, many senators have asked me about my judicial philosophy . . . . It is simple: fidelity to the law. The task of a judge is not to make the law—it is to apply the law. And it is clear, I believe, that my record in two courts reflects my rigorous commitment to interpreting the Constitution according to its terms . . . .").

80. Remarks by John McCain on Judicial Philosophy, *supra* note 60.

81. *Id.* (emphasis added).

82. *Id.* (emphasis added).

83. Kirk Victor, *Court's in Session*, NAT'L J., May 23, 2009, at 57.

84. *Cf.* Young, *supra* note 12, at 1147–48 (identifying as one possible definition of judicial activism "departures from the constitutional authority—whether it be text, structure, or history—that legitimated judicial power in the first place").

in criticizing then-Judge Sonia Sotomayor. He singled out her "private property decision permit[ing] the government to take property from one developer and give it to another," "[h]er 2008 *Ricci* decision allow[ing] a city to discriminate against one group of firefighters because of their race," and "[h]er 2009 Second Amendment decision [giving] states the power to ban firearms."[85] This is not how Republican politicians tended to use the term "judicial activism" to criticize the perceived excesses of the Warren and Burger Courts.

Today, there appear to be two primary ways of understanding the Republican rhetoric of judicial activism. First, the charge may be that judicial activists fail to show proper deference to the will of popular majorities. Second, and increasingly at present, the accusation may be that judicial activists allow their merely personal views, and not the law, to dictate outcomes in cases. The quotation with which I began this inquiry espouses both conceptions of the Republican critique. "Judicial activism," the 2008 Republican Platform instructs, "is a grave threat to the rule of law because unaccountable federal judges are usurping democracy, ignoring the Constitution and its separation of powers, and imposing their personal opinions upon the public."[86] Frames of unaccountability, usurpation of democracy, and disrespect of separation-of-powers limits on judicial authority seem primarily to condemn judges who fail to accord proper deference to popular majorities. Charges of ignoring the Constitution and imposing personal views seem predominantly to express concern about judges who are unfaithful to the law. I now analyze each conception of judicial activism in turn.

## III. Judicial Activism as the Failure to Show Deference

### A. *Political Practice*

To determine whether there is tension between the deference rhetoric often employed by Republican politicians and the reality of contemporary Republican commitments, it is instructive to consider the particular judicial decisions that Republican leaders single out for greatest criticism. As we saw in Part II, Senator McCain, while campaigning for president, criticized not only the Court's intervention in *Roper* and the Ninth Circuit's ruling in *Newdow*, but also the deference displayed by the Court in *Kelo*. He voiced those criticisms immediately after he rebuked judges who "brush off the standards of the

85. Jeff Sessions, *A Confirmation Conversion*, USA Today, July 27, 2009, at 8A.

86. 2008 Republican Party Platform, *supra* note 1, at 19.

people themselves and their elected representatives."[87] Likewise, President George W. Bush, while speaking at a Federalist Society event near the end of his presidency,[88] criticized the Ninth Circuit's ruling in *Newdow*, the Supreme Court's decision in *Kelo*, and the Court's partial invalidation of the Military Commissions Act of 2006 in *Boumediene v. Bush*.[89] By contrast, he expressed approval of the Court's rejection of a facial challenge to the federal Partial-Birth Abortion Ban Act of 2003 in *Gonzales v. Carhart*,[90] and its invalidation of the District of Columbia's gun control law in *District of Columbia v. Heller*.[91] Thus, both McCain and Bush criticized the apparent absence of judicial deference to popular majorities and the apparent presence of judicial deference to popular majorities.

The 2008 Platform also illustrates contemporary contradictions between rhetoric and reality. Immediately after decrying "unaccountable federal judges" who "are usurping democracy" and stating that this "[j]udicial activism . . . . must stop,"[92] the Platform lists these objections:

> We condemn the Supreme Court's disregard of homeowners' property rights in its *Kelo* decision and deplore the Court's arbitrary extension of Americans' habeas corpus rights to enemy combatants held abroad. We object to the Court's unwarranted interference in the administration of the death penalty in this country for the benefit of savage criminals whose guilt is not at issue. We lament that judges have denied the people their right to set abortion policies in the states and are undermining traditional marriage laws from coast to coast. We are astounded that four justices of the Supreme Court believe that individual Americans have no individual right to bear arms to protect themselves and their families.[93]

This bill of particulars condemns both judicial failures to exercise deference (alleged enemy combatants, capital punishment, abortion, and gay marriage) and judicial failures to protect constitutional rights (property rights and gun rights). In a subsequent section entitled "Preserving Our Values," the Platform proclaims that "[i]ndividual rights—and the responsibilities that go with them—are the foundation of a free society."[94] Among other things, the Platform endorses Sec-

87. Remarks by John McCain on Judicial Philosophy, *supra* note 60.

88. *See* Press Release, Office of the White House Press Secretary, President Bush Discusses Judicial Accomplishments and Philosophy (Oct. 6, 2008), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2008/10/20081006-5.html (last visited June 14, 2009).

89. 128 S. Ct. 2229 (2008).

90. 550 U.S. 124 (2007).

91. 128 S. Ct. 2783 (2008).

92. 2008 Republican Party Platform, *supra* note 1, at 19.

93. *Id.* at 19–20.

94. *Id.* at 51.

ond Amendment rights, constitutional colorblindness, religious liberties, and property rights. The Platform further "affirm[s] that the unborn child has a fundamental individual right to life which cannot be infringed."[95]

The manner in which the 2008 Platform engages the subject of abortion captures nicely the problematic relation between political rhetoric and political practice. The party's commitment to the idea that a fetus has a constitutional right to life under Section One of the Fourteenth Amendment contradicts the Platform's earlier criticism of the Court's abortion jurisprudence—specifically, the "lament that judges have denied the people their right to set abortion policies in the states."[96] If the point in dispute were *who* gets to decide the abortion issue, then the "right" of "the people"—that is, deference logic—might carry independent weight. But the actual point seems to be *how* the abortion issue gets decided. Majoritarian democracy and judicial deference have little to do with the matter. "Judicial activism," Keith Whittington notes, "apparently now includes decisions such as those leaving in place the University of Michigan's race conscious admissions policies and those refraining from interfering with the town of New London's redevelopment plans."[97]

Notably, in redeclaring the party's commitment to colorblindness, the 2008 Platform "affirm[s] the commonsense approach of the Chief Justice of the United States: that the way to stop discriminating on the basis of race is to stop discriminating."[98] Only Justices Scalia, Thomas, and Alito endorsed the assertiveness of Chief Justice Roberts in *Parents Involved in Community Schools v. Seattle School District*

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95. *Id.* at 52–54.

96. *Id.* at 20.

97. KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 283–84 (Ira Katznelson et al. eds., 2007) (internal quotation marks omitted). The *New York Times* noted,

> Since President Obama nominated Judge Sotomayor for the Supreme Court, a ubiquitous accusation by her critics . . . is that she is a "judicial activist" who legislates from the bench.
>
> Yet . . . it is far from clear that her judicial record supports the accusation that she is an activist. Several empirical studies have concluded that she is not particularly prone to overriding policy decisions by elected branches.
>
> And her cases that have attracted the most criticism from conservatives—involving a decision to discard the results of firefighter exams because members of minorities scored poorly, a controversial property condemnation and a campaign finance law—are instances in which she deferred to policy decisions by elected branches that conservatives hoped judges would strike down.

Charlie Savage, *Uncertain Evidence for "Activist" Label on Sotomayor*, N.Y. TIMES, June 20, 2009, at A10.

98. 2008 Republican Party Platform, *supra* note 1, at 52.

*No. 1*.[99] Not coincidentally, those four Justices are held in highest regard in contemporary Republican politics. I now consider the extent to which they can accurately be described as practitioners of judicial deference.

### *B. Judicial Practice*

It is uncontroversial to suggest that only Chief Justice Roberts and Justices Scalia, Thomas, and Alito belong on the list of current Justices who are widely esteemed in Republican political circles. While running for president in 2000, George W. Bush identified Justices Scalia and Thomas as models of the kind of judges that he would appoint.[100] Moreover, during the 2008 presidential election, there were relatively clear differences between the two candidates regarding which Justices they admired most and least. During the Saddleback Presidential Candidates Forum, Senator John McCain told Pastor Rick Warren that he never would have nominated Justices Stevens, Souter, Ginsburg, and Breyer. McCain also said that Roberts and Alito were two of his "most recent favorites," and that he was "proud of President Bush for nominating them."[101] Obama, by contrast, told Pastor Warren that he would not have nominated Justices Scalia and Thomas, and that time had already confirmed his ultimate decision to vote against the confirmation of Chief Justice Roberts.[102] Legal commentators often note how Chief Justice Roberts and Justices Scalia, Thomas, and Alito are perceived in Republican and Democratic politics.[103] I will leave Justice Kennedy aside because there is widespread disagreement between and among Republicans and Democrats about

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99. 551 U.S. 701, 748 (2007) (plurality opinion of Roberts, C.J.) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."). For a discussion of the plurality's apparently broad rejection of the use of racial criteria to integrate public schools, see *infra* notes 153–162 and accompanying text.

100. *See* Press Release, *supra* note 89 ("A lot has happened since 2000. Yet I can still remember the heated debate over the kinds of judges Presidents should appoint. . . . When asked if I had any idea in mind of the kind of judges I would appoint, I clearly remember saying, I do. That would be Judges Scalia and Thomas.").

