The 2016 Election and the Future of Constitutional Law: The Lessons of 1968

by EARL M. MALTZ*

Introduction

The recent death of Justice Antonin Scalia and the furor surrounding President Obama's effort to have Judge Merrick B. Garland seated as Scalia's replacement has served as a graphic reminder of the influence of presidential politics on the evolution of constitutional doctrine. The backdrop of the dispute over the Garland nomination is a series of politically charged decisions in which the justices have been closely divided along ideological lines. Thus, for example, during the 2014 term, the progressive position was adopted by votes of 5-4 in cases dealing with issues such as same-sex marriage[1] and the procedures for legislative apportionment,[2] while conservatives prevailed in disputes over capital punishment[3] and the rights of immigrants.[4] In recent years, the same sharp divisions have emerged in cases dealing with a variety of other significant constitutional issues as well.[5]

Against this background, if (as seems likely) Judge Garland is not confirmed prior to the upcoming presidential election in November, the outcome of that election will almost certainly have a profound impact on the trajectory of the Court's decisions for years to come. Even if no other justice leaves the Court in the next four years, a Democratic president would almost certainly choose a replacement for Justice Scalia who would join with Justices Stephen G. Breyer, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan to create a majority that would consistently support progressive positions. By contrast, a Republican president would

* Distinguished Professor, Rutgers University School of Law, Camden Campus.

1. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

2. Ariz. State Legislature v. Ariz. Indep. State Redistricting Commission, 135 S. Ct. 2562 (2015).

3. Glossip v. Gross, 135 S. Ct. 2726 (2015).

4. Kerry v. Din, 135 S. Ct. 44 (2015).

5. *See, e.g.*, Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (constitutionality of preclearance requirement of Voting Rights Act of 1965).

be much more likely to select a justice who would join the conservative bloc of Chief Justice John G. Roberts, Jr. and Justices Clarence Thomas and Samuel Alito, leaving Justice Anthony M. Kennedy as the swing vote in most cases. Moreover, particularly given the fact that Justices Kennedy, Breyer, and Ginsburg will each be over the age of eighty before the year 2020, the next president might very well have the opportunity to fill other vacancies among the justices, thereby creating an opportunity to further enhance the influence of either progressives or conservatives in cases dealing with issues such as campaign finance regulations,[6] abortion,[7] and race-based affirmative action.[8]

Of course, the presidential election of 2016 will not be the first to have had a profound impact on the course of constitutional development. In an era in which formal constraints on judicial decision-making have lost much of their significance and the choice of justices has become openly politicized, such elections almost inevitably have an impact on the evolution of constitutional doctrine. But, among recent presidential contests, the election of 1968 stands out as a particularly significant moment in American constitutional history.

In that election, Republican Richard M. Nixon, who had railed against what he characterized as the progressive excesses of the Warren Court, won a narrow victory over Hubert H. Humphrey, who, on domestic issues, was known as a stalwart of the progressive wing of the Democratic Party. Although Nixon served only slightly more than one full term before resigning in disgrace, he had the opportunity to make four appointments to the Court. These four justices played a crucial role in shaping constitutional doctrines that continue to have significance almost fifty years later.

This article will focus on the impact that the election of 1968 has had on the evolution of constitutional law. The article will begin by discuss the

6. Conservative justices are often hostile to measures that limit contributions to political campaigns. *See, e.g.*, Citizens United v. Fed. Elections Comm'n, 130 S. Ct. 876, 917–925 (Roberts, C.J., concurring); *id.* at 925–29 (Scalia, J., concurring). By contrast, progressive often vote to reject constitutional challenges to such regulations. *See, e.g.*, *id.* at 929–79 (Stevens, J., dissenting).

7. While conservative justices often vote to reject constitutional challenges to state-imposed limits on abortion, progressives are generally hostile to such regulations. *Compare* Gonzalez v. Carhart, 550 U.S. 124, 132–68 (2007) (Kennedy, J.) (rejecting challenge to statute prohibiting "partial birth" abortion) *with id.* at 169–91 (Ginsburg, J., dissenting) (arguing that prohibition was unconstitutional).

8. While conservative justices are generally hostile to race-conscious affirmative action programs, progressive justices almost uniformly find such programs to be constitutionally unobjectionable. *Compare* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 708–48 (2007) (Roberts, C.J.) (striking down race-conscious admission program) *with id.* at 808–68 (Breyer, J., dissenting) (arguing that constitutional challenge should be rejected).

election itself and Nixon's narrow victory over Humphrey. Using the decisions involving the constitutional rights of the poor as an example, the article will then describe the impact of the Nixon victory on the evolution of constitutional doctrine. Finally, the article will discuss the lessons of the experience of 1968 and its aftermath not only for the potential impact of the upcoming presidential election, but also for our understanding of the nature of constitutional law generally.

I. The Presidential Election of 1968[9]

The contest for the presidency in 1968 featured not only Republican Richard M. Nixon and Democrat Hubert H. Humphrey but also George C. Wallace, the candidate of the American Independent Party, who was a vocal supporter of racial segregation. Wallace had great strength in the South and would ultimately carry five states in that region.[10] Nonetheless, from the beginning of the general election campaign, it was clear that either Nixon or Humphrey would ultimately be chosen to be president. Although both had had long experience on the national political stage, Nixon and Humphrey brought very different perspectives to the campaign.

A. Richard Nixon[11]

Richard Milhouse Nixon was born in Yorba Linda, California, on January 9, 1913. He spent his early childhood on a family farm and then moved to Whittier, California, where his father opened a gas station and grocery store. After graduating from Whittier College in 1934 and Duke Law School in 1937, Nixon practiced law in both Whittier and La Habra, California. After the outbreak of World War II, Nixon moved to Washington, D. C., where he worked at the Office of Price Administration until entering the Navy in August, 1942. While in the military, Nixon rose to the rank of lieutenant commander before resigning his commission in 1946. The same year, he was elected to Congress as a Republican, serving two terms in the House of Representatives and gaining national recognition as a staunch anti-Communist for his role in the investigation of Alger Hiss.

