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ABSTRACT

The significance of the events of 2016 for the future development of constitutional law has been widely discussed in both scholarly commentaries and the popular press. After the death of Justice Antonin Scalia early in that year, many progressives looked forward hopefully to the prospect of regaining control of the Supreme Court for the first time in almost fifty years. However, after the Senate refused to consider Barack Obama's nomination of Merrick Garland to replace Justice Scalia, the surprise victory of Donald Trump in the presidential election led instead to further consolidation of the conservative dominance of the Court.

Unlike the election of 2016, the impact of the presidential election of 2004 on the evolution of constitutional doctrine has generally been ignored by commentators. In 2004, apparently due in part to the backlash against the drive to obtain legal recognition for same-sex marriages, Republican George W. Bush won a narrow victory over Democrat John Kerry. Bush soon had the opportunity to fill two vacancies on the Court, and both of his choices have in general brought a conservative perspective to the cases that have come before them. If, by contrast, Kerry had been elected in 2004, he would have almost certainly chosen progressives to replace Justices Sandra Day O'Connor and William Rehnquist, giving progressives a majority on the Court that they would still enjoy today.

This article begins by outlining the development of the dispute over same-sex marriage and the apparent relationship between that dispute and the Republican victory in 2004. The article then describes the consequences that that victory has had for the ultimate resolution of a wide variety of constitutional disputes and concludes by discussing the lessons of the election and its aftermath for our understanding of the role that the institution of judicial review has come to play in our political system.

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I. INTRODUCTION

In recent years, the concept of backlash has figured prominently in scholarly commentary on the use of the judiciary to promote social change. Proponents of the backlash thesis argue that judicial decisions designed to advance progressive values can ultimately prove to be counter-productive from the progressive perspective. These commentators observe that the decisions can become focal points that inspire detractors to mobilize political forces that oppose progressive policies and undermine the ability of progressives themselves to create the kind of political consensus that would more effectively advance those policies.[1] Proponents of this perspective insist that progressives should not rely on the judiciary to act as an effective counter-majoritarian force in American society.[2]

Much of the discussion of the concept of backlash has focused on the issue of same-sex marriage. In the wake of the 2003 decision in *Goodridge v. Massachusetts Department of Public Health*,[3] in which the Supreme Judicial Court of Massachusetts concluded that the state constitution required the government to recognize same-sex marriages, Michael Klarman observed that "because [*Goodridge*] was a court decision rather than a reform adopted by voters or popularly elected legislators, critics were able to deride it as the handiwork of 'activist judges' defying the will of the people"[4] and warned that "[b]y outpacing public opinion on issues of social reform, such rulings mobilize opponents, undercut moderates, and retard the cause they purport to advance."[5]

Initially, the political developments that immediately followed the *Goodridge* decision seemed to give some credence to this claim. After the action of the Massachusetts court, those who opposed same-sex marriage once again made strenuous efforts to preserve the traditional conception of marriage by organizing political campaigns aimed at amending state constitutions to enshrine the conception of marriage as a relationship between one man and one woman.[6] Such amendments were adopted in twenty-three

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1. *See, e.g.*, Mark Kende, *Foreword*, 54 DRAKE L. REV. 791, 792 (2006).

2. *See generally* Robert Post & Reva B. Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373 (2007).

3. 798 N.E.2d 941, 969–70 (Mass. 2003).

4. Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 475 (2005) (quoting Elisabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 24, 2004, at A18) (quoting President Bush defending a constitutional amendment banning same-sex marriage because "activist judges" were attempting to redefine marriage in his view).

5. *Id.* at 482.

6. Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728, 1734–35 (2017) [hereinafter *Community in Conflict*].

states between 2004 and 2006.[7] With these events in mind, Gerald N. Rosenberg asserted that the reaction that had been engendered by the state court decisions proved that "[t]he battle for same-sex marriage would have been better served if [supporters of same-sex marriage] had never brought litigation, or had lost their cases."[8]

Even from the perspective of 2006, this assessment overlooked a crucial aspect of the relationship between judicial action and the dynamic of the political conflict over same-sex marriage. Unlike the issue of abortion, where the courts became major players only after the issue had become a matter of intense debate in a number of state legislatures,[9] at the time that state courts entered the fray, the proponents of same-sex marriage were having no success in persuading state legislators to endorse the idea that such relationships should be given legal recognition.[10] As Reva B. Siegel has observed, by raising the profile of the issue, decisions such as *Goodridge* prompted many people to reconsider their views on same-sex marriage and ultimately to create widespread public support for that concept.[11]

Moreover, with respect to the issue of same-sex marriage itself, the practical significance of the backlash against *Goodridge* and related cases proved to be short lived. The political successes of the opponents of same-sex marriage were ultimately undone by the decisions of the Supreme Court of the United States, culminating in the 2015 decision in *Obergefell v. Hodges*,[12] where a majority of the justices concluded that the Fourteenth Amendment required all state governments to recognize same-sex marriages. Thus, if one focused on the issue of same-sex marriage in isolation, he or she would have to conclude that, from a progressive perspective, judicial intervention was an indispensable aspect of what ultimately proved to be an almost unqualified success.