101. The interview transcript is available at CNN.com—Transcripts, http://transcripts.cnn.com/TRANSCRIPTS/0808/17/se.01.html (last visited Jan. 10, 2009). *See also* Remarks by John McCain on Judicial Philosophy, *supra* note 60 ("I have my own standards of judicial ability, experience, philosophy, and temperament. And Chief Justice Roberts and Justice Samuel Alito meet those standards in every respect. They would serve as the model for my own nominees if that responsibility falls to me."); *id.* ("I will look for people in the cast of John Roberts, Samuel Alito, and my friend the late William Rehnquist . . . .").

102. CNN.com—Transcripts, *supra* note 102.

103. *See, e.g.*, Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2D 423, 423 (2007); *cf.* Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43, 59 (2007) ("Clearly, the Rehnquist Court justices generally regarded as the most conservative (Chief Justice Rehnquist and Justices

how to characterize him. I will also leave Justice Sotomayor aside because she recently joined the Court.

Framed precisely, then, the question I shall examine is whether it is true as a general matter that Chief Justice Roberts and Justices Scalia, Thomas, and Alito are more likely to side with the government than are Justices Stevens, Souter, Ginsburg, and Breyer.[104]

To be sure, there are important areas of litigation involving the government in which the Court does not divide neatly into the four-Justice blocks described above. I am thinking specifically of the Court's recent Sixth Amendment revolutions in the areas of the Confrontation Clause[105] and criminal sentencing.[106] The same could be said of some Fourth Amendment,[107] free speech,[108] and free exercise cases,[109] as well as cases involving the dormant commerce clause.[110] Those decisions produce either splits that are difficult to describe in ideological terms or near unanimity among the Justices.[111] In addition, sometimes individual Justices vote in unexpected ways.[112]

Nonetheless, it turns out that a striking aspect of the decision-making process of this Court is the near-perfect extent to which the Justices can be grouped into the same blocks in certain divisive cases.

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Scalia and Thomas) were far more reticent to invalidate state laws than were their more liberal counterparts.").

104. Of course, it is impossible to discern just from voting behavior whether a vote for the government signifies deference logic or simple substantive agreement with the government's position. I assume that a vote for the government signifies deference. I make that assumption not because it is necessarily sound, but because even if one makes that assumption, Chief Justice Roberts and Justices Scalia, Thomas, and Alito are still not accurately characterized as practitioners of judicial deference as a general matter.

105. *See, e.g.*, Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009); Giles v. California, 128 S. Ct. 2678 (2008).

106. The line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), has tended to implicate differences in methodology—specifically, legalism versus pragmatism—not differences in ideology. *See, e.g.*, Oregon v. Ice, 129 S. Ct. 711 (2009); United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004).

107. *See, e.g.*, Virginia v. Moore, 128 S. Ct. 1598 (2008) (9–0 decision).

108. *See, e.g.*, United States v. Williams, 128 S. Ct. 1830 (2008) (7–2 decision).

109. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990). In free exercise cases, Justice Alito may end up agreeing more with Justice Souter than with Justice Scalia. *See, e.g.*, Blackhawk v. Pennsylvania, 381 F.3d 202, 204 (3d Cir. 2004); Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999).

110. *See, e.g.*, United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007); Granholm v. Heald, 544 U.S. 460 (2005).

111. Cases that concern limits on punitive damages, although they do not involve the government as a party, also implicate splits that are difficult to describe in ideological terms. *See, e.g.*, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008); Philip Morris USA v. Williams, 549 U.S. 346 (2007).

112. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 698–705 (2005) (Breyer, J., concurring in the judgment); Hamdi v. Rumsfeld, 542 U.S. 507, 554–79 (2004) (Scalia, J., dissenting); Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 838–42 (2002) (Breyer, J., concurring).

Such cases are well described by Anthony Kronman's notion of "identity-defining" conflicts, so named because the choices they require "define the community that makes them in the same way that some personal choices define the individual who does."[113] For example, Chief Justice Roberts and Justices Scalia, Thomas, and Alito almost always agree with one another in constitutional litigation involving government regulation of abortion,[114] race and equal protection,[115] the meaning and scope of the Second Amendment,[116] eligibility for the death penalty,[117] the detention or trial of alleged enemy combatants,[118] and the domestic judicial enforceability of international law.[119] Likewise, Justices Stevens, Souter, Ginsburg, and Breyer almost always agree with one another on these issues. And Justice Kennedy proves decisive by agreeing with one side or the other. In cases implicating those profound questions of personal and collective identity, this 5–4 or 4–1–4 fracture best characterizes the Roberts Court, which is why it is often called the Kennedy Court.[120] It is not merely that the views of the Justices within each block are positively correlated across issue areas. The Justices can, almost without exception,[121] be counted on to agree with the other members of their voting block on all of those issues.[122] As Christopher Eisgruber recently noted with only modest overstatement, "If you tell me where a justice stands on abortion, I can tell you what that justice's position is on affirmative action,

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113. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 88–89 (1993) ("In the political sphere, as in the personal, there are some choices that have what I call identity-defining consequences."). Kronman notes,

> [T]hose controversies that happen at any moment to be the most lively and important ones in a community—those with the largest implications for its direction and destiny—often present conflicts among values that reflect incomparable visions of what is most worthy in the community's current practices or future possibilities . . . .

*Id.* at 90.

114. *See* Gonzales v. Carhart, 550 U.S. 124 (2007).

115. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

116. *See* District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

117. *See* Kennedy v. Louisiana, 128 S. Ct. 2641 (2008).

118. *See* Boumediene v. Bush, 128 S. Ct. 2229 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006). *But see* Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., joined by Stevens, J., dissenting).

119. *See* Medellín v. Texas, 128 S. Ct. 1346 (2008); Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006).

120. *See, e.g.*, Erwin Chemerinsky, *When It Matters Most, It Is Still the Kennedy Court*, 11 GREEN BAG 2D 427 (2008).

121. *Medellín* and *Sanchez-Llamas* are partial exceptions. *See infra* note 130.

122. I have not included gay rights and the Establishment Clause in the list compiled in the text because the Roberts Court has yet to decide a case in either area. *But see infra* notes 131–136 and accompanying text (discussing the likely views of Chief Justice Roberts and Justice Alito on the subject).

gun control, criminal procedure, federalism and other privacy issues."[123]

Turning to the jurisprudence, Chief Justice Roberts and Justices Scalia, Thomas, and Alito tend to be the most deferential in certain areas of constitutional and statutory law. Consider, for example, recent decisions falling under the general heading of access to courts, including cases that involve standing doctrine[124] and filing deadlines.[125] Consider as well decisions involving government regulation of abortion,[126] eligibility for the death penalty,[127] criminal cases generally,[128] the detention or trial of alleged enemy combatants,[129] and the domestic judicial enforceability of international law.[130] In those areas, Roberts, Scalia, Thomas, and Alito are accurately characterized as jurists who tend to reject claims of individual rights against the government, while Justices Stevens, Souter, Ginsburg, and Breyer are accurately described as Justices who hold the opposite view.[131]

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123. Adam Liptak, *To Nudge, Shift, or Shove the Court Left*, N.Y. TIMES, Feb. 1, 2009, at WK4. Professor Eisgruber also noted the "surprising amount of ideological coherence on the court over the last 30 years." *Id.*

124. *See* Hein v. Freedom from Religion Found., 551 U.S. 587 (2007); Massachusetts v. EPA, 549 U.S. 497 (2007).

125. *See* Bowles v. Russell, 551 U.S. 205 (2007); *cf.* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (corporate defendant).

126. *See* Gonzales v. Carhart, 550 U.S. 124 (2007).

127. *See* Kennedy v. Louisiana, 128 S. Ct. 2641 (2008); *cf.* Roper v. Simmons, 543 U.S. 551 (2005) (death penalty decision of the Rehnquist Court); Atkins v. Virginia, 536 U.S. 304 (2002) (same).

128. *See* Ward Farnsworth, *Signatures of Ideology: The Case of the Supreme Court's Criminal Docket*, 104 MICH. L. REV. 67, 69 chart 1 (2005) (demonstrating empirically a huge difference in the frequency with which the Justices have voted for the government in non-unanimous criminal cases since 1953).

129. *See* Boumediene v. Bush, 128 S. Ct. 2229 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006). *But see* Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., joined by Stevens, J., dissenting).

130. *See* Medellín v. Texas, 128 S. Ct. 1346 (2008); Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006). *Medellín* and *Sanchez-Llamas* are partial exceptions. In *Medellín*, Justice Stevens concurred in the judgment, expressing great sympathy for the dissenting views of Justices Souter, Ginsburg, and Breyer but voting on the same side as the other group of four. *See* 128 S. Ct. at 1372. In *Sanchez-Llamas*, Justice Ginsburg concurred in the judgment, joining only part of Justice Breyer's dissenting opinion, which Justices Stevens and Souter joined in full. *See* 548 U.S. at 360.