9. MICHAEL NELSON, RESILIENT AMERICA: ELECTING NIXON IN 1968, CHANNELING DISSENT AND DIVIDING GOVERNMENT (University Press of Kansas 2014) (providing a detailed account of the presidential election of 1968).

10. *See* John Woolley & Gerhard Peters, *Election of 1968*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/showelection.php?year=1968 (last visited July 31, 2015) [hereinafter *Election of 1968*].

11. Richard Nixon has been the subject of numerous biographies. *See, e.g.*, HERBERT S. PARMET, RICHARD M. NIXON: AN AMERICAN ENIGMA (Pearson 2008); CONRAD M. BLACK, THE INVINCIBLE QUEST: THE LIFE OF RICHARD MILHOUS NIXON (McClelland & Stewart 2007).

Nixon continued his vociferous campaign against what he saw as the Communist threat after being elected to the Senate from California in 1950.

In 1952, Nixon was elected to serve as Vice President under Republican Dwight D. Eisenhower. Nixon served two terms in that position before losing an extremely close contest to John F. Kennedy in the presidential election of 1960. Two years later, he was the Republican nominee in the race for governor of California, but once again was defeated.

After his 1962 defeat, many believed that Nixon's political career was over. However, he returned with a vengeance in 1968, fending off challenges from both more liberal and more conservative opponents and receiving the Republican nomination for President at the convention that was held in Miami Beach, Florida in early August, 1968.[12] At Nixon's behest, the convention chose Maryland Governor Spiro T. Agnew of Maryland as the Republican candidate for Vice-President.

In the general election campaign that followed, Nixon consistently sought to portray himself as both a champion of law and order and a defender of the traditional values that socially conservative Americans perceived as being under assault from what was becoming known as the "counter-culture." One of the most prominent targets of Nixon's attacks was what he described as the "judicial activism" of the Warren Court, particularly those decisions that expanded the rights of criminal defendants.[13] Simultaneously, while seeking to appeal to Southern whites by criticizing the overzealous efforts of the Johnson administration to integrate schools in the South through mandated transportation of students away from their neighborhood schools, Nixon voiced approval of the school desegregation decisions that had been issued by the Supreme Court itself.[14]

B. Hubert Humphrey[15]

Hubert Horatio Humphrey was born in Wallace, South Dakota, on May 27, 1911, the son of a pharmacist who was also an active participant in local politics. Humphrey graduated from the University of Minnesota in 1937. After receiving his master's degree from Louisiana State University,

12. PBS.ORG, *The Election of 1968*, http://www.pbs.org/johngardner/chapters/5a.html (last visited July 21, 2015).

13. *See, e.g.*, *Nixon Links Court to Rise in Crime*, N.Y. TIMES, May 31, 1968, at 18.

14. *See, e.g.*, *Muskie Considers Nixon Misleading*, N.Y. TIMES, Sept. 13, 1968, at 50.

15. Biographies of Hubert Humphrey include: CHARLES L. GARRETSON III, HUBERT H. HUMPHREY: THE POLITICS OF JOY (Transaction Publishers 1993) and CARL SOLBERG, HUBERT HUMPHREY: A BIOGRAPHY (W.W. Norton & Co. Inc. 1st ed. 1984).

Humphrey returned to the University of Minnesota as an instructor and doctoral student in 1943 before serving as a Professor of Political Science at Macalester College in St. Paul, Minnesota, from 1943 to 1944.

Humphrey quickly left academia to pursue a career in politics. In 1943, he made his first attempt to secure elective office, but was defeated as the Democratic candidate for Mayor of Minneapolis. Soon thereafter, Humphrey played a key role in effectuating the merger of the Democratic and Farmer Labor parties in Minnesota. After being elected under the Democratic Farmer Labor ("DFL") banner, he served as mayor of Minneapolis from 1945 through 1948. In 1947, he also became one of the founders of the Americans for Democratic Action, a progressive anticommunist organization

Humphrey came to national prominence by virtue of his role in a debate over the issue of civil rights at the Democratic National Convention that was held in Philadelphia in 1948. At the convention, in an effort to avoid antagonizing Southern Democrats, the platform committee drafted a party platform that condemned racial discrimination only in the most general terms.[16] However, after a dramatic speech in which Humphrey declared that the Democratic Party should "get out of the shadow of states' rights and walk forthrightly into the bright sunshine of human rights,"[17] party progressives succeeded in persuading a majority of the convention delegates to abandon the committee plank in favor of much stronger language that endorsed the specific recommendations of the 1946 Commission on Civil Rights that had been created by President Harry S. Truman. In response, the delegates from the Southern states walked out of the convention.[18]

The same year that he made his convention speech, Humphrey was elected to represent Minnesota in the United States Senate, where he would serve for sixteen years. In the Senate, he established a reputation as one of the leading proponents of civil rights and other progressive causes. While serving as majority whip, he was one of the principal authors of the Civil Rights Act of 1964 and played a major role in engineering the passage of the statute.[19] After failing to secure the Democratic presidential

16. The Associated Press, *Truman Sets Feb. 1 As 'Freedom Day,'* N.Y. TIMES, July 1, 1948, at 1.

17. *Hubert H. Humphrey: 1948 Democratic National Convention Address*, AMERICAN RHETORIC: TOP 100 SPEECHES, http://www.americanrhetoric.com/speeches/huberthumphrey 1948dnc.html (last visited July 21, 2015).

18. John Woolley & Gerhard Peters, *Democratic Party Platform of 1948*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/index.php?pid=29599 (last visited July 21, 2015).

19. N.Y. TIMES, Jan. 14, 1978, at 1.

nomination in 1960, Humphrey left the Senate in 1964 and was elected Vice President on the Democratic ticket headed by Lyndon Baines Johnson. Johnson subsequently won a landslide victory in the presidential election.