However, a very different picture emerges when one places the dispute over same-sex marriage in the context of the development of constitutional law more generally. A number of commentators have concluded that the intense reaction to decisions such as *Goodridge* played a critical role in determining the outcome of the presidential election of 2004, which pitted Democrat John Kerry against Republican George W. Bush.[13] If Kerry had

7. Reva B. Siegel, *The Supreme Court 2012 Term--Foreword: Equality Divided*, 127 HARV. L. REV. 1, 80 n.406 (2013).

8. Gerald N. Rosenberg, *Courting Disaster: Looking for Change in all the Wrong Places*, 54 DRAKE L. REV. 795, 813 (2006).

9. *See, e.g.*, Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2034–52 (2011).

10. *See* William N. Eskridge, Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 291 (2013).

11. *Community in Conflict*, *supra* note 6, at 1746–51.

12. 135 S. Ct. 2584 (2015).

13. *See infra* notes 32–37 and accompanying text.

been triumphant in that election, he would soon have had the opportunity to create a progressive majority on the Supreme Court that would have remained intact even in the face of subsequent conservative appointments such as Neil Gorsuch and Brett Kavanaugh. However, apparently due in substantial measure to the backlash engendered by the effort to legalize same-sex marriage, Bush won the presidency in 2004.[14] As a result, when two seats on the Court became open soon after the election, Bush had the opportunity to choose John Roberts and Samuel Alito to fill the vacancies, paving the way for an explosion of conservative activism in a variety of different contexts.

This article is the first to discuss the intricate relationship among the dispute over same-sex marriage, the presidential election of 2004, and the creation of the body of constitutional doctrine that has emerged in the period between that election and today. The article will begin by providing an overview of the evolution of the conflict over same-sex marriage in the late twentieth and early twenty-first centuries.[15] The article will then discuss the 2004 presidential election and the influence of the same-sex marriage debate on the outcome of that election, which provided Bush with the opportunity to appoint Roberts and Alito to replace Chief Justice William Rehnquist and Justice Sandra Day O'Connor.[16] After describing the impact of these appointments on the Court's jurisprudence,[17] the article will conclude by discussing the import of these events for our understanding of the role that the Supreme Court and the institution of judicial review plays in the American political system.[18]

II. THE BATTLE FOR THE RECOGNITION OF SAME-SEX MARRIAGES

The evolution of the dispute over same-sex marriage was a byproduct of the rise of the LGBT rights movement that came to prominence in the late twentieth and early twenty-first centuries.[19] Prior to that time, the idea that such marriages would be legally recognized was unthinkable to most Americans. Thus, in 1972, the Supreme Court concluded that a claim that the

14. *See Community in Conflict*, *supra* note 6, at 1735 (stating that many attributed "President Bush's margin of victory to the marriage debate").

15. *See infra* Part II.

16. *See infra* Parts III–IV.

17. *See infra* Part V.

18. *See infra* Part VI.

19. The relationship between the struggle to gain legal recognition for same-sex marriages and the broader movement for LGBT rights is discussed in detail in MICHAEL KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2014) and Douglas Nejaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and its Relationship to Marriage*, 102 CALIF. L. REV. 87 (2014).

Constitution protected the right of same-sex couples to marry did not even present a substantial federal question,[20] and as late as 1986, in *Bowers v. Hardwick*, the Court held that the Constitution did not prohibit state governments from criminalizing all same-sex sexual relationships.[21]

The proponents of same-sex marriage achieved their first major success in 1993 when the Hawaii Supreme Court held in *Baehr v. Lewin* that, for state constitutional purposes, a statute that gave legal recognition only to opposite sex marriages discriminated against same-sex couples on the basis of sex and thus should be subject to strict scrutiny. [22] Three years later, a lower court judge in Hawaii formally concluded that the existing legal regime was unconstitutional.[23] Similarly, in 1998, an Alaska state court determined that the Alaska constitution required the state to recognize the marriages of same-sex couples.[24]

The backlash against these decisions was swift and intense. In both Hawaii and Alaska, opponents of same-sex marriage mobilized to successfully orchestrate the passage of state constitutional amendments that effectively reversed the relevant court decisions and restored the regime under which only opposite sex unions were entitled to legal recognition.[25] In other states, defenders of the traditional conception of marriage aggressively promoted measures designed to ensure that local state judges would not follow the lead of the *Baehr* court.[26] Moreover, in 1996, Congress adopted the Defense of Marriage Act (DOMA), which defined marriage for purposes of federal law as a union of one man and one woman and also provided that, in other contexts, states could refuse to give legal effect to same-sex unions that had been solemnized in other states.[27]

Against this background, the year 2003 proved to be an inflection point in the ongoing struggle over same-sex marriage. In that year, two landmark decisions presaged a major change in the judicial attitude toward not only same-sex marriage, but also toward LGBT rights more generally. First, in

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20. Baker v. Nelson, 409 U.S. 810 (1972), *overruled by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

21. 478 U.S. 186, 192–95 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

22. 852 P.2d 44, 67 (Haw. 1993), *abrogated by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

23. Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996), *rev'd*, 994 P.2d 566 (Haw. 1999).

24. Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998).

25. Josephine Ross, *Sex, Marriage and History: Analyzing the Continued Resistance to Same Sex Marriage*, 55 SMU L. REV. 1657, 1658–59 (2002); *see also* ALASKA CONST. art. 1, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman.").

26. *See id.* at 1658 n.5.

27. Defense of Marriage Act, Pub. L. No. 104-99, § 2, 110 Stat. 2419 (1996).

Lawrence v. Texas, the Supreme Court voted to overrule *Bowers v. Hardwick*, holding that state governments could not criminalize private, consensual, sexual activity between people of the same gender.[28] Although Justice Kennedy's majority opinion in *Lawrence* explicitly disclaimed any intention to express a view on the constitutional issues raised by the debate over same-sex marriage,[29] a number of observers believed that, in the wake of the decision, "the issue [of same-sex marriage] is now seriously in play."[30] Thus, supporters of same-sex marriage characterized *Lawrence* as "a tremendous tool moving forward,"[31] which "gave the gay rights movement new credibility in debates about marriage."[32] Conversely, one opponent of same-sex marriage observed that he and like-minded individuals "will be asking how they can protect life as they know it, rather than life as the Supreme Court tells them it is going to be."[33]

Less than five months after *Lawrence* was decided, the supporters of same-sex marriage received another major boost with the decision in *Goodridge v. Massachusetts Department of Public Health*.[34] During the decade between the decisions in *Baehr* and *Lawrence*, advocates for LGBT rights had made little headway in their efforts to have same-sex marriages recognized by state governments. However, in *Goodridge*, the Supreme Judicial Court of Massachusetts concluded that the state constitution required the government to recognize such marriages.[35]

The reactions to the *Goodridge* decision broke down along predictable lines. On one hand, supporters of same-sex marriage were exultant, characterizing the decision as "a tremendous victory for fairness and families."[36] On the other, critics of the decision not only reiterated their opposition to the concept of same-sex marriage as a matter of policy, but also insisted that the Massachusetts court had usurped the authority of the state legislature.[37] Thus, for example, one commentator insisted that "it is inexcusable for [the Massachusetts] court to force the state legislature to 'fix' its state constitution to make it comport with the pro-homosexual agenda of four court jus-

28. 539 U.S. 558, 577–79 (2003).

29. *Id.* at 578.

30. William Safire, Editorial, *Shutting the Bedroom Door*, PITTSBURGH POST-GAZETTE, July 1, 2003, at 15.

31. Sarah Kershaw, *Adversaries on Gay Rights Vow State-by-State Fight*, N.Y. TIMES, July 6, 2003, § 1, at 8.

32. Dean E. Murphy, *Gays Celebrate, and Plan Campaign for Broader Rights*, N.Y. TIMES, June 27, 2003, at A20.

33. Kershaw, *supra* note 31.

34. 798 N.E.2d 941 (Mass. 2003).

35. *Id.* at 969–70.

36. Pam Belluck, *Marriage by Gays Gains Big Victory in Massachusetts*, N.Y. TIMES, Nov. 19, 2003, at A1.

37. *Id.*

tices."[38] Another commentator declared that "[LGBT] activists have known they're not going to get their way in the legislative arena, and they shopped around for activist judges,"[39] and also asserted that "if the definition of marriage is to be changed, it should be done by the American people, not by four judges in Massachusetts."[40]

But whatever one's view of the merits of *Lawrence* and *Goodridge*, one thing was clear: particularly when considered together, the two decisions had significantly raised the national profile of the debate over legal recognition of same-sex marriages. For example, one observer described *Goodridge* as "pretty close to an earthquake, politically,"[41] and asserted that the decision provided "exactly the right kind of material for a backlash."[42] The accuracy of the latter claim was quickly borne out by subsequent events.

Even before 2003, those who opposed same-sex marriage had advocated the passage of an amendment to the federal constitution that would have prevented the legal recognition of these relationships.[43] In the wake of *Lawrence* and *Goodridge*, the supporters of such an amendment pressed even harder for its adoption.[44] In addition, recognizing the difficulties inherent in securing federal constitutional action, the same groups argued that state constitutions should be amended in a manner designed to prevent judges in those states from following the lead of Massachusetts.[45] In eleven states, voters were called upon to pass on such initiatives in November, 2004.[46] The intense debate over these proposals provided a significant part of the backdrop to the presidential campaign that was underway at the same time these initiatives were being considered.