131. The end of the October 2008 Term offered further illustrations. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009) (dividing 5–4 over whether due process required recusal of a state supreme court justice who received extraordinarily large campaign contributions from one of the litigants in a case before him); Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (dividing 5–4 over the pleading requirements of Federal Rule of Civil Procedure 8 in a damages suit against present and former high-ranking federal officials); Herring v. United States, 129 S. Ct. 695 (2009) (dividing 5–4 over the applicability of the exclusionary rule in the context of negligent mistakes by police); Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308 (2009) (dividing 5–4 over whether a prisoner is constitutionally entitled to test DNA evidence post-

Controversies falling under the general heading of gay rights or the separation of church and state should also be included on any list of divisive conflicts that are likely to fracture the Court into identifiable camps. The Roberts Court has yet to render a decision concerning the extent to which the Constitution protects the equality or liberty of homosexuals, but it seems unlikely that Chief Justice Roberts and Justice Alito would have voted with the majority's articulation of individual rights in *Lawrence v. Texas*[132] or *Romer v. Evans*.[133] Likewise, the Roberts Court has yet to render any Establishment Clause decisions, but it seems doubtful that either Chief Justice Roberts or Justice Alito would have found a constitutional violation in, say, either *Van Orden v. Perry*[134] or *McCreary County v. ACLU of Kentucky*.[135] I recognize the problem with using recorded votes to look for evidence of judicial views while using independent judgments about judicial views to predict votes. Nonetheless, those predictions seem accurate.[136]

One should not generalize from the substantial list above, however, because another substantial list cuts in the opposite direction. Consider First Amendment challenges to campaign finance legislation,[137] Second Amendment challenges to gun control laws,[138] Takings Clause

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conviction). In each of those cases, Chief Justice Roberts and Justices Scalia, Thomas, and Alito voted in favor of the position of the government or government officials.

132. 539 U.S. 558 (2003).

133. 517 U.S. 620 (1996).

134. 545 U.S. 677 (2005).

135. 545 U.S. 844 (2005).

136. *Cf., e.g.*, Hein v. Freedom from Religion Found., 551 U.S. 587 (2007) (fracturing 5–4 along familiar ideological lines over whether taxpayers have standing to assert an Establishment Clause claim against Executive Branch actions funded by general appropriations, as opposed to a specific congressional grant). Gay rights may be a closer question. Roberts, for example, offered pro bono legal advice to the gay-rights advocates in *Romer*. *See* Sheryl Gay Stolberg & David D. Kirkpatrick, *Court Nominee Advised Group on Gay Rights*, N.Y. TIMES, Aug. 5, 2005, at A1.

137. *See, e.g.*, Davis v. Fed. Election Comm'n, 128 S. Ct. 2759 (2008); Fed. Election Comm'n v. Wisc. Right to Life, Inc., 551 U.S. 449 (2007); *see also* Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994–2000*, 48 UCLA L. REV. 1191, 1198 (2001) ("[W]e can no longer assume that the Left generally sides with speakers and the Right with the government. . . . Many of the strongest libertarian voices in favor of free speech rights and against government power now come from conservatives at least as much as from liberals."). Accordingly, it is not clear why political scientists code a vote in favor of a First Amendment claim as "liberal" and a vote against as "conservative." *See, e.g.*, Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559 (1989) ("Liberal statements include . . . those ascribing support for . . . the individual against the government in . . . First Amendment cases."). That problem has been recognized and rectified by legal scholarship that uses some of the methods of modern political science. *See* Ringhand, *supra* note 103, at 56–57; Lori A. Ringhand, *The Rehnquist Court: A "By-the-Numbers" Retrospective*, 9 U. PA. J. CONST. L. 1033, 1041–42 (2007).

138. *See* District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

challenges to assertions of the power of eminent domain,[139] equal protection challenges to the use of affirmative action in various settings,[140] equal protection challenges to race-conscious student assignment plans,[141] challenges to the permissible scope of federal laws aimed at protecting the environment,[142] and all of the ways in which the Rehnquist Court restricted congressional power in the name of federalism.[143] In litigation involving those issues, Chief Justice Roberts and Justices Scalia, Thomas, and Alito are characteristically solicitous of the interests of individual claimants who contest government action.[144] *District of Columbia v. Heller* exactly exempli-

139. *See* Kelo v. City of New London, 545 U.S. 469 (2005).

140. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (law school admissions); Gratz v. Bollinger, 539 U.S. 244 (2003) (university admissions); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (government contracting). Those decisions, as well as *Kelo*, came down before Chief Justice Roberts and Justice Alito joined the Court. One can object on that ground to my inclusion of those decisions, but the strength of such an objection would turn on the likelihood that either Roberts or Alito would have voted differently from Chief Justice Rehnquist and Justices Scalia and Thomas in any of those cases. I have included those decisions because I find such a scenario unlikely. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality opinion of Roberts, C.J.) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."); Adam Liptak, *Issue of Property Rights Is Likely to Arise in Sotomayor's Confirmation Hearings*, N.Y. TIMES, June 15, 2009, at A13 ("Without quite saying *Kelo* had been incorrectly decided, both [Roberts and Alito], at the time federal appeals court judges, spoke at length [during their confirmation hearings] about their doubts concerning its wisdom and consequences.").

141. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007). For reasons that I have identified elsewhere, race-conscious student assignment plans are not properly described as affirmative action programs. *See* Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781, 835–38 (2006).

142. *See, e.g.*, Rapanos v. United States, 547 U.S. 715 (2006).

143. The Court restricted federal power under the Commerce Clause, the Tenth Amendment, the Eleventh Amendment, and Section Five of the Fourteenth Amendment. Those cases were decided before Roberts and Alito joined the Court, but there is every reason to believe that they agree with the judicially enforced limits on federal power that the Rehnquist Court imposed. For a discussion and case citations, see Neil S. Siegel, Dole*'s Future: A Strategic Analysis*, 16 SUP. CT. ECON. REV. 165 (2008).

144. For an illustration from the end of the October 2008 Term, see Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (dividing 5–4 over whether a city violated Title VII by discarding the results of an exam used to identify firefighters best qualified to fill vacant lieutenant and captain positions when the results of the exam showed that white candidates had significantly outperformed minority candidates). Moreover, in *Northwest Austin Municipal Utility District v. Holder*, 129 S. Ct. 2504, 2516–17 (2009), the Court held 8–1 that a small utility district in Texas was eligible to seek relief from the preclearance obligations of § 5 of the Voting Rights Act of 1965 under the "bailout" provision of the statute. 129 S. Ct. at 2516–17. The Court thereby avoided deciding the constitutionality of Congress's twenty-five-year extension of § 5 in 2006. It is almost certainly the case, however, that a decision on the constitutional question would have generated—and may yet generate—a 5–4 ideological split. The Court sent the message that a majority of Justices view § 5 as unconstitutional and that Congress is now on the clock to redraft the statute before the Court strikes it down. *See* Posting of Tom Goldstein to SCOTUSblog, http://www.scotusblog.com/wp/analysis-supreme-court-invalidates-section-5's-coverage-scheme-2/ (June 22,

fies that point. In *Heller*, the Court struck down the District's gun control statute, declaring for the first time in American history that the Second Amendment protects an individual right to possess a firearm, including a handgun, in the home for purposes of self-defense.[145]

The case of the Second Amendment is worth considering more closely. Despite concerted efforts by gun rights advocates to change the authoritative meaning of the Second Amendment in the decades after *Brown v. Board of Education*,[146] Chief Justice Burger stated in 1991 that the individual-rights view of the Second Amendment was "the subject of one of the greatest pieces of fraud, I repeat the word 'fraud,' on the American public by special interest groups that I have ever seen in my lifetime."[147] Similarly, former Solicitor General Erwin Griswold opined in 1990 that "to assert that the Constitution is a barrier to reasonable gun laws, in the face of the unanimous judgment of the federal courts to the contrary, exceeds the limits of principled advocacy."[148] And Judge Bork stated in 1989 that the Amendment "guarantee[s] the right of states to form militia, not for individuals to bear arms."[149] He adjudged state gun control legislation "probably constitutional."[150]

Yet two decades later, the Roberts Court decided *Heller* and the Court fractured ideologically. Something obviously changed to make many Republican jurists more receptive to the National Rifle Association's view of the Second Amendment. Reva Siegel offers a convinc-

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2009, 13:13 EST) ("Though the Supreme Court by a wide margin today formally declined to resolve a challenge to the constitutionality of Section 5, the reality is far different. The decision unambiguously served notice that the Justices are prepared to invalidate the statute as it stands."). In addition, the Court heard reargument in *Citizens United v. FEC*, No. 08-205, on September 9, 2009, after directing the parties "to file supplemental briefs addressing" whether "the Court [should] overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. FEC*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b." Order in Pending Case, No. 08-25 (June 29, 2009), *available at* http://www.supremecourtus.gov/orders/courtorders/062909zr.pdf. The Court could have chosen to decide the case on far narrower grounds. Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito appeared poised to overrule precedent and hold that a key provision of federal campaign finance law violates the First Amendment. On January 21, 2010, as this Article was going to press, those five Justices did just that. *See* Citizens United v. FEC, 130 S. Ct. 876 (2010).

145. District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (holding that the Second Amendment protects an individual right to possess a firearm—including a handgun—unconnected with service in a militia, and to use that firearm for traditionally lawful purposes, such as self-defense within the home).

146. 347 U.S. 483 (1954).

147. Reva B. Siegel, *Dead or Alive: Originalism As Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 224 (2008) (citation omitted).

148. *Id.* (citation omitted).