At the beginning of 1968, most would have predicted that in the election to be contested in November of that year, Humphrey would once again be the vice presidential candidate of the Democratic party. But such predictions did not adequately reckon with the impact of the deep divisions in the party that had been engendered by the Vietnam War. After a strong showing by antiwar candidate Eugene McCarthy in the New Hampshire primary that was held on March 12, 1968, Robert F. Kennedy entered the race for the Democratic presidential nomination. Against this backdrop, on March 31, Johnson withdrew from the race. On April 27, Humphrey announced that he too would seek the Democratic nomination. This initially created an intense, three-way struggle in which Humphrey was seen as the candidate of the party establishment, while McCarthy and Kennedy vied for the support of Democratic insurgents. Events took an even more shocking turn on June 5 when, shortly after midnight, Kennedy was assassinated as he left a party celebrating his victory over McCarthy in the California primary that had been held the day before.[20]

These events formed the backdrop for proceedings of the Democratic National Convention that convened in Chicago, Illinois on August 26, 1968. The convention itself was a tumultuous affair marked by bitter exchanges between members of competing factions within the hall and violent clashes between police officers and antiwar demonstrators on the streets of Chicago more generally. Against this background, on August 28 a majority of the delegates chose Humphrey to be the Democratic candidate for President on the first ballot. The following day, Democratic Sen. Edmond Muskie of Maine was selected as his running mate.[21]

While eventually seeking to distance himself from the Johnson administration on the issue of the Vietnam War, on domestic issues Humphrey remained firmly committed to the defense of the actions taken by the administration. Unlike Nixon, he unabashedly championed the progressive social policies embodied in the Civil Rights Act of 1964 and the Voting Rights Act of 1965, as well as the other elements of the Great Society programs that had been enacted during Johnson's tenure in office.[22]

20. PBS.ORG, *supra* note 12.

21. *Id.*

22. *See, e.g.*, Max Frankel, *Humphrey Terms Campaign A Poll on Human Rights*, N.Y. TIMES, Sept. 9, 1968, at 1.

In short, on this point, the distinctions between Humphrey and Nixon could hardly have been starker.

C. The Campaign

Initially, Nixon was the heavy favorite to prevail in the presidential election over both Humphrey and Wallace. Polls taken soon after the Democratic convention showed Humphrey trailing Nixon by a double-digit margin among likely voters.[23] But as the election approached, Humphrey began to close the gap. Thus, a poll published less than one week before the election was to be held found the two leading candidates to be in a virtual dead heat.[24]

Ultimately, however, Nixon prevailed, receiving slightly more than forty-three percent of the popular vote, while Humphrey received slightly less than forty-three percent of the votes that were cast. More importantly, the returns entitled Nixon to receive 301 votes in the Electoral College, leaving Humphrey with only 191 and Wallace with 46. A shift of less than 300,000 votes out of the more than 73 million that were cast would have been enough to provide Humphrey with a majority of the electoral votes.[25] However, the narrowness of Nixon's margin of victory made little difference to the effect of his triumph on the evolution of constitutional law.

II. The Nixon Appointees

The significance of Nixon's victory for the development of constitutional doctrine can hardly be overestimated. During his first term in office, Nixon was given the opportunity to dramatically reshape the composition of the Supreme Court. In part, this opportunity arose from what might be described as normal attrition. Thus, both John Marshall Harlan and Hugo L. Black left the Court at the end of their lives in 1971. But in addition, the extent of Nixon's influence on the trajectory of constitutional law was enhanced by idiosyncratic events over which he had no control.

Ironically, one of these events was triggered by the fear of an impending victory by Nixon in the presidential election itself. In an effort to ensure that his successor as Chief Justice would be chosen by Lyndon Johnson rather than Nixon, Earl Warren resigned his post on June 13, 1968, with the proviso that the resignation would become effective only after a

23. WASH. POST, Sept. 15, 1968, at A2.

24. WASH. POST, Nov. 4, 1968, at A1.

25. *Election of 1968*, *supra* note 10.

new Chief Justice was confirmed.[26] However, this stratagem failed to produce the desired result in substantial measure because Johnson chose Associate Justice Abe Fortas to succeed Warren and Judge Homer Thornberry of the United States Court of Appeals for the Fifth Circuit to fill the seat that would be vacated if Fortas were elevated.

Almost any identifiably progressive nominee would have faced opposition from people dissatisfied with the orientation of Warren Court jurisprudence. Nonetheless, in some important respects, Fortas proved to be a uniquely vulnerable choice. First, as a sitting justice, he had a voting record on cases involving issues such as criminal procedure and obscenity, and this record presented easily identified specific targets on which the opposition could focus. Second, some aspects of Fortas's nonjudicial activities raised significant ethical concerns. Against this background, Johnson and his supporters were unable to muster the support necessary to break a filibuster against the nomination.[27] The following year, in the face of new allegations of ethical improprieties, Fortas was forced to leave the Court entirely.[28]

As a result of the resignations of Warren and Fortas, Nixon was given the opportunity to fill a total of four seats on the Court during his first term in office. Ultimately, these seats were filled by Chief Justice Warren E. Burger and Justices Harry Blackmun, Lewis F. Powell, Jr. and William H. Rehnquist. As Kevin J. McMahon has demonstrated, Nixon did not make any concerted effort to find the most conservative nominees available.[29] Thus, his selections were not uniformly hostile to all constitutional arguments generally associated with progressive jurisprudence.[30] Nonetheless, because progressives were effectively excluded from consideration, Nixon's choices ultimately played a crucial role in the rejection of progressive arguments in a wide variety of cases. The evolution of the law dealing with the rights of the poor provides a classic

26. Artemis Ward, *An Extraconstitutional Arrangement: Lyndon Johnson and the Fall of the Warren Court*, 2 WHITE HOUSE STUDIES 97, 98 (Robert W. Watson ed., 2007).

27. John Massaro, *LBJ and the Fortas Nomination for Chief Justice*, 97 POL. SCI. Q. 603 (1982–83) (discussing the struggle over the Fortas nomination and the refusal of the Senate to confirm him in detail).

28. The circumstances surrounding the Fortas resignation are described in LAURA KALMAN, ABE FORTAS: A BIOGRAPHY (1990) and BRUCE MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE (1988).