During the presidential campaign, the Republican party sought to appeal to those who strongly opposed the concept of same-sex marriage in principle.[47] In an apparent reference to decisions such as *Goodridge* and

38. *Id.*

39. Katharine Q. Seelye & Janet Elder, *Strong Support is Found for Ban on Gay Marriage*, N.Y. TIMES, Dec. 21, 2003, § 1, at 1.

40. *Id.*

41. Belluck, *supra* note 36.

42. *Id.*

43. *See, e.g.*, Robert H. Bork, *Stop Courts from Imposing Gay Marriage*, WALL ST. J., Aug. 7, 2001, at A1.

44. *See, e.g.*, Elisabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1.

45. *See, e.g.*, James Dao, *State Action is Pursued on Same-Sex Marriage*, N.Y. TIMES, Feb. 27, 2004, at A24.

46. Joel Roberts, *11 States Ban Same Sex Marriage*, CBS NEWS (Sept. 30, 2004), https://www.cbsnews.com/news/11-states-ban-same-sex-marriage.

47. *See generally* REPUBLICAN NAT'L COMM., 2004 REPUBLICAN PARTY PLATFORM: A SAFER WORLD AND A MORE HELPFUL AMERICA (2004), https://www.cbsnews.com/htdocs/pdf/GOP2004platform.pdf.

Baehr, the Republican platform complained that "a few judges and local authorities are presuming to change the most fundamental institution of civilization, the union of a man and a woman in marriage."[48] The platform also called for the adoption of a federal constitutional amendment that would permanently limit the legal definition of marriage to a union between one man and one woman—a proposal that was also endorsed by Republican candidate George W. Bush.[49]

By contrast, the Democratic party sought to stake out a middle ground on the same-sex marriage issue. While declaring its support for "full inclusion of gay and lesbian families in the life of our nation and seek[ing] equal responsibilities, benefits, and protections for these families"[50] and condemning the constitutional amendment that was endorsed in the Republican platform,[51] the Democratic platform implicitly rejected the notion that the Supreme Court should intervene on the issue, declaring that "[i]n our country, marriage has been defined at the state level for 200 years, and we believe it should continue to be defined there."[52] In addition to embracing this perspective, both Democratic candidate John Kerry and running mate John Edwards maintained that they were personally opposed to same-sex marriage.[53]

The election itself proved to be one of the closest in United States history. The outcome was ultimately determined by the contest for Ohio's electoral votes. More than five million votes were cast in Ohio, and Bush emerged victorious by a margin of less than 120,000 votes.[54] As a result, Bush received a majority of the votes in the electoral college. If, on the other hand, Kerry had triumphed in Ohio, the Democratic nominee would have become president.[55]

A number of observers have concluded that the backlash against *Lawrence* and *Goodridge* played a significant role in determining the outcome of the election.[56] Ohio was one of the eleven states where voters were called upon to consider ballot initiatives dealing with same-sex marriage in No-

48. *Id.*
49. *Id.*
50. DEMOCRATIC NAT'L COMM., STRONG AT HOME, RESPECTED IN THE WORLD: THE DEMOCRATIC PLATFORM OF AMERICA 36 (2004), http://www.nytimes.com/packages/html/politics/dnc_platform2004.pdf.
51. *Id.*
52. *Id.*
53. Katharine Q. Seelye, *Where Kerry and Edwards Stand*, N.Y. TIMES, Feb. 19, 2004, at A16.
54. FED. ELECTION COMM'N, FEDERAL ELECTIONS 2004 6 (2005), https://transition.fec.gov/pubrec/fe2004/federalelections2004.pdf.
55. *Id.*
56. Roberts, *supra* note 46.

vember, 2004,[57] and these observers maintain that the presence of the initiative on the Ohio ballot proved to be a significant advantage for Bush. They contend that, although both Bush and Kerry purported to oppose legal recognition of same-sex marriages in 2004, the presence of the issue on the ballot incentivized an unusually large number of conservative Christians to come to the polls in Ohio and other states, and this demographic group was composed primarily of Bush supporters. Thus, they argue, if the anti-same-sex marriage initiative had not been before the voters, Kerry would likely have been victorious in Ohio and thus been elected President of the United States.[58]

As already noted, the results of the 2004 election ultimately had little impact on the resolution of the debate over the legal recognition of same-sex marriage. However, the backlash *Lawrence* and *Goodridge* provoked has had a profound impact on the evolution of constitutional doctrine in a wide variety of other areas. Not surprisingly, this impact was a byproduct of the power of the president to nominate the justices who sit on the Supreme Court.