149. *Id.*

150. *Id.*

ing account of the causal processes that were at work in the interim. She "situates originalism's claim to ground judicial decisionmaking outside of politics in the constitutional politics of the late twentieth century, and demonstrates how *Heller* respects claims and compromises forged in social movement conflict over the right to bear arms in the decades after *Brown*."[151] Current Republican rhetoric that the judges they favor respect the will of the people seems to presuppose that this history never happened. Such rhetoric incorrectly implies that courts, not legislatures, remain the central object of criticism of the Republican Party.[152]

Similar to *Heller* in this regard is *Parents Involved*, the consolidated cases in which families with children in the public school systems of Seattle, Washington and Louisville, Kentucky brought an equal protection challenge to the school districts' use of racial criteria in student assignment plans aimed at promoting racial integration. The plaintiffs in the Seattle case supported their claim to constitutional attention by stressing the "plight of two families" as illustrative of "the consequences of the District's racial classification scheme for many families in Seattle."[153] "Both children," the petitioners explained, "were denied admission" to their first choice of high school "because they were white and consequently were not allowed to enroll in the biotech program" that was "unique" to the school.[154]

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151. Siegel, *supra* note 148, at 192–93. Reva Siegel explains,

> Exploring this social movement history, we learn how, in the wake of *Brown*, citizens made claims on a Second Amendment concerned with law and order and self-defense; how, during the 1980s, a growing coalition of citizens came to assert their convictions about the Second Amendment as the original understanding; and why, by the 1990s, proponents of this law-and-order Second Amendment came to differentiate their claims from those of the modern militia movement, emphasizing that the Second Amendment entitled the citizen to arms needed to defend his family against crime, not against the government.

*Id*. at 194.

152. Professor Siegel captures the tension that many Republican jurists perceived circa 1990:

> In *The Constitution in the Year 2000*, originalism advanced the "social issues" agenda of the New Right by delegitimating rights recognized by the Warren and Burger Courts; orginalism was a tool for criticizing *courts*, not for challenging legislatures. By contrast, the individual rights claim on the Second Amendment was a New Right right, at odds with judicial precedent and in tension with New Right complaints about judicial activism. Its recognition would require a federal bench prepared to advance original understanding as a reason for invalidating *legislative* action.
>
> At the end of the 1980s, the bench and bar still did not see the Second Amendment as authorizing judicial intervention of that kind.

*Id*. at 224.

153. Petitioner's Brief at 7, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (No. 05-908).

154. *Id.* at 7–8.

As noted above, that constitutional attack attracted sufficient support among the Justices to prevail.[155] In a majority opinion joined by Justices Scalia, Kennedy, Thomas, and Alito, Chief Justice Roberts wrote at length about the problems facing young Joshua McDonald, a student in the Louisville school system. "When petitioner Crystal Meredith moved into the school district in August 2002," Roberts explained, "she sought to enroll her son . . . in kindergarten for the 2002–2003 school year. His resides school was only a mile from his new home, but it had no available space."[156] Roberts further explained that the school district assigned Joshua to another school that was ten miles from their home, and Meredith sought to transfer him to the school that was one mile from home.[157] Although "[s]pace was available," Roberts noted that "Joshua's transfer was nonetheless denied because . . . '[t]he transfer would have an adverse effect on desegregation compliance.'"[158] Later, in a part of his opinion that Justice Kennedy declined to join, the Chief Justice concluded that "the school districts have not carried their burden of showing that the ends they seek justify the particular extreme means they have chosen—classifying individual students on the basis of their race and discriminating among them on that basis."[159] *Parents Involved* illustrates that sometimes the Justices most admired in Republican politics empathize[160] with "poor Joshua."[161] Sometimes they are the most eager to trump

155. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

156. *Id.* at 717.

157. *Id.* (citation omitted).

158. *Id.* (citation omitted); *see also id.* at 728 (plurality opinion) ("Joshua McDonald's requested transfer was denied because his race was listed as 'other' rather than black, and allowing the transfer would have had an adverse effect on the racial guideline compliance of Young Elementary, the school he sought to leave." (citation omitted)).

159. *Id.* at 745 (plurality opinion).

160. *See, e.g.*, Ramesh Ponnuru, Op-Ed., *When Judicial Activism Suits the Right*, N.Y. TIMES, June 24, 2009, at A29 ("Conservatives are moved, as well, by their empathy for the Frank Riccis of the world. When President Obama has talked about empathy on the bench, conservatives have responded that, given free rein, it can lead judicial reasoning astray. On race, unfortunately, we are illustrating our own point.").

161. I am referring, of course, to these famous words authored by Justice Blackmun:

> Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes . . . , "dutifully recorded these incidents in [their] files." It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about "liberty and justice for all"—that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded. Joshua and his mother, as petitioners here, deserve—but now are denied by this Court—the opportunity to have the facts of their case considered in the light of the constitutional protection that 42 U.S.C. § 1983 is meant to provide.

legislative majorities, even despite longstanding opposition—framed in the language of judicial deference—to court-ordered racial integration.[162]

I am not endeavoring to be exhaustive in my case citations or discussions of different areas of law. Nor, obviously, am I attempting to employ quantitative techniques and ensure a representative sample, which presents its own promises and problems, and in any event, is unnecessary for my purposes.[163] But I cannot fairly be charged with cherry picking cases or doctrinal categories that support my general points. One commentator who does not share my constitutional commitments has come to a similar conclusion, rejecting "the widespread myth that the defining difference between liberal and conservative justices is that the former support 'individual rights' and 'civil liberties,' while the latter routinely defer to government assertions of authority."[164] Moreover, empirical studies have generated similar results.[165]

There are numerous and significant instances in which Chief Justice Roberts and Justices Scalia, Thomas, and Alito use the power of judicial review to protect individual rights or to invalidate federal laws in the name of federalism, and in which Justices Stevens, Souter, Ginsburg, and Breyer do not. To reiterate, the former group of Justices

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DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting) (citation omitted).

162. *See, e.g.*, *supra* notes 16–19 and accompanying text (discussing Richard Nixon's stated reason for opposing busing pursuant to desegregation decrees); Milliken v. Bradley, 418 U.S. 717, 741–42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process" (citation omitted)). For a discussion of the deference logic that used to be employed to limit school desegregation, see Siegel, *supra* note 141, at 824–25, 841–43.

163. I particularly want to avoid the problem of according the same weight to each decision of the Court. It makes scant sense to "count" a *Parents Involved*, a *Heller*, or a *Carhart* as worth the same as any other decision of the Court.

164. David E. Bernstein, *Liberals, Conservatives, and Individual Rights*, CATO, June 27, 2008, http://www.cato.org/pub_display.php?pub_id=9511; *see id.* ("There are many ideological differences between the conservative and liberal justices on the Supreme Court. But a consistent, stronger liberal devotion to supporting individual rights and civil liberties against assertions of government power isn't one of them."). Professor Bernstein does not appear to register the extent to which Republican political rhetoric is responsible for the myth that he correctly rejects.

165. Professor Ringhand summarizes the results of one of her careful studies:

> [T]he interesting difference between the Court's "liberal" and "conservative" justices is not whether they used their power of judicial review "actively" but *how* they used that power. Liberal justices used the power of judicial review to protect certain First Amendment rights, certain civil rights, and the rights of criminal defendants; conservative justices used the same power to protect other First Amendment rights, other civil rights, and states' rights.

Ringhand, *supra* note 103, at 45–46 (footnote omitted).

has, among other things, rejected congressional efforts to regulate the influence of individual or corporate wealth on the political process, breathed new doctrinal life into the Second Amendment, and insisted on near or total colorblindness in race cases no matter what the purposes, effects, or dominant social meanings of the classifications at issue.[166] It seems difficult to sustain the notion that, as a general matter, those four Justices typically defer to the government or tend to have a limited view of the role of courts in vindicating individual rights.[167] As Thomas Keck concludes in his study, "Contemporary judicial conservatism is a rights-based conservatism,"[168] and yet "we still tend to associate judicial restraint arguments with conservatives."[169] In substantial part, this may be because "constitutional conservatives continue to emphasize the long-standing critique of 'government by judiciary,'" even though "their primary concern is more often with liberalism than with judicial power."[170]

The key question, in other words, is not why one group of justices characteristically defers to the government while the other does not.[171] Rather, the question is why each practices judicial deference when it does. That is, supporters of each group bear the burden of justifying which individual rights it would protect and which limits on federal power it would impose. Republicans and Democrats alike must confront that question. But after decades of Republican rhetoric about the need for judicial deference to legislative majorities, Republicans may face difficulties, or at least a degree of awkwardness, in defending rulings against the government that liberals do not face.[172]

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166. *But see* Johnson v. California, 543 U.S. 499, 524–50 (2005) (Thomas, J., joined by Scalia, J., dissenting) (deferring to a state policy of routinely segregating prisoners based on their race).

167. *See, e.g.*, Ponnuru, *supra* note 160 ("Judicial restraint has also been absent [in the opinions of the conservative Justices in affirmative action cases].").

168. KECK, *supra* note 13, at 286.

169. *Id.* at 288.

170. *Id.* at 289.

171. Other scholars have documented the existence of distinct kinds of judicial deference—namely, deference to Congress versus deference to state and local governments. On the Rehnquist Court, "[a]lthough the liberal justices invalidated more state laws than did the conservative justices, the conservatives were much more willing to invalidate federal laws and to overturn precedents than were their liberal counterparts." Ringhand, *supra* note 103, at 67; *see* Paul Gewirtz & Chad Golder, Op-Ed., *So Who Are the Activists?*, N.Y. TIMES, July 6, 2005, at A19. As Professor Ringhand suggests in the above quotation, one could also define judicial deference or assertiveness in terms of attitudes toward stare decisis. I do not explore the question of fidelity to precedent here because Republican politicians have not emphasized the issue.

172. Judge Posner provocatively writes,

> The true springs of the *Heller* decision must be sought elsewhere than in the majority's declared commitment to originalism. The idea behind the decision—it is not articulated, of course, and perhaps not even consciously held—may simply be that turnabout is fair play. Liberal judges have used loose construction to expand constitutional

Judge J. Harvie Wilkinson's robust and controversial criticism of *Heller* registers the problem in a refreshingly candid way.[173] By contrast, in a recent public interview at Duke Law School, Justice Scalia seemed to revel in the frequency with which he deems himself required to declare government action "stupid but constitutional."[174] He did not mention how often he has felt obliged to declare government action "sensible but unconstitutional." One might call this "the *Heller* problem" for practitioners of the rhetoric of judicial activism.[175]

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> prohibitions beyond any responsible construal of original meaning; and now it is the conservatives' turn.