29. KEVIN J. MCMAHON, NIXON'S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES (2011).

30. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 691–92 (1973) (Powell, J., concurring in the result) (enhanced scrutiny for sex discrimination); Roe v. Wade, 410 U.S. 113 (1973) (Chief Justice Burger and Justices Blackmun and Powell support strict scrutiny for restrictions on access to abortion).

example of the impact of the Nixon justices on the development of constitutional law.

III. The Nixon Appointees and the Rights of the Poor

A. The Rights of the Poor in Warren Court Jurisprudence

During the Warren era, the Court handed down a number of decisions which seemed to suggest that wealth-based classifications should be considered suspect under the two-tiered approach to equal protection analysis.[31] The first indications that the Court might be moving toward the view that the Equal Protection Clause should be interpreted to require enhanced scrutiny of classifications based on wealth came in the 1963 decision in *Douglas v. California*.[32] In concluding that the state of California was constitutionally required to provide indigent criminal defendants with appointed counsel in appeals as of right, Justice William O. Douglas declared that:

> [T]here is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.[33]

In 1966, speaking for the majority in *Harper v. Virginia Board of Elections*,[34] Douglas focused on discrimination between rich and poor in a quite different context. *Harper* was a challenge to a state requirement that citizens pay a poll tax in order to be eligible to vote. In holding that this requirement violated the Equal Protection Clause, Douglas declared that "wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process"[35] and that "lines drawn on the basis of wealth or property, like those of race are traditionally

31. The basic structure of two-tiered equal protection analysis is described in Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

32. Douglas v. California, 372 U.S. 353 (1963).

33. *Id.* at 357–58.

34. Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).

35. *Id.* at 668.

disfavored."[36] Three years later, speaking for a unanimous Court in *McDonald v. State Board of Election Commissioners*,[37] Chief Justice Warren declared in *dictum* that discrimination based on wealth was a factor "which . . . independently render[s] a classification highly suspect and thereby demand[s] a more exacting judicial scrutiny."[38]

Progressives enthusiastically embraced these decisions and optimistically looked to a future in which they hoped that the Court would invoke the Constitution to provide even greater protection for the interests of the least wealthy Americans.[39] However, even before the decision in *McDonald* was handed down, the presidential election of 1968 set in motion a series of events that would ultimately prove these hopes to be unfounded.

B. The Nixon Appointees and the Rights of the Poor

Even after the arrival of Warren Burger and Harry Blackmun, the Court initially continued to expand the scope of constitutional protections for the rights of indigents. The 1971 decision in *Boddie v. Connecticut*[40] was the first case in which the Court invoked the Fourteenth Amendment to invalidate the requirement that a fee be paid to initiate a civil action. *Boddie* was a challenge to a Connecticut statute that required a person seeking a divorce to pay a fee that averaged fifty dollars in order to have his petition adjudicated. With only Justice Black dissenting, the *Boddie* Court held that the state of Connecticut could not constitutionally require an indigent who was seeking a divorce to pay the fee. But while Justices Douglas and Brennan would have relied on the same equal protection analysis that had animated *Douglas* and *Harper*,[41] Justice Harlan's majority opinion relied instead on the Due Process Clause of the Fourteenth Amendment.

In concluding that the Connecticut fee requirement ran afoul of the Due Process Clause, Harlan—who had dissented in both *Douglas* and *Harper*—explicitly declined to express any view on the question of whether the Constitution protected the right to pursue civil actions

36. *Id*. (citations omitted).

37. McDonald v. Bd. of Election Comm'rs of Chi., 394 U.S. 802 (1969).

38. *Id*. at 807.

39. See Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) for the classic exposition of the progressive view on these issues.

40. Boddie v. Connecticut, 401 U.S. 371 (1971).

41. *Id*. at 383–86 (Douglas, J., concurring in the result); 386–89 (Brennan, J., concurring in part).

generally. Instead, he focused on two specific characteristics of divorce proceedings. First, he noted that divorce involved "the adjustment of [the] fundamental human relationship [of marriage],"[42] which the Court had consistently characterized as an interest "of basic importance in our society."[43] In addition, the majority opinion repeatedly emphasized the fact that the parties were powerless to adjust their marital status without judicial intervention. Against this background, Harlan concluded that the state "[could not] pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so."[44]

The carefully worded opinion in *Boddie* left the status of other constitutional challenges to laws that required the payment of fees uncertain. This uncertainty was resolved in 1973 when the contention that discrimination on the basis of wealth should generally be subject to strict scrutiny was decisively rejected in *United States v. Kras*.[45] *Kras* was a constitutional challenge to a requirement that those seeking a discharge of their debts in bankruptcy pay a fee in order to have their petitions considered by the federal judiciary. Relying heavily on *Boddie*, an indigent petitioner who claimed that he was unable to pay the fee raised both due process and equal protection challenges to the requirement. However, Byron White joined the four Nixon appointees to form a majority that found these claims to be without merit.

Justice Blackmun's majority opinion in *Kras* cited a variety of factors in concluding that the constitutional challenge was without merit. Not surprisingly, much of the opinion focused specifically on the problem of distinguishing *Kras* from *Boddie*. After noting that in the *Boddie* opinion itself Justice Harlan had specifically noted that his analysis was designed to go "'no further than necessary to dispose of the case before us,'"[46] Blackmun emphasized the fact that the Court subsequently had declined to review lower court decisions that had rejected constitutional challenges to the very fees that were at issue in *Kras*.[47] While conceding that "a denial of certiorari normally carries no implication or inference,"[48] Blackmun noted that the denial of certiorari in the cases that he cited had drawn dissents from Justices Black and Douglas, and argued that "the pointed dissents . . . so soon after *Boddie*, and Mr. Justice Harlan's failure to join the dissenters,

42. *Id*. at 383.
43. *Id*. at 376 (citations omitted).
44. *Id*. at 383.
45. United States v. Kras, 409 U.S. 434 (1973).
46. *Id*. at 442 (*quoting Boddie*, 401 U.S. at 382.)
47. *Id*.
48. *Id*. at 443.