III. THE ISSUE OF THE SUPREME COURT IN THE 2004 CAMPAIGN

During the 2004 presidential campaign, people of all political persuasions understood that Bush and Kerry had very different perspectives on the appropriate role of the Court in constitutional adjudication. Focusing on issues such as so-called partial birth abortion and perceived threats to the use of the Pledge of Allegiance, the Republican platform complained that "scores of judges with activist backgrounds in the hard-left now have lifetime tenure" and asserted "that the self-proclaimed supremacy of these judicial activists is antithetical to the democratic ideals on which our nation was founded."[59] Moreover, while declaring that he would not have any "litmus test" when he considered appointments to the federal courts,[60] Bush had

57. *See* Sarah Kershaw & James Dao, *Voters in 10 States Likely to Ban Gay Marriages*, N.Y. TIMES, Sep. 28, 2004, at A14.

58. *See, e.g.*, David E. Campbell & J. Quin Monson, *The Religion Card: Gay Marriage and the 2004 Presidential Election*, 72 PUB. OPINION Q. 399, 414 (2008); Todd Donovan et al., *Priming Presidential Votes by Direct Democracy*, 70 J. POL. 1217, 1227–29 (2008); *see also* Laurie A. Rhodebeck, *Another Issue Comes Out: Gay Rights Policy Voting in Recent Presidential Elections*, 62 J. HOMOSEXUALITY 701, 722 (2015) ("[A] cautious summary of the evidence is that the [same-sex marriage] issue mattered [for] . . . evangelicals in states with gay marriage bans on the ballot."). Some commentators disagree. *See, e.g.*, Gregory B. Lewis, *Same-Sex Marriage and the 2004 Presidential Election*, 38 PS: POL. SCI. & POL., 195, 197–98 (2005).

59. REPUBLICAN NAT'L COMM., *supra* note 47, at 84.

60. Adam Nagourney & Robin Toner, *In Final Debate, Clashes on Taxes and Health Care*, N.Y. TIMES, Oct. 14, 2004, at A19.

previously identified Antonin Scalia and Clarence Thomas—both of whom were outspoken critics of decisions such as *Roe v. Wade*—as justices whom he admired.[61]

By contrast, the Democratic platform explicitly endorsed *Roe* and called for "the appointment of judges who will uphold our laws and constitutional rights, not their own narrow agendas."[62] In addition, Kerry himself pledged to appoint judges who were committed to supporting the pro-choice position.[63] But while the constitutional status of abortion rights attracted the most attention during the presidential campaign, both commentators and the candidates themselves at times pointed out that the power to appoint justices to the Supreme Court could potentially impact the Court's decisions on a much broader range of issues.[64]

In 2004, discussions of potential Supreme Court nominees were conducted against the backdrop of a body of constitutional doctrine that, on balance, had moved substantially to the right under the leadership of Chief Justice William Rehnquist. Beginning in late 1991, the driving force behind this shift was a group of five justices that included Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas. In some cases, these justices joined together to form majorities that refused to strike down government actions that progressives viewed as being inconsistent with constitutional norms.[65] In addition, the same five justices also demonstrated a willingness to deploy the Constitution in support of values that were generally associated with conservative political thought. This willingness was reflected in the disposition of a wide variety of cases dealing with issues such as affirmative action,[66] federalism,[67] property rights,[68] and First Amendment protections for commercial speech.[69]

These decisions were generally made over the objections of a group of more progressive justices that, after 1994, was composed of Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Steven Breyer. Moreover, this group also won some significant victories during the

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61. Adam Cohen, Editorial, *Imagining America if George Bush Chose the Supreme Court*, N.Y. TIMES, Oct. 18, 2004, at A16.

62. DEMOCRATIC NAT'L COMM., *supra* note 50, at 35.

63. Seelye, *supra* note 53.

64. *See, e.g.*, Cohen, *supra* note 61; Jodi Wilgoren, *Kerry Invokes the Bible in Appeal for Black Votes*, N.Y. TIMES, Sept. 10, 2004, at A16 (discussing Kerry's statements regarding the Supreme Court's paramount influence as Kerry noted that the Court only upheld affirmative action by one vote).

65. *E.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

66. *E.g.*, Gratz v. Bollinger, 539 U.S. 244 (2003).

67. *E.g.*, United States v. Morrison, 529 U.S. 598 (2000).

68. *E.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

69. *E.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

Rehnquist era.[70] In cases where the justices were divided primarily along ideological lines, progressives almost invariably emerged victorious when even one of the justices whose views were normally characterized as "conservative" was persuaded to abandon his or her erstwhile allies.