*See, e.g.*, Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, New Republic, Aug. 27, 2008, at 32, 33.

173. *See* J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 Va. L. Rev. 253, 254 (2009) ("*Heller* encourages Americans to do what conservative jurists warned for years they should not do: bypass the ballot and seek to press their political agenda in the courts."). The title of one response to Wilkinson conveys just how threatening his view of *Heller* is perceived to be in certain circles. *See* Nelson Lund & David B. Kopel, *Unraveling Judicial Restraint: Guns, Abortion, and the Faux Conservatism of J. Harvie Wilkinson, III* (George Mason Univ. Law & Econ. Research Paper Series, Working Paper No. 08-61, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1309714.

174. *See* Justice Antonin Scalia, A Life in the Law: Remarks at Duke University School of Law (Jan. 29, 2009) (partial transcript), *available at* http://www.law.duke.edu/news/story?id=2952&u=11. I do not doubt that Justice Scalia sometimes votes against his personal values, as in certain criminal cases. *See, e.g.*, *supra* notes 105–106 and accompanying text (referring to recent Confrontation Clause and sentencing cases). But on the most divisive issues, the ones that he and others care about most (such as abortion regulations, criminal prohibitions on homosexual sex, bans on gay marriage, capital punishment, the government's prosecution of the war on terror, and public support for religion or endorsement of religion), it does not appear that he views the underlying policies as stupid at all. In *Lawrence v. Texas*, 539 U.S. 558 (2003), for example, Justice Thomas joined Justice Scalia's dissenting opinion, but Scalia conspicuously declined to join Thomas's declaration that "the law before the Court today 'is . . . uncommonly silly.'" *Id.* at 605 (Thomas, J., dissenting) (quoting Griswold v. Connecticut, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting)).

175. Justice Scalia is a frequent and voluble practitioner of the rhetoric of judicial activism in cases in which he opposes a particular exercise of judicial power. In *Lawrence v. Texas*, he stated,

> [T]he Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. . . . What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change.

Lawrence v. Texas, 539 U.S. 558, 602–03 (2003) (Scalia, J., dissenting). In *Romer v. Evans*, he wrote,

> Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means . . . . This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that "animosity" toward homosexuality is evil.

Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (citation omitted); *see also* United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) ("The virtue of a democratic system . . . is destroyed if the smug assurances of each age are removed from the demo-

### C. Deference: Substantial but Not Strict

One possible objection to my analysis is that I have misdescribed the Republican critique of judicial activism, so that I have dismantled a straw man of my own creation. After all, Republican politicians have never advocated strict judicial deference in the tradition of James Bradley Thayer.[176] At best, it might be suggested, I have been using an imperfect proxy for the sort of failure to defer that warrants the Republican charge of judicial activism—a proxy that renders the phenomenon more empirically tractable at the cost of distorting the phenomenon itself.[177] Few today argue that a decision striking down a law is activist by simple virtue of the fact of invalidation. For example, almost no one criticizes *Brown* as activist, at least not anymore.[178] More charitably construed, then, perhaps the Republican rhetoric of judicial activism condemns judges who fail to show real and substantial deference, although (of course) not strict judicial deference. Spe-

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cratic process and written into the Constitution."). Justice Scalia also appealed to democratic values in *Planned Parenthood v. Casey*:

> [B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting).

176. *See* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 129–30 (1893).

177. For example, Frank Cross and Stefanie Lindquist write,

> A commonly invoked measure of judicial activism is the Court's willingness to invalidate statutes. While this is not a perfect or complete measure of activism, it surely has a rough accuracy, because striking down legislation is a clear flexing of judicial power at the expense of another branch of government. Richard Posner has suggested that he would like to see this metric for activism become "canonical," because it involves courts "acting contrary to the will of the other branches of government." Ernest Young concedes that these are the "most dramatic instances" of judicial activism. Most of the past decisions cited as "activist" involved the invalidation of a statute, whether it be an anti-abortion law in *Roe* or the Violence Against Women Act in *Morrison*. In addition, this measure has the advantages of being ideologically neutral and readily quantifiable and has been used as a proxy in other research.

Frank B. Cross & Stefanie Lindquist, *The Decisional Significance of the Chief Justice*, 154 U. PA. L. REV. 1665, 1701–02 (2006) (footnotes omitted); *see also, e.g.*, Green, *supra* note 2, at 1218 ("[T]he definition of 'judicial activism' as any decision invalidating a statute is popular among quantitative empiricists, largely because such activity is easy to count. In modern times, this definition appears everywhere from political science journals to law reviews to the *New York Times*." (footnotes omitted)).

178. For example, Craig Green writes,

> [A] focus on examples of judicial *review* fails to condemn judicial *activism*, because a key function of post-*Marbury* courts is to invalidate unconstitutional acts. . . . [M]odern analysts find nothing more obvious about activism than that it is bad. If activism meant any statutory overrule, then such antipathy would be largely misplaced.

Green, *supra* note 2, at 1219 (footnote omitted)).

cifically, perhaps Republican politicians have insisted on judicial deference when government is not *clearly* violating the Constitution.[179] That formulation allows room for deference as an independent constitutional value, but not so much room as to swallow the institution of judicial review.

Insisting on substantial but not strict deference, however, does not fill the hole separating Republican rhetoric from Republican practice. For one thing, it is not at all clear that a commitment to judicial deference has much to do with *why* Chief Justice Roberts and Justices Scalia, Thomas, and Alito side with the government when they do.[180] It is not as if they are likely to be personally or politically opposed to, say, restrictive regulations on abortion, governmental displays of religion, capital punishment, and aggressive prosecution of the war on terror. Nor is it likely that they personally or politically approve of aggressive gun control measures, economic development takings, restrictive campaign finance laws, and affirmative action programs. For another thing, Republican politicians are almost certainly incorrect that there were *clear* violations of the Constitution in cases such as *Heller*, *Kelo*, *Grutter*, *Gratz*, *Parents Involved*, and several recent campaign finance cases, as well as numerous federalism cases in which the Rehnquist Court invalidated acts of Congress. If the violations were "clear," why did the Court split 5–4 in most of those cases? Moreover, if the violations were clear, why did constitutional text, original meaning, and precedent play a limited or nonexistent role in many of them?[181] To consider one example, calling the outcome in *Heller*

179. *See, e.g.*, Ponnuru, *supra* note 160 ("Judicial restraint . . . is best understood as a finger on the scales, tipping judges in close cases against invalidating the actions of Congress or state or local governments. To invalidate laws without a strong argument that the Constitution requires doing so is precisely what conservatives usually mean by 'judicial activism.'").

180. *See supra* note 104 (distinguishing a vote for the government from a principled commitment to judicial deference as an independent constitutional value).

181. Notably, Republican politicians and activists have tended to avoid criticizing Justices Scalia and Thomas for reasoning in ways that are methodologically suspect from their own jurisprudential points of view. I note four examples. First, they do not purport to follow the original meaning of the First Amendment in free speech cases. *See, e.g.*, Ringhand, *supra* note 103, at 52–54 ("[O]f the nine First Amendment cases in which Justice Thomas voted to invalidate a federal law and Justice Breyer (the justice with the fewest federal invalidation votes) did not, three involved campaign finance regulation, three involved commercial speech and one involved the Federal Communication Carriers 'must carry' rules for broadcasters—areas not readily implicated under an originalist understanding of the First Amendment." (footnotes omitted)). Second, they ignore the original meaning of the Fourteenth Amendment (and Fifth Amendment) in race cases. *See, e.g.*, Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 92 (2009) (arguing that the basis for Scalia's and Thomas's colorblindness "assertions was and is mysterious—at least for an announced (and proselytizing) Originalist. Not only does the constitutional text say no such thing . . . but the best evidence of the original intentions is that the framers did not intend to constitutionalize a principle of strict colorblindness." (footnotes omitted)). Third,

"clearly" correct, as opposed to merely correct on balance, requires one to explain why the Court and many federal judges got the Second Amendment "clearly" wrong from 1791 until 2008.[182] That is no small task.

As the requirement of *clear* error vanishes from the definition of judicial activism, the definition itself collapses into another possible way of understanding deference rhetoric. Perhaps Republican politicians have simply been insisting on judicial deference when, but only when, government is not violating the Constitution.[183] To champion deference when government is not violating the Constitution, however, is not to champion deference at all; it is merely to want judges who interpret the Constitution correctly, as opposed to incorrectly. In other words, Republican deference rhetoric then reduces to the assertion that Republicans possess a substantive constitutional vision and want judges to express that vision. That is entirely appropriate; they are entitled to their own constitutional commitments. But when they call what they want "judicial deference," "judicial restraint," or "respect for popular majorities," and when they call deviations from what they want "judicial activism," "government by judiciary," or "judicial usurpation"—when they attack judges in the terms that they do—they are hiding their commitments behind what appears to be a general point about restraint, deference, or judicial role. The packaging is deceptive. It masks substance in process.