surely are not without some significance as to their and the Court's attitude about the application of the *Boddie* principle to bankruptcy fees."[49]

Blackmun then turned to a detailed analysis of what he saw as the substantive differences between *Boddie* and *Kras*. Blackmun asserted that "the *Boddie* appellants' inability to dissolve their marriages seriously impaired their freedom to pursue other protected associational activities."[50] By contrast, he contended that "Kras's alleged interest in the elimination of his debt burden, and in obtaining his desired new start in life, although important and so recognized by the enactment of the Bankruptcy Act, does not rise to the same constitutional level"[51] and that "if Kras is not discharged in bankruptcy, his position will not be materially altered in any constitutional sense. Gaining or not gaining a discharge will effect no change with respect to basic necessities."[52] In addition, the majority opinion emphasized the possibility that, unlike those seeking to end their marriages, a debtor might be able to gain significant relief without benefit of judicial intervention by negotiating with his creditors[53]—a point that was also the focus of Chief Justice Burger's concurring opinion.[54]

Finally, Blackmun noted what he characterized as the insignificance of the burden that the bankruptcy fees imposed on debtors. Observing that the weekly cost of the required fees would be "a sum less than the payments Kras makes on his couch of negligible value in storage, and less than the price of a movie and little more than the cost of a pack or two of cigarettes,"[55] he declared that "if [Kras] really needs and desires that discharge, this much available revenue should be within his able-bodied reach when the adjudication in bankruptcy has stayed collection and has brought to a halt whatever harassment, if any, he may have sustained from creditors."[56]

Justices Douglas, Brennan, Stewart, and Marshall saw no cognizable distinction between the constitutional issues presented by *Boddie* and *Kras* and would have required the government to allow indigents to file for bankruptcy without paying the fee. Stewart asserted that "in the unique situation of the indigent bankrupt, the Government provides the only effective means of his ever being free of these Government-imposed

49. *Id.*
50. Kras, 409 U.S. at 444–45.
51. *Id.* at 445.
52. *Id.*
53. *Id.*
54. *Id.* at 450–51 (Burger, C.J., concurring).
55. *Id.* at 449.
56. *Id.*

obligations"[57] and Douglas contended that the "discrimination in [*Kras*] denies equal protection within our decisions which make particularly 'invidious' discrimination based on wealth or race."[58] However, Marshall's condemnation of the majority opinion was particularly impassioned.[59] He decried Blackmun's reliance on Harlan's vote to deny certiorari in the earlier bankruptcy cases, noting that the vote could have been based on any number of considerations that were independent of Harlan's views on the merits and observing that:

> The point of our use of a discretionary writ is precisely to prohibit that kind of speculation. When we deny certiorari, no one, not even ourselves, should think that the denial indicates a view on the merits of the case. It ill serves judges of the courts throughout the country to tell them, as the majority does today, that in attempting to determine what the law is, they must read, not only the opinions of this Court, but also the thousands of cases in which we annually deny certiorari.[60]

But Marshall was even more irate about Blackmun's suggestion that the payment of the required fee would not create serious hardships for those seeking bankruptcy protection. He complained that:

> It may be easy for some people to think that weekly savings of less than $2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. A sudden illness, for example, may destroy whatever savings they may have accumulated, and by eliminating a sense of security may destroy the incentive to save in the future. A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have—like attempting to provide some comforts for a gravely ill child, as Kras must do.

57. *Id*. at 455 (Stewart, J., dissenting).

58. *Id.* at 458 (Douglas, J., dissenting).

59. *Id*. at 451–57 (Marshall, J., dissenting).

60. *Id.* at 461 (Marshall, J., dissenting).

> It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.[61]

For obvious reasons, progressives were disappointed with the result and majority opinion in *Kras*.[62] The decision was clearly a major setback for those who sought to use the Fifth and Fourteenth Amendments as vehicles to create significant constitutional protection for poor people as a class. But many advocates for the poor were even more dismayed by the Court's disposition of *San Antonio Independent School District v. Rodriguez*.[63]

In *Rodriguez*, the justices were called upon to enter a dispute that some progressives analogized to the struggle to end racial segregation in American schools.[64] The problem arose from the system by which public schools were financed in the United States. While in most cases the state governments themselves provided a significant portion of the funding of the schools through statewide taxes, in almost every state individual school districts were also charged with the obligation of raising much of their own funds through the imposition of taxes levied on real property within the district. As a result, the amount of money available to spend on schools often varied widely between districts depending not only on the rate at which property was taxed but also the value of the property upon which taxes could be imposed.

For many years, this regime went largely unchallenged. However, in the late 1960s, progressives filed a series of lawsuits based on the theory that dramatic differences in spending on education inevitably created differences in educational opportunity between students in rich districts and students in poor districts, and that the resulting inequality violated constitutional norms. In 1971, progressives won a signal victory in

61. *Id*. at 460 (Marshall, J., dissenting).

62. *See Note, The Supreme Court, 1972 Term*, 87 HARV. L. REV. 55, 66 (1973).

63. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). Both the dispute that gave rise to *Rodriguez* and the Supreme Court's treatment of the case are described in detail in PAUL A. SRACIC, *SAN ANTONIO V. RODRIGUEZ* AND THE PURSUIT OF EQUAL EDUCATION (2006). For other perspectives, see, for example, Michael Heise, *The Story of* San Antonio Independent School District v. Rodriguez*: School Finance, Local Control and Constitutional Limits* in MICHAEL OLIVAS and RONNA SCHNEIDER, eds., EDUCATION LAW STORIES (2007) and Richard Schragger, San Antonio v. Rodriguez *and the Legal Geography of School Finance Reform* in MIRIAM GILLES AND RISA GOLUBOFF, eds., CIVIL RIGHTS STORIES (2008).

64. *See* Philip B. Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583 (1968).