The resolution of the legal disputes in *Gratz v. Bollinger*[71] and *Grutter v. Bollinger*[72] typified the decision-making dynamic of the Court during the late Rehnquist era. In *Gratz* and *Grutter,* the justices faced challenges to the constitutionality of the use of race in the consideration of applications for admission to two different schools that were both part of the University of Michigan.[73] *Gratz* challenged the affirmative action program that was used in the undergraduate admissions process.[74] *Grutter*, by contrast, focused on the process by which applications to the university's law school were evaluated.[75]

On their faces at least, the two processes were quite different in operation. The undergraduate admissions process was based on a pure numerical calculation that rated applicants on a 150-point scale and guaranteed admission to those applicants who scored 100 on that scale. Any person who was a member of an underrepresented minority ("URM") had 20 points added to his score.[76] The law school, on the other hand, purported to consider race as one factor in a "holistic" process, "the hallmark of [which was] its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential 'to contribute to the learning of those around them.'"[77] While the use of race in the undergraduate admissions process was found unconstitutional in *Gratz*,[78] the Court rejected the constitutional challenge in *Grutter*.[79]

The majority opinions in both cases purported to rely on the mode of analysis first articulated in 1978 by Justice Lewis Powell in the seminal decision in *Regents of the University of California v. Bakke*.[80] In *Bakke*, Justice Powell insisted that all consideration of race in the admissions process should be subjected to strict scrutiny, and that any such consideration should be held unconstitutional unless the Court determined that the use of race was necessary to further a compelling governmental interest. He argued that, in the context of university admissions, "the attainment of a diverse student

70. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003).
71. 539 U.S. 244.
72. 539 U.S. 306.
73. *See generally Gratz*, 539 U.S. at 252–53; *Grutter*, 539 U.S. at 311–16.
74. 539 U.S. at 251.
75. 539 U.S. at 311.
76. *Gratz*, 539 U.S. at 255.
77. *Grutter*, 539 U.S. at 315.
78. 539 U.S. at 275.
79. 539 U.S. at 343–44.
80. 438 U.S. 265 (1978).

body"[81] constituted a compelling governmental interest, and that universities could give some consideration to the race of individual applicants in order to advance that interest so long as the consideration of race was part of a process that was "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant."[82] As an example, Justice Powell cited the plan used to evaluate applicants to the undergraduate program at Harvard University.[83] But at the same time, he concluded that the use of racial quotas in the admissions process was unconstitutional.[84]

Against this background, a majority of the justices concluded that the undergraduate admissions policy that was challenged in *Gratz* did not pass constitutional muster.[85] Speaking for the five members of the conservative coalition, Chief Justice Rehnquist asserted that:

> The current [undergraduate admissions] policy does not provide [the] individualized consideration [envisioned in Justice Powell's opinion]. The . . . policy automatically distributes 20 points to every single applicant from an "underrepresented minority" group, as defined by the University. The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups. Moreover, unlike Justice Powell's example, where the race of a "particular black applicant" could be considered without being decisive, the [policy's] automatic distribution of 20 points has the effect of making "the factor of race . . . decisive" for virtually every minimally qualified underrepresented minority applicant.[86]

By contrast, in *Grutter*, Justice O'Connor abandoned her erstwhile allies and joined with the four progressive justices to create a majority that rejected the constitutional challenge to the use of race in the law school admissions process.[87] In her majority opinion, she stated that "like the Harvard plan Justice Powell referenced in *Bakke,* the Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions."[88]

The juxtaposition of *Gratz* and *Grutter* illustrates the tenuousness of the balance of power that determined the outcome of controversial cases in the late Rehnquist era. Cognizant of this reality, progressives often cited

81. *Id.* at 311.
82. *Id.* at 317.
83. *Id.* at 316–19.
84. *Id.* at 320.
85. *Gratz*, 539 U.S. at 275.
86. *Id.* at 271–72 (footnote omitted) (citations omitted).
87. 539 U.S. at 343–44.
88. *Id.* at 337.

judicial appointments as an important reason to vote for Kerry[89] and all parties understood that the outcome of the election was likely to have important consequences for the Court's treatment of a wide variety of constitutional issues.[90] The nature of these consequences began to emerge clearly less than one year after the presidential contest was decided.

IV. THE APPOINTMENTS OF JOHN ROBERTS AND SAMUEL ALITO

In 2005, the nature of the relationship between the election and the future of constitutional law began to take on a more concrete form when the re-elected president was given the opportunity to fill two seats on the Supreme Court. Both vacancies arose from the departure of justices generally associated with the conservative wing of the Court, and the president was given the opportunity to make two appointments to the Court. Thus, if John Kerry had won the presidency and had had the chance to fill even one of these vacancies, he would almost certainly have taken the opportunity to appoint a person who would have joined the progressive holdovers to create a durable, progressive majority that would have dominated the Court's decision-making process in ideologically charged cases for the foreseeable future. However, in substantial measure because of the dispute over same-sex marriage, the vacancies were filled not by Kerry, but instead by George Bush, who, as already noted, "ha[d] made no secret of his desire to impose a more conservative stamp on the . . . Court."[91] As a result, rather than shifting the ideological balance of the Court decisively to the left, the appointees who were ultimately confirmed moved the balance slightly to the right.