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they employed nonoriginalist and nontextualist reasoning in *Heller*. *See* Siegel, *supra* note 138, at 193 ("It is, to say the least, striking that an originalist interpretation of the Second Amendment would treat civic republican understandings of the amendment as antiquated, and refuse to protect the arms a militia needs to defend against tyranny."). Fourth, they are not bound by the text and original understanding of the Eleventh Amendment in state sovereign immunity cases. *See, e.g.*, Posting of Ernest A. Young to http://www.acslaw.org/node/13546 (June 9, 2009, 12:07 EST) (noting that, in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), "Justice Souter's eighty-five-page dissent conclusively demonstrated that this immunity is inconsistent not only with the text of the Eleventh Amendment but also with the Founding Generation's understanding of sovereignty."). Instead, Scalia and Thomas are more likely to be criticized for their entirely principled—although not necessarily correct—opposition to substantive due process limits on large punitive damage awards. *See, e.g.*, Philip Morris USA v. Williams, 549 U.S. 346, 361–62 (2007) (Thomas, J., dissenting); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (Scalia and Thomas, JJ., dissenting); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 598 (Scalia, J., dissenting) (1996). Moreover, Justice Scalia is criticized for voting to protect flag burning under the First Amendment and for rejecting presidential power to indefinitely detain U.S. citizens on U.S. soil as enemy combatants absent suspension of the writ of habeas corpus. *See* Texas v. Johnson, 491 U.S. 397, 398–99 (1989); Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting).

182. *See, e.g.*, United States v. Miller, 307 U.S. 174 (1939).

183. *See, e.g.*, CASS SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 42 (2005) ("When people criticize judges as activist, they mean just this: *The court is not following the right understanding of the Constitution*. To label a decision 'activist' is to label it wrong.").

## IV. Judicial Activism as Legal Infidelity

So perhaps the rhetoric of judicial activism is best understood as having little to do with judicial deference. Perhaps Senator Sessions has captured the best current understanding of this rhetoric. As noted in Part II, Sessions (following Senator Hatch) has been asserting that a judicial activist is "a judge who allows their personal views to override their commitment to the law."[184]

Identifying the Sessions definition of judicial activism, rather than some notion of judicial deference, as key to Republican criticism of judges has the obvious advantage of not requiring Republican politicians to give up anything. Simply asserting, as President George W. Bush did, that "the Constitution means what it says," and equating "what it says" with what Republican politicians say it says, allows them to denounce both a *Roe* and a *Kelo* as "activist" without any sense of internal inconsistency. Likewise, it allows them to praise both a *Carhart* and a *Heller* (or a *Parents Involved*) as the antithesis of "activist," again without any sense of contradiction.

Despite the political utility of (re)defining judicial activists as judges "who allow[ ] their personal views to override their commitment to the law,"[185] the move encounters problems. First, it appears to constitute a shift away from the primary definition of activism that was long used in Republican Party platforms and presidential campaign rhetoric, which, as documented in Part II, decried judicial interference with the political process. That shift may explain why certain prominent and veteran Republican judges reacted to *Heller* with incredulity.[186] With so much water under the bridge, switching definitions now seems to require an explanation to dispel the appearance of opportunism. Either respect for the popular will is highly relevant to the discharge of a judge's responsibilities, or respect for the popular will is not particularly relevant. Selective criticism, both at a given time and over time, leaves the impression that respect for popular majorities is invoked only when government action should be upheld for other reasons, or only when the Democratic Party controls the federal judiciary.[187]

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184. Victor, *supra* note 84, at 37.

185. *Id.*

186. *See generally* Wilkinson, *supra* note 173 and accompanying text; Posner, *supra* note 172 and accompanying text (discussing the *Heller* decision).

187. *See, e.g.*, Friedman, *supra* note 15, at 343–346 (observing that over the past decade or so "a surprising number of conservatives suggested that giving up on the idea of restraint altogether might be best for the cause," while "[o]ther conservatives simply adopted a new definition of judicial activism").

Second, and more fundamentally, the asserted antinomy between "personal views" and "the law" presupposes an unsustainably sharp distinction between constitutional politics and constitutional law, particularly concerning the work of the Supreme Court of the United States. It presupposes that the "the law" to which the justices are bound is fixed in advance and awaits mere discovery and application by the jurist, so that a justice can simply put aside "personal views" and apply "the law." But of course that is often not true of the relationship between justices (or anyone else) and the Constitution of the United States. It is widely recognized that the language of the Constitution is often underdeterminate and that various traditional sources of law often do not add up to a clear answer.[188] Robert Bork made this point more than forty years ago.[189]

It is noteworthy to observe in this setting that there appears to be little discernible difference between "personal views" and views of "the law" among the very people who insist on a strict distinction between the two when identifying bad judicial behavior. That much is

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188. For a discussion of the underdeterminacy problem in constitutional adjudication, see generally, for example, Siegel, *supra* note 79. *Cf.* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 74 (1962) ("Judges and lawyers recurrently come to feel that they find law rather than make it. Many otherwise painful problems seem to solve themselves with ease when this feeling envelops people.").

189. Bork wrote,

> [I]t is naive to suppose that the Court's present difficulties could be cured by appointing Justices determined to give the Constitution its "true meaning," to work at "finding the law" instead of reforming society. The possibility implied by those comforting phrases does not exist. Every thoughtful working lawyer has shared the insight expressed by Willy Stark, the Huey Long-like politician in *All the King's Men* and a legal realist if ever there was one. The law, he said, "is like a single-bed blanket on a double bed and three folks in the bed and a cold night. There ain't ever enough blanket to cover the case, no matter how much pulling and hauling . . . ."
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> The question, then, is not whether courts should make law, but how and from what materials. . . .
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> . . . .
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> The primary traditional sources of constitutional law—the materials that courts, lawyers, and scholars usually cite to one another, and that laymen imagine do or should dictate results—are the text of the Constitution, history, and precedent. They often set the outer limits of inquiry, and they sometimes dictate results. But more often these sources suggest that the Court must enter a field and yet do not answer the important questions found there.

Robert H. Bork, *The Supreme Court Needs a New Philosophy,* FORTUNE, Dec. 1968, at 136, 140–41. Bork actually omitted the crucial middle ground between purporting to find the Constitution's "true meaning" on the one hand, and feeling entitled to "reform[ ] society" on the other. *Cf.* Young, *supra* note 182 (noting "the inevitable reality that traditional legal sources like text and precedent do not mandate a clear and solitary 'right answer' in all cases . . . and that politics and policy often influence how judges fill in the gap legal indeterminacy creates," but insisting that "that sort of realistic appraisal of the limits of legal constraint differs significantly from the view that judges should forthrightly embrace a policymaking role").

evident from the irony of President George W. Bush's speech before a highly partisan, adoring audience about the autonomy of law from contemporary political commitments.[190] It is also suggested by the lack of significant distance in the Republican Party, or the Democratic Party for that matter, between what members would like the Constitution to mean regarding abortion, gun rights, gay rights, religion, etc., and what each party contends that the Constitution means. Which "personal views" do each side give up on those issues in the name of fidelity to "the law"? It is the open-endedness of constitutional language and the multiplicity of potentially conflicting sources of constitutional meaning that allow each party to fashion a constitution that substantially reflects the values of its members, at least concerning the issues that Americans care about most.[191]

The pervasive and widely perceived reality of ambiguity and disagreement partially explains why serious people do not call for the impeachment of judges with whom they disagree fundamentally about what the law is. If "the law" is as "clear"[192] as Senator McCain at times suggested during his 2008 presidential campaign, then it makes scant sense for him to count it as a source of pride that he and his fellow Senate Republicans "didn't pretend that [Ginsburg's and Breyer's] disagreements with us were a disqualification from office even though the disagreements were serious and obvious."[193] Why would a senator who takes his own constitutional obligations seriously—as McCain presumably does—vote to confirm a judicial nominee who, in the view of the senator, routinely ignores "the law" even when "the law" is "clear"? Why vote to confirm, as opposed to impeach, a lawless judge?

Lurking in the confirmation practices of the Senate that McCain described may be an implicit recognition that the law is often not clear and that contemporary political commitments partially inform the meaning of the Constitution.[194] The 2000 Republican Platform put the point accurately, even if unwittingly: "We applaud Governor

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190. *See* Press Release, *supra* note 88.

191. *See generally* Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008); Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CAL. L. REV. 1473 (2007). I explore in those pieces why the argument in the text is compatible with—indeed, essential to—the vindication of rule-of-law values. To reject legal determinacy is not to collapse the distinction between law and politics. It is to recognize the political foundations of the rule of law.

192. *See supra* notes 81–82 and accompanying text.

193. Remarks by John McCain on Judicial Philosophy, *supra* note 60.

194. *See id.* ("It is part of the discipline of democracy to respect the roles and responsibilities of each branch of government, and, above all, to respect the verdicts of elections and judgment of the people.").

Bush's pledge to name only judges who have demonstrated that they share his conservative beliefs and respect the Constitution."[195] "Conservative beliefs" partially define for Republican politicians what it means to show "respect for the Constitution," and Republican judges draw from those beliefs in crafting constitutional law.

Accordingly, with respect to legal views that fall within the range of reasonable contemporary disagreement, the Hatch/Sessions charge of "judicial activism" amounts to an epithet for the positions of those with whom one disagrees in a debate about substantive constitutional meaning. If activism concerns whether judges "allow[ ] their personal views to override their commitment to the law," then the activism label merely describes one's view of what the law is not, amidst potentially robust disagreement about what the law is.[196] In that case, it seems best to retire talk of judicial activism and engage the substantive questions directly.[197]

The only ways that I perceive to avoid conflating a charge of judicial activism with substantive disagreement is either to limit the charge to the uncontroversial set of situations when the law is truly clear, or else to conduct a motive analysis. According to the bad-motive interpretation, judicial activists know what the law is but nonetheless refuse to follow it because of their "personal views." That definition of activism, however, seems impossible to apply. How are we to discern what judges really think the law requires of them? More importantly, the definition presumes so much bad faith—indeed, impeachable bad faith—despite pervasive disagreement that it seems difficult to credit.[198] People who believe that the judges with whom they disagree disregard what they know to be the law in order to promote a personal or political agenda may lack sufficient tolerance to be worthy of consultation in crafting a defensible definition of judicial activism.