Serrano v. Priest,[65] in which the California Supreme Court embraced their position and paved the way for dramatic reform in the manner in which the public schools in the state were financed. The proponents of radical change in the school financing system were further galvanized when a presidential commission formed to study the problem issued a report supporting their position.[66]

The case that ultimately brought the issue to the Supreme Court arose from a challenge to the manner in which the state of Texas financed its public schools. While the Texas system was complicated, one point was clear—the amount of money available to each school district was determined in large measure by the amount of property taxes that were raised in the district, leading to a substantial disparity of resources between property-poor and property-rich districts. The way in which the system operated was illustrated by a comparison between two different school districts, both of which were located in the metropolitan area of San Antonio, Texas.

The Englewood Independent School District, whose population was composed primarily of minority students, was located in the core city of San Antonio. The median family income in the district was $4,681 per year and, because little commercial and industrial property was located there, the assessed property value per pupil was $5,690. As a result, with a tax rate of $1.05 per $100 of value, the total amount of money available to the Englewood district was $356 per pupil. By contrast, families of students in the predominantly Anglo Alamo Heights Independent School District had a median income of $8,001 per year, and the average assessed value of the real property located in the district was $49,000 per pupil. Thus, with a property tax rate of $0.85 per $100 of assessed value, the Alamo Heights district could spend $594 per person.[67]

Those challenging the constitutionality of the Texas system argued that the heavy emphasis on local property taxes violated the Equal Protection Clause. The plaintiffs contended that the constitutionality of the system should be judged by a more stringent standard than the traditional rational basis test for two separate reasons. First, they asserted that the use of the system discriminated against poor residents of Texas on the basis of wealth. Second, they argued that disparities in access to resources inevitably led to inequality in educational opportunity, and that because education should be considered a fundamental right, such disparities should

65. Serrano v. Priest, 483 P.2d 1241 (Cal. 1971).

66. N.Y. TIMES, March 7, 1972, p. 1.

67. *Rodriguez*, 411 U.S. at 12–13.

be subjected to strict scrutiny. Finally, the challengers claimed that, in any event, the Texas system failed to pass even the rational basis test.[68]

These arguments provoked a variety of responses. First, even if one accepted the general proposition that wealth should be considered a suspect classification, it was far from clear that the reliance on local property taxes to finance public education qualified as wealth discrimination; even prior to the Court's consideration of *Rodriguez*, a number of studies had demonstrated that a change to a statewide funding scheme might well put poor students in the inner city at a disadvantage because they lived close to high value commercial and industrial property that was a prolific source of revenue from property taxes.[69] But in any event, the basic idea that wealth should be considered a suspect classification was rejected in *Kras*, which, although argued after *Rodriguez*, was decided before the school finance decision was announced.

By contrast, the argument that education should be considered a fundamental right could claim a more plausible constitutional pedigree. For example, in *Brown v. Board of Education*,[70] Chief Justice Earl Warren had relied in part on the observation that "education . . . is the most important function of state and local governments" to justify his conclusion that the maintenance of racially segregated schools violated the Equal Protection Clause.[71]

Nonetheless, as in *Kras*, the four Nixon appointees formed the core of a five-justice majority that rejected the constitutional challenge in *Rodriguez*. After describing the elements of the Texas school financing system, Justice Powell's majority opinion first addressed the contention that the application of strict scrutiny was appropriate because the system discriminated against some students on the basis of wealth. Powell rejected this argument, noting that, unlike the cases in which the Court had relied on wealth discrimination to raise the level of scrutiny, the Texas system discriminated only against "a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts,"[72] and that this class had none of the traditional "indicia of suspectness."[73] Drawing on the framework

68. *Id*. at 16–17.

69. Stephen R. Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of* Serrano v. Priest *and Its Progeny*, 120 U. PA. L. REV. 504 (1972).

70. Brown v. Board of Education, 347 U.S. 483 (1954).

71. *Id*. at 493.

72. *Rodriguez*, 411 U.S. at 28.

73. *Id*.

developed in the famous *Carolene Products* footnote,[74] he observed that "the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[75]

The majority opinion then turned to the argument that education should be considered a fundamental right. Referencing earlier decisions in which the Court had declined to give special protection to the rights to receive welfare benefits and have access to adequate housing,[76] Powell emphasized the distinction between the "social importance" of a right and the question of whether that right was "explicitly or implicitly guaranteed by the Constitution."[77] He found no such guarantee with respect to the right to a public education, rejecting the contention that that right should be deemed fundamental because education was necessary to the effective exercise of the right to vote and to the exercise of the First Amendment freedom of speech.[78]

Conversely, Powell argued that the specific nature of the issues presented in *Rodriguez* made the use of strict scrutiny particularly inappropriate in that case. In addition to observing that the Court had consistently emphasized the need to defer to legislative judgments on issues of fiscal policy, he noted the complexity of the issues related to public education and implicitly invoked Benjamin Cardozo's principle of "experimental federalism,"[79] averring that, "the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions."[80] Thus, while leaving open the possibility that the Court might take a different view of a case in which public education was *completely* denied to some class of children,[81] Powell concluded that the rational basis test provided the appropriate standard of review in *Rodriguez*. Applying this test, he had no trouble in finding that the Texas system was rationally related to the state interest in assuring a

74. United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

75. *Rodriguez*, 411 U.S. at 28.

76. *Id*. at 32 (*citing* Lindsey v. Normet, 405 U.S. 56 (1972) (housing); Dandridge v. Williams, 397 U.S. 471 (1970) (welfare benefits)).

77. *Id*. at 32.

78. *Id*. at 35–38.

79. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

80. *Rodriguez*, 411 U.S. at 43.