The sequence of events that produced this result began in June 2005, when Justice O'Connor resigned for personal reasons, creating the first opening on the Court in more than a decade. After considering a variety of candidates, Bush selected John G. Roberts, Jr., to fill the vacancy created by O'Connor's resignation. However, shortly before the Senate hearings on the Roberts nomination were scheduled to begin, Chief Justice Rehnquist died, and Bush announced that Roberts was now his choice to succeed Rehnquist rather than O'Connor.

Although the Roberts nomination was immediately condemned by some progressives,[92] his opponents had difficulty gaining traction during the

89. *See, e.g.*, Dave Lindorff, *A Progressive Case for Voting for (Gag) Kerry?*, COUNTERPUNCH (Sept. 27, 2004), https://www.counterpunch.org/2004/09/27/a-progressive-case-for-voting-for-gag-kerry/ (last visited Dec. 18, 2018).

90. *See, e.g.*, Michael C. Dorf, *The Likely Impact of the Presidential Election on the Supreme Court*, CNN (July 7, 2004, 12:36 PM), http://www.cnn.com/2004/LAW/07/07/dorf.scotus.elections/.

91. Todd Purdum, *Bush Picks Nominee for Court*, N.Y. TIMES, July 20, 2005, at A1.

92. *Id*.

confirmation process. First, Roberts' resume was, by any standard, extremely impressive. He had served on the United States Court of Appeals for the District of Columbia since 2003, and prior to becoming a federal judge had argued thirty-nine cases before the Supreme Court.[93] Indeed, Roberts was described by one commentator as "perhaps the most impressive Supreme Court advocate of his generation."[94] Second, although Roberts was known to be a political conservative, his record was bereft of the kind of evidence that unambiguously suggested that he would vote to remove constitutional protections for abortion rights or take other positions that progressives viewed as extreme. Ultimately, a virtuoso performance by Roberts during his confirmation hearings left Democratic senators deeply divided on the nomination, and he was confirmed by a vote of 78-22.[95]

The debate over the choice of Justice O'Connor's successor proved to be far more contentious. Soon after Roberts was confirmed, Bush nominated Harriet Miers to fill the seat that was to be vacated when O'Connor left the Court.[96] From the beginning, the nomination came under criticism from a variety of different quarters.[97]

By most standards, Miers had had a very distinguished career before her nomination.[98] Indeed, in many respects, her qualifications were very similar to those of Justice Lewis F. Powell, Jr., who had been nominated to serve on the Court by President Richard M. Nixon and confirmed almost unanimously by the Senate in 1972.[99] Among other things, she had risen to be the co-managing partner of a 400 person law firm in Dallas, Texas, and had been the first female president of both the Dallas Bar Association and the state bar association of Texas before joining the Bush administration in 2001 and becoming White House Counsel in 2004. Nonetheless, noting that Miers had no judicial experience,[100] some progressives characterized her as "[an] inexperienced crony [of George Bush],"[101] and asserted that she was "just not qualified" to serve as a justice on the Court.[102]

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93. See Nina Totenberg, *In 'The Chief,' an Enigmatic Conservative John Roberts Walks a Political Tightrope*, NPR, https://www.npr.org/2019/03/22/701754699/in-the-chief-an-enigmatic-conservative-john-roberts-walks-a-political-tightrope (last visited Jan. 17, 2020).

94. Jeffrey Rosen, *In Search of John Roberts*, N.Y. TIMES, July 21, 2005, at A29.

95. 151 CONG. REC. S10,649–50 (daily ed. Sept. 29, 2005).

96. Elisabeth Bullimer, *Bush Names Counsel as Choice for Supreme Court*, N.Y. TIMES, Oct. 4, 2005, at A1.

97. *Id.*

98. Miers' background is discussed in detail in Todd Purdum & Neil Lewis, *Hard-Working Advocate for the President*, N.Y. TIMES, October 4, 2005, at A1.

99. The circumstances surrounding Powell's appointment and confirmation are described in detail in JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR., 222–42 (1994).

100. Dahlia Lithwick, *Deferential Calculus*, N.Y. TIMES, October 21, 2005, at A25.

101. *Id*.

102. Editorial, *Harriet Miers Exits Stage Right*, N.Y. TIMES, October 28, 2005, at A20.

The Miers nomination created a different kind of problem for some people and groups who would ordinarily have been expected to support a Bush nominee. Because of the nature of her professional experience, Miers had never been required to publicly express her views on abortion and other issues of significance to social conservatives.[103] For some conservatives, this lack of a paper trail evoked bitter memories of their experience with the nomination of David Souter.