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195. 2000 Republican Party Platform, *supra* note 42.

196. To be clear, my focus is on how the "activist" label is used in Republican political discourse. My purpose is not to parse the various potential components of "judicial activism" as a concept. For additional conceptions of judicial activism that I do not discuss, see LINDQUIST & CROSS, *supra* note 2, at 29–43; Green, *supra* note 2; William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217 (2002); Young, *supra* note 12, at 1143–45.

197. *See, e.g.*, KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS 39 (2006) ("The label 'activist' turns out to possess exactly the same fault it claims to identify in judges: it is entirely result-oriented. *This is so because the plain meaning of the Constitution does not decide any difficult or controversial cases.*").

198. For example, during the Court's October 2008 Term, the Justices split 5–4 in 29.1% of decided cases and 6–3 in 16.5% of decided cases. In other words, there were at least three dissenters in nearly half of the cases that the Court decided. *See* SCOTUSblog, Decisions by Final Vote—OT08, http://www.scotusblog.com/wp/wp-content/uploads/2009/06/vote2.pdf (last visited Sept. 21, 2009).

## V. What about the Democrats?

A likely objection to my argument is that it lacks evenhandedness. I have singled out Republican politicians for criticism, but Democrats too have long been on both sides of the issue of judicial deference. Compare, for example, the views of supporters of the Warren Court with progressive-era objections to the *Lochner* Court and the deferential posture of the New Deal Court vis-à-vis the federal government.[199] Moreover, during the past decade or so, liberal academics have been spilling ink accusing the Rehnquist and Roberts Courts of judicial activism,[200] so they may also be guilty of using rhetoric that does not match up with the reality of their own basic orientations towards judicial review. In addition, one might disapprove of Democrats who talk the general language of rights and "empathy" but who seemingly apply those concepts overwhelmingly to racial minorities and women, and not, for example, to gun owners, homeowners, fetuses, and white school and job applicants. One might also condemn Democrats who elect to emphasize stare decisis in lieu of defending their constitutional commitments on their own terms.[201] Finally, one might criticize Democrats who avoid discussing the issue of judges because they believe that it is not politically advantageous for them to do so.

I shall briefly consider those five points in the order that I have articulated them. First, my purpose is not to establish that Democrats are more candid or principled than Republicans as a general matter. I neither maintain nor presuppose that Democrats have been consistent

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199. *See, e.g.*, *supra* notes 13–86 and accompanying text.

200. For a collection of such criticism, see Lindquist & Cross, *supra* note 2, at 8–9; Young, *supra* note 12, at 1139–40. For example, Jack Balkin and Sandy Levinson have written that the judicial activism of the Warren Court "has been replaced with one much harsher and more conservative, protecting state governments from civil rights plaintiffs, state officers from federal regulatory mandates, property owners from environmental regulation, and whites from affirmative action." Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045, 1092 (2001).

201. Here is how one of the newest Democrats in Congress discussed abortion during the Roberts hearings, albeit while he was still a moderate Republican:

> I am very seldom a user of charts, but on this one I prepared a chart because it speaks—a little too heavy to lift, but it speaks louder than just—thank you, Senator Grassley. Thirty-eight cases where *Roe* has been taken up, and I don't want to coin any phrases on super precedents. We will leave that to the Supreme Court. But would you think that *Roe* might be a super-duper precedent in light—
>
> [Laughter.]
>
> Chairman SPECTER—of 38 occasions to overrule it?

*Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 145 (2005) (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary).

over time. Second, I am not particularly concerned in this context about how law professors, either liberal or conservative, talk about judges. My focus is on how the individuals who possess the most rhetorical and actual power in our society—namely, national politicians, particularly presidents—have been talking about judges in the present and over the past several decades. It is the president who "tells us stories about ourselves, and in so doing he tells us what sort of people we are, how we are constituted as a community. We take from him not only our policies but our national self-identity."[202] Third, if the case can be made that Democratic politicians have consistently made claims to the effect that "everyone has the same rights," then Democrats deserve criticism for not meaning what they say or else for saying it poorly. The language of rights always implies a theory of rights that will give rights to some and not to others. In the abstract, rights talk is vacuous. Fourth, it seems potentially disingenuous and counterproductive for Democrats who fear legal change from the Roberts Court to emphasize the virtue of fidelity to precedent more than they articulate a constitutional vision that may persuade their fellow Americans.

Most serious of all may be the fifth charge—that Democratic politicians tend to avoid talking about the judicial stakes in national elections because they have made the calculation that they have little to gain and much to lose.[203] For example, throughout the 2008 campaign, then-Senator Obama did not emphasize the likely consequences should Senator McCain win the presidency and nominate a replacement for Justice Stevens, Souter, or Ginsburg. Yet Obama surely knew that the impact on constitutional law could have been enormous. True, a Democratic Senate might have limited some of the options available to McCain. But Chief Justice Roberts and Justices Scalia, Thomas, and Alito nonetheless might have no longer required Justice Kennedy's vote on the issues that most deeply divide the country and the Court.

None of this, however, diminishes the culpability of Republican politicians for relentlessly railing against judicial activism. When one compares the leadership of the Republican Party with the leadership of the Democratic Party, there is a striking difference in the extent to

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202. MARY E. STUCKEY, THE PRESIDENT AS INTERPRETER-IN-CHIEF 1 (1991).

203. The issue of underlying causes—that is, why it appears politically unprofitable for Democratic politicians to talk much about judges—is worthy of examination. Part of the answer may be that the Republican Party wants more from courts these days than does the Democratic Party, so that the issue of judicial selection is more mobilizing for Republicans than for Democrats.

which each decries activist judges. Republican presidents, presidential candidates, and members of Congress regularly condemn government by judiciary, judges who legislate from the bench, judges who impose their personal values on the people, and judges who ignore the clear meaning of the Constitution. Democratic presidents, presidential candidates, and members of Congress do not.[204]

Compare, for example, President George W. Bush's rhetoric documented throughout this inquiry with President Obama's rhetoric when he singled out three judicial qualities in nominating Judge Sotomayor to replace Justice Souter:

> First and foremost is a rigorous intellect—a mastery of the law . . . . Second is a recognition of the limits of the judicial role, an understanding that a judge's job is to interpret, not make, law; to approach decisions without any particular ideology or agenda, but rather a commitment to impartial justice; a respect for precedent and a determination to faithfully apply the law to the facts at hand.
>
> . . . And yet, these qualities alone are insufficient. . . . For as Supreme Court Justice Oliver Wendell Holmes once said, "The life of the law has not been logic; it has been experience." Experience being tested by obstacles and barriers, by hardship and misfortune; experience insisting, persisting, and ultimately overcoming those barriers. It is experience that can give a person a common touch and a sense of compassion; an understanding of how the world works and how ordinary people live. And that is why it is a necessary ingredient in the kind of justice we need on the Supreme Court.[205]

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204. One study found 127 references to "legislating from the bench" in Congress from 1990 to 2006; Republicans made more than 75% of the references. LINDQUIST & CROSS, *supra* note 2, at 19 (citing Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185, 197 (2007)). No doubt, "liberals in Congress have begun to express concern for judicial activism," but "conservative complaints about judicial activism remain predominant." LINDQUIST & CROSS, *supra* note 2, at 20.

205. Press Release, Office of the White House Press Secretary, Remarks by the President in Nominating Judge Sonia Sotomayor to the United States Supreme Court (May 26, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-Nominating-Judge-Sonia-Sotomayor-to-the-United-States-Supreme-Court. Here is the full Holmes quote:

> The life of the law has not been logic: it has been experience. The seed of every new growth within its sphere has been a felt necessity. The form of continuity has been kept up by reasonings purporting to reduce every thing to a logical sequence; but that form is nothing but the evening dress which the new-comer puts on to make itself presentable according to conventional requirements. The important phenomenon is the man underneath it, not the coat; the justice and reasonableness of a decision, not its consistency with previously held views. No one will ever have a truly philosophic mastery over the law who does not habitually consider the forces outside of it which have made it what it is. More than that, he must remember that as it embodies the story of a nation's development through many centuries, the law finds its philosophy not in self-consistency, which it must always fail in so long as it continues to grow, but in history and the nature of human needs.

To be sure, Republican presidents have strongly emphasized Obama's second factor—the difference between interpreting law and making law. But Obama's rhetoric is a far cry from talk of unaccountable, activist judges who legislate from the bench or who insist that "the Constitution means" something other than "what it says."[206] The difference in tone and substance is particularly significant in light of Obama's third factor—personal experience—which actually becomes most relevant when there is not a clear distinction between interpreting law and making law.