81. *Id*. at 37 (by implication).

basic education for each child in the state while at the same time providing for "a large measure of participation in and control of each district's schools at the local level."[82]

Although he joined Justice Powell's majority opinion, Potter Stewart also filed a separate concurrence, emphasizing his view that, in general, the Equal Protection Clause should not be seen as a vehicle for enforcing fundamental rights.[83] In addition, three separate dissenting opinions were written in *Rodriguez*. Justices Douglas and Brennan joined an opinion by Justice White, which concluded that the Texas system lacked a rational basis.[84] White conceded that a financing system might well be constitutional if it provided a meaningful opportunity for parents to improve their children's education by increasing per pupil expenditures.[85] However, he argued that no such option was realistically available in property-poor districts such as Englewood.[86] Brennan also added a separate opinion[87] contending that education should be considered a fundamental right because, in his view, "there can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association."[88]

In addition to concurring with White, Douglas joined an opinion by Thurgood Marshall, which, like Marshall's opinion in *Kras*, differed markedly in tone from the other two dissents.[89] Marshall emphasized the fundamentality of education for constitutional purposes[90] and criticized the two-tiered approach to equal protection analysis more generally, arguing that the Court should instead adopt a "sliding scale" approach under which the justices would be called upon to make individualized judgments assessing the significance of the particular right at stake and the importance of the state interest served by the challenged classification.[91] But he also complained bitterly that *Rodriguez* was "a retreat from our historic commitment to equality of educational opportunity and an unsupportable acquiescence in a system which deprives children in their earliest years of

82. *Id*. at 49.
83. *Id*. at 59 (Stewart, J., concurring).
84. *Id*. at 63–70 (White, J., dissenting).
85. *Id.* at 64.
86. *Id*. at 64–65.
87. *Id*. at 62–63 (Brennan, J., dissenting).
88. *Id*. at 63.
89. *Id*. at 70–133 (Marshall, J., dissenting).
90. *Id.* at 98.
91. *Id*. at 98–103.

the chance to reach their full potential as citizens"[92] and that, because of the majority's unwillingness to strike down the Texas school financing scheme, "countless children [will] unjustifiably receive inferior educations that 'may affect their hearts and minds in a way unlikely ever to be undone.'"[93]

Despite the holdings in *Kras* and *Rodriguez*, advocates for the poor continued to press constitutional claims in a variety of different contexts.[94] Cases that focused on the intersection between poverty and abortion rights elicited particularly strong reactions from the justices. In 1973, the Court held in *Roe v. Wade*[95] that the right to choose whether or not to bear a child was fundamental for constitutional purposes, and that therefore limitations on access to abortion were permissible only when necessary to serve a compelling governmental interest. Against this background, pro-choice attorneys argued that the government could not constitutionally deny poor women funding for abortions while at the same time providing such funding for the expenses attendant to childbirth when a fetus was carried to term. With the Nixon appointees once again providing critical votes, the Court rejected this contention in *Maher v. Roe*[96] and *Harris v. McRae*.[97]

The majority opinions in *Maher* and *Harris*, respectively, were crafted by Lewis Powell and Potter Stewart, both of whom had joined the majority in *Roe*. Both Powell and Stewart distinguished sharply between government policies that created barriers to abortion access and those policies that facilitated one choice rather than another. Thus, in *Maher*, Powell asserted that "an indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires"[98] and that "the [fact that] indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation."[99] Similarly, in *Harris*, Stewart contended that "[a]lthough the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of

92. *Id.* at 71.

93. *Id.* at 71–72 (citation omitted).

94. *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221 (1981) (Medicaid benefits for institutionalized people with mental illness).

95. Roe v. Wade, 411 U.S. 113 (1973).

96. Maher v. Roe, 434 U.S. 464 (1977).

97. Harris v. McRae, 448 U.S. 297 (1980).

98. *Maher*, 434 U.S. at 474.

99. *Id.*

choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom."[100]

Not surprisingly, the three justices who dissented in *Maher* and the four dissenters in *Harris* saw the situation quite differently. Once again, Thurgood Marshall was particularly passionate in his criticisms of the majority. Chastising Powell for what Marshall described "insensitivity to the human dimension of [the abortion funding] decisions,"[101] he complained that:

> The enactments challenged here brutally coerce poor women to bear children whom society will scorn for every day of their lives. Many thousands of unwanted minority and mixed-race children now spend blighted lives in foster homes, orphanages, and "reform" schools. . . . I am appalled at the ethical bankruptcy of those who preach a "right to life" that means, under present social policies, a bare existence in utter misery for so many poor women and their children.[102]

Brennan's dissent in *Harris* was couched in equally strong language. He asserted that:

> The [statute at issue] is a transparent attempt by the Legislative Branch to impose the political majority's judgment of the morally acceptable and socially desirable preference on a sensitive and intimate decision that the Constitution entrusts to the individual. Worse yet, the Hyde Amendment does not foist that majoritarian viewpoint with equal measure upon everyone in our Nation, rich and poor alike; rather, it imposes that viewpoint only upon that segment of our society which, because of its position of political powerlessness, is least able to defend its privacy rights from the encroachments of state-mandated morality.[103]

100. *Harris*, 448 U.S. at 317–18.

101. Beal v. Doe, 438 U.S. 438, 457 (1977) (Marshall, J., dissenting).

102. *Id.* at 456–57 (citations omitted).

103. *Harris*, 448 U.S. at 332 (Brennan, J., dissenting).

Taken together, the decisions in *Kras*, *Rodriguez*, *Maher* and *Harris* established the proposition that, in general, the Court should not intervene to provide special protection for the interests of the poor as a class, but should instead leave such interests in the hands of other branches of government—a principle that remains firmly ensconced in constitutional doctrine even today.[104] At the same time, if Hubert Humphrey had defeated Nixon in the 1968 election, all of these cases would no doubt have been decided differently. Each case found the Court deeply divided, with the Nixon appointees forming the core of the majority which rejected the constitutional arguments made by progressives on behalf of the poor. By contrast, one can confidently predict that Humphrey would have chosen nominees who shared his own progressive instincts, and would thus have been be inclined to join progressive holdovers William Brennan and Thurgood Marshall to create majorities that were far more receptive to the claims of the poor.