The differences between Bush's rhetoric and Obama's rhetoric are typical of the contrasting ways in which Republican politicians and Democratic politicians tend to talk—or not talk—about the subject of judicial activism. One searches the 2008 Democratic Party Platform in vain for any such talk.[207] Likewise, earlier Democratic platforms "did not contain similar objections to judicial activism."[208]

## CONCLUSION

I have sought to destabilize a certain political rhetoric. No matter how much "Republican candidates continue to campaign on a platform of judicial restraint,"[209] it is false to insist that respect for popular majorities or fidelity to the Constitution distinguishes the Republican Party from the Democratic Party. There is too much evidence to the contrary in the actual commitments of the modern Republican Party, in the voting behavior of the Justices who are most admired in the Party, and in the pervasive reality of irreconcilable disagreement that characterizes our heterogeneous constitutional culture.[210] Neither side has a monopoly on deference or fidelity. The real debates are substantive debates about close constitutional questions.

Like Democrats, Republicans should be required to defend their constitutional commitments on their own terms, and not with misleading talk about judicial activism. It may be troubling in a democracy—in a political community that deeply values the accountability of the

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Oliver Wendell Holmes, Jr., Book Notices, 14 AM. L. REV. 233, 234 (1880).

206. *See supra* note 77 and accompanying text (quoting President George W. Bush).

207. *See* DEMOCRATIC NAT'L PARTY, PLATFORM STANDING COMM., RENEWING AMERICA'S PROMISE 54–55, *available at* http://www.presidency.ucsb.edu/papers_pdf/78283.pdf (last visited Sept. 21, 2009).

208. LINDQUIST & CROSS, *supra* note 2, at 18.

209. KECK, *supra* note 13, at 291.

210. For example, Justice Sotomayor was confirmed for a seat on the Court by a "largely party-line vote." Charlie Savage, *Senate Confirms Sotomayor for the Supreme Court*, N.Y. TIMES, Aug. 7, 2009, at A1.

government to the governed—that one of the two major political parties continues to campaign in part based on a conception of the judicial role that it does not in fact possess, and in part based on assertions about the nature of American constitutional law that are not in fact true. This may not be much of a problem for voters who know better, whether they be Democrats or Republicans who accurately apprehend that activism talk really signifies substantive disagreement with particular views on particular issues, and nothing more. But it may be a serious problem for voters who do not know better—specifically, for the large, relatively nonideological middle in America that decides elections.[211] The Court possesses great power because neither party is committed to judicial deference as a general matter and because it is often impossible for the Justices "just" to "follow the law" when executing their responsibilities. Citizens should understand the judicial stakes when they vote for presidents and senators.[212]

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211. *See, e.g.*, MORRIS P. FIORINA ET AL., CULTURE WAR? THE MYTH OF A POLARIZED AMERICA (2006). Fiorina finds significant polarization among political elites but not much polarization among most Americans. *See id.* at 32 ("Public opinion data are far more consistent with the argument that a polarized political class makes voters appear polarized when they are not, than with the argument that a polarized electorate is forcing the political class to take more polarized positions.").

212. The empirical evidence regarding what Americans believe about judicial activism appears mixed. On the one hand, a 2005 survey by the American Bar Association found that 56% of Americans strongly or somewhat believed that judicial activism was a contemporary "crisis," while 46% strongly or somewhat agreed with the assertion that judges were "arrogant, out-of-control and unaccountable." LINDQUIST & CROSS, *supra* note 2, at 10 (citing Martha Neil, *Half of U.S. Sees "Judicial Activism Crisis"*, AMERICAN BAR ASSOCIATION, http://www.abanet.org/journal/ereport/s30survey.html (last visited Jan. 7, 2009)). Lindquist and Cross also document increasing references to judicial activism in major newspapers, as well as books published in the popular press that address the issue. A prominent example is Mark Levin's 2005 *New York Times* bestseller *Men in Black*, which was widely popular despite being "essentially a complaint about decisions with which he disagrees, with no neutral principle to define judicial activism other than his personal vision of the Constitution." LINDQUIST & CROSS, *supra* note 2, at 13 (footnote omitted). Lindquist and Cross conclude that "even though judicial activism is often associated with the Warren Court era, it continues to be a matter of major public concern today." *Id.* at 12.

On the other hand, some evidence suggests a different story about what Americans believe about judicial activism. In the context of the Supreme Court confirmation hearing of Justice Alito, political scientists James Gibson and Gregory Caldeira asked a nationally representative sample some questions about judicial activism. Surprisingly, only 39% of respondents had ever heard of the term. Gibson and Caldeira further found that self-identified Democrats and Republicans were equally likely to approve of judicial activism (40% and 37%, respectively), although Republicans were more likely than Democrats to reject activism (55% to 38%, respectively), which also means that Republicans were less likely than Democrats to report no opinion regarding activism (8% and 22%, respectively). Gibson and Caldeira further found that 34% of self-identified liberals supported judicial activism, as did 36% of self-identified conservatives. Perhaps most importantly, 45% of self-identified centrists had a favorable view of judicial activism. Gibson concluded that "[i]f the findings from this survey are of any guidance, then ideologically focused debates about judicial activism are unlikely to provide advantage to one side or the

I am not suggesting that complete candor and transparency is always a virtue in public political or constitutional argument. We should not desire a politics in which the two parties endlessly fight about "who we are" as a people in the most candid, explicit, and uncompromising fashion. Statesmanship is required to negotiate reasonable, irreconcilable disagreement in a land as diverse as America.[213] But conceding that, it seems difficult to excuse, let alone to justify, the rhetoric of judicial activism on grounds of statesmanship or as otherwise worth the costs. Citizens who do not know the sort of judges for whom they are likely voting may not be pleased with the judges they end up getting. And instrumental considerations aside, there are dignitary harms associated with misleading the public about the nature and function of judicial review. It is wrong to deceive people—and thereby to diminish their apprehension of the governmental institutions under which they live—in the absence of very good reason for doing so.[214]

If the rhetoric of judicial activism can finally be laid to rest, the quality of public debates about the role of courts in American society will likely improve. Perhaps then, the collective focus, particularly during national elections, will be on debating which substantive visions provide the best account of America's living constitutional tradition[215] and can sustain the allegiance of a nation that often divides over the content of its constitutional character.

Of course, whether the Republican Party has any incentive to stop using the rhetoric of judicial activism is an entirely different question. Presumably, the party would have ceased deploying activism talk long ago if it did not possess political force—if it did not appeal to a certain

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other." James L. Gibson, *Americans Quite Tolerant of Activist Judges*, MILLER-MCCUNE, July 16, 2009, http://www.miller-mccune.com/legal_affairs/americans-quite-tolerant-of-activist-judges-1348.

213. For a discussion of the relationship between statesmanship and social solidarity in the context of judging, see generally Siegel, *supra* note 191.

214. I cannot do justice here to the questions of whether, why, and when it matters how political leaders and citizens talk about judges. Nor can I address at a general level of abstraction the question of what qualifies as an appropriate level of honesty and candor in public constitutional argument.

215. For discussions of the idea of a constitutional vision, see, for example, Neil S. Siegel, *"Equal Citizenship Stature": Justice Ginsburg's Constitutional Vision*, 43 NEW ENG. L. REV. 799 (2009) (symposium honoring the jurisprudence of Justice Ruth Bader Ginsburg); Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, *in* THE CONSTITUTION IN 2020, at 25 (J.M. Balkin & Reva B. Siegel eds., 2009). For a discussion of constitutional visions that focuses on the politics of certain transformative presidents, see generally WHITTINGTON, *supra* note 88, at 53–58.

segment of the population whose support the party seeks.[216] Despite a temporary lull in activism rhetoric during the Senate Judiciary Committee's questioning of Judge Sonia Sotomayor,[217] the disconnect between rhetoric and reality shows no signs of approaching the breaking point.[218] For the time being at least, the Republican Party will continue to deserve criticism for distorting public debate by clothing its substantive constitutional vision in the deceptive procedural dress known as the rhetoric of judicial activism.[219]

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216. *See, e.g.*, LINDQUIST & CROSS, *supra* note 2, at 28 ("Judicial activism would not be wielded as a political epithet if it did not have political value.").

217. During the Sotomayor hearing, the Senators on the Judiciary Committee devoted only 2 percent of their total words to the subject of judicial activism, and the Democratic committee members were responsible for 72 percent of that 2 percent. The Republican committee members spent a paltry 362 words on the topic. Yi Zhou, *One Panel, Two Hearings*, N.Y. TIMES, July 19, 2009, at WK3 (reporting the results of a *New York Times* analysis of Senate transcripts).

218. *See, e.g.*, Sessions, *supra* note 85, at 8A ("I don't believe that Judge Sotomayor has the deep-rooted convictions necessary to resist the siren call of judicial activism. She has evoked its mantra too often. As someone who cares deeply about our great heritage of law, I must withhold my consent."); David Stout, *McCain Opposes Sotomayor*, N.Y. TIMES, August 4, 2009, at A14 ("Mr. McCain said he had 'great respect' for the judge but could not accept her 'long public record of judicial activism' . . . ."). The *New York Times* observed,

> During three days of debate on the Senate floor, Republicans labeled Judge Sotomayor a judicial activist, criticizing several of her speeches about foreign law and judicial diversity—including a now-famous line lauding a "wise Latina" judge—as well as her votes in cases involving Second Amendment rights, property rights and a racial discrimination claim brought by white firefighters in New Haven.

Savage, *supra* note 210, at A1.

219. I cannot analyze the Sotomayor hearing here. Among other things, it is worth inquiring why Sotomayor, notwithstanding the popularity of the president at the time and a very favorable composition of the Senate, elected to follow the approach of Chief Justice Roberts and make statements about the nature of constitutional law and the role of a justice that are very difficult to defend intellectually. *See, e.g.*, *supra* note 79. To the extent that Sotomayor, like Roberts, was simply following the path of least resistance to confirmation, a key question is why that is the path of least resistance.