Nor would the impact of a Humphrey victory have been limited to the expansion of constitutional protections for the poor. The votes of the Nixon appointees were crucial in a wide variety of cases in which the Court accepted the legal arguments made by conservatives, including decisions which vindicated the constitutionality of antisodomy laws,[105] allowed states to impose significant restrictions on access to abortions,[106] limited the scope of remedies in school desegregation cases,[107] declined to impose strict scrutiny on gender-based classifications,[108] rejected the claims of criminal defendants,[109] deferred to state regulation of sexually explicit literature[110] and subjected affirmative action plans to stringent constitutional limitations.[111] In each of these contexts, Humphrey appointees would undoubtedly been more sympathetic to progressive arguments. In short, a Humphrey victory in 1968 would almost certainly have led to the creation of a constitutional order, which by modern standards would have been almost unrecognizable.

104. *See, e.g.*, Andy Siegel, *From Bad to Worse: Some Early Speculation About the Roberts Court and the Constitutional Fate of the Poor* 59 S.C. L. REV. 851 (2008) (summarizing caselaw).

105. Bowers v. Hardwick, 476 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 538 (2003).

106. H.L. v. Matheson, 450 U.S. 398 (1981).

107. Milliken v. Bradley, 418 U.S. 717 (1974).

108. Frontiero v. Richardson, 411 U.S. 677 (1973).

109. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984) (search and seizure); Kirby v. Illinois, 406 U.S. 682 (1972) (right to counsel).

110. Miller v. California, 413 U.S. 15 (1973).

111. Wygant v. Jackson Board of Education, 476 U.S. 267 (1986).

Conclusion

The developments of the Burger era provide a clear illustration of the impact that a single presidential election can have on the ideological orientation of constitutional doctrine. The effect of the outcome of the 2016 election may well be no less significant in this regard. To be sure, unlike Richard Nixon, the candidate who is chosen in the upcoming election is unlikely to have the opportunity to select as many as four justices during her first term in office. But, given the current makeup of the Court, even a single appointment might well have a profound effect on the evolution of constitutional law for the foreseeable future.

From this perspective, the debate between those who argue that the decisions of the Supreme Court are based simply on ordinary political concerns and those who insist that the justices are moved largely by distinctively legal considerations is of relatively little practical significance.[112] Even assuming that all of the justices are making a good faith effort to apply "neutral" legal principles,[113] in each case the content of those principles will depend upon the particular legal theory to which the justice subscribes. Conversely, during the selection process, each president will choose nominees who adhere to theories that generate results that are generally consistent with the political perspective of that president. Thus, in essence, the choice of Supreme Court justices becomes a mechanism by which each president can ensure that his own political views will continue to influence policy decisions long after the president himself has left office.

Against this background, if recent history is to be taken as a guide, progressives in particular can be confident that they will be satisfied with the choices made by a Democratic president. Each of the seven appointments made by Democratic presidents since 1962 has enthusiastically embraced the fundamental tenets of progressive constitutionalism, and there is no reason to believe that the behavior of the nominees of a future Democratic president will be any different. Thus, assuming that a Democrat has the opportunity to replace Justice Scalia, one can predict with some certainty that the overall orientation of constitutional jurisprudence will move sharply to the left.

112. For a nuanced discussion of the interaction between ordinary politics and distinctively legal principles in the judicial decision-making process, see MARK V. TUSHNET, IN THE BALANCE: LAW AND POLITICS IN THE ROBERTS COURT (2013).

113. The concept of neutral principles is elaborated in Herbert Wechsler, *Toward Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

By contrast, over the past half-century, the performance of the justices chosen by Republican presidents has proven to be less predictable.[114] However, frustrated by the performance of some recent Republican appointments, the conservatives who dominate the party have become increasingly vocal in demanding that future nominees have demonstrated that they were indeed committed to the tenets of conservative constitutional theory.[115] Thus, one can only assume that any Republican president chosen in 2016 will make every effort to identify candidates with such a commitment, with the ultimate goal of creating a Court dominated by justices who share those values.[116]

In any event, whichever party ultimately prevails in the next election, a recognition of the relationship between the appointments process and the evolution of constitutional doctrine should play a more significant role in academic discussions of constitutional theory generally. Constitutional scholars have been preoccupied with the project of defining the role that judicial review ought to play in the American political system and creating models that they insist will generate decisions that are consistent with that role.[117] Whatever merits these projects might have in purely intellectual terms, they are unlikely to produce a major impact on the development of constitutional doctrine in the real world. Instead, in the post-1968 era, the

114. For example, during the 2003 term of the Supreme Court both John Paul Stevens, who had been appointed by Republican Gerald Ford and Justice David Souter, who had been appointed by Republican George H. W. Bush, were far more likely to be aligned with progressives Ruth Bader Ginsburg and Stephen Breyer than with any of the conservative members of the Court. Note, *The Supreme Court, 2003 Term—The Statistics*, 118 HARV. L. REV. 497, 499 (2004).

115. *See, e.g.*, Howard Kurtz, *Conservative Pundits Packed a Real Punch*, WASH. POST (Oct. 28, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/10/27/AR2005102702240.html (discussing conservative opposition to nomination of Harriet Miers).

116. In at least one important respect, the behavior of such a majority is likely to be somewhat different than it would have been during the Burger era. At the time that Richard Nixon was making his choices for the Court, conservative constitutional theorists such as Robert Bork were emphasizing the need to defer to the decisions of other branches of government. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). In more recent years, by contrast, conservative commentators such as Randy Barnett and Richard Epstein have argued that the Court should intervene more actively in cases involving issues such as property rights and challenges to the scope of federal authority more generally. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION (2014). Thus, a twenty-first century Court dominated by justices who are committed to conservative ideology is likely not only to reject efforts to deploy the Constitution in support of progressive values, but also to invalidate a variety of progressive actions taken by other branches of government.

117. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1981); JOHN O. MCGINNIS AND MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013); LAURENCE H. TRIBE AND MICHAEL C. DORF, ON READING THE CONSTITUTION (1991).

Court's decisions on divisive constitutional issues have clearly become little more than the ghosts of presidencies past, subject only to random contingencies, which are by their nature unpredictable at the time that appointments are made. However uncomfortable this reality might be, we ignore it only at our peril.