Souter had been tapped by President George H.W. Bush to replace progressive stalwart William J. Brennan in 1990. Faced with a Senate controlled by Democrats, in choosing Souter, Bush was apparently influenced by a desire to avoid the kind of bitter controversy that had been generated by the effort to seat Robert Bork on the Court only three years earlier.[104] Prior to his nomination, Bork had written extensively on many of the most contentious issues before the Court, and these writings had provided ammunition for those who led the successful campaign against his confirmation.[105] By contrast, although he had been a member of the New Hampshire Supreme Court from 1983 to 1990, Souter had served as a federal judge for only three months prior to his nomination and was dubbed the "stealth candidate" because his record was bereft of any direct evidence of his positions on the issues that were of the greatest concern to both conservatives and progressives.[106]

Despite this paucity of evidence, the Souter nomination was described as a "home run" by former New Hampshire Governor John Sununu, a Bush administration official with impeccable conservative credentials,[107] and Souter was confirmed by the Senate with only nine progressives in dissent. However, from the perspective of conservatives, the choice of David Souter ultimately proved to be anything but a "home run." After initial indications that he might be something of a moderate, by the mid-1990s Souter had become one of the most progressive members of the Rehnquist Court, consistently rejecting conservative positions on a wide variety of issues including

103. Bullimer, *supra* note 96.

104. *See* Linda Greenhouse, *The 'Not Bork' Test; Senators Know What Judge Souter Isn't, But a Question Remains: Is That Enough?* N.Y. TIMES, Sep. 17, 1990, at A18.

105. *See* Herman Schwartz, *The Bork Legacy*, THE NATION (Dec. 20, 2012), https://www.thenation.com/article/bork-legacy/.

106. Jeremy Rabkin, *The Sorry Tale of David Souter, Stealth Justice*, WEEKLY STANDARD (Nov. 6, 1995, 12:00 AM), https://www.weeklystandard.com/jeremy-rabkin/the-sorry-tale-of-david-souter-stealth-justice.

107. Philip Shenon, *Conservative Says Sununu Assured Him on Souter*, N.Y. TIMES, Aug. 24, 1990, at A15.

the scope of federal power[108] and the constitutionality of race-conscious affirmative action programs.[109]

Not surprisingly, the memory of the Souter nomination weighed heavily on the minds of conservatives after Miers was nominated to succeed O'Connor. Thus, although Bush himself and some other conservative leaders insisted that they were certain that Miers shared their ideological perspective,[110] other conservatives complained that "it was impossible to know if she would be . . . as much of a disappointment to the right as [Justice Souter]."[111] Such complaints played a major role in Bush's decision to withdraw the Miers nomination in favor of Samuel A. Alito, Jr.[112]

Alito brought a very different resume to the confirmation process. He had been a judge on the United States Court of Appeals for the Third Circuit since 1990 and, unlike Miers, had a long history of publicly embracing conservative doctrines in cases dealing with issues such as abortion[113] and federalism.[114] Reactions to Alito's nomination broke down along traditional ideological lines. Conservatives were quick to enthusiastically endorse the choice, with the leader of one prominent conservative group declaring that the difference between the Miers and Alito nominations was that the former "was [that of] being at a morgue," while the latter resembled "being at a combination of a Super Bowl party and a bar mitzvah."[115] Progressives, on the other hand, were particularly disturbed by the fact that Alito would be replacing O'Connor, who on occasion had abandoned the conservative coalition and embraced progressive positions. At times, they described the dangers Alito posed in near-apocalyptic terms. For example, one prominent progressive asserted that "the confirmation of Samuel Alito carries a clear and present danger of a constitutional revolution on a very broad front"[116] and another described Alito as "a walking constitutional amendment who

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108. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 628–55 (2000) (Souter, J., dissenting).

109. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 291–98 (2003) (Souter, J., dissenting).

110. Elizabeth Bumiller, *Strategy: White House Tries to Quell a Rebellion on the Right*, N.Y. TIMES, October 10, 2005, at A20.

111. *Id*.

112. David D. Kirkpatrick, *Alito's Ascent Caps Long Campaign*, N.Y. TIMES, Jan. 30, 2006.

113. Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 719–27 (3d Cir. 1992) (Alito, J., dissenting in part).

114. Chittisier v. Dep't of Cmty. & Econ. Dev., 226 F.3d 223 (3d Cir. 2000); United States v. Rybar, 103 F.3d 273, 286–94 (3d Cir. 1996) (Alito, J., dissenting).

115. Elisabeth Bumiller & Carl Hulse, *Bush Picks U.S. Appeals Judge to Take O'Connor's Court Seat*, N.Y. TIMES, Nov. 1, 2005, at A1.

116. John Broder, *Armageddon! Measuring the Power of a New Justice*, N.Y. TIMES, Nov. 6, 2005, § 4, at 4.

would undo precedents that protect fundamental rights and liberties that Americans think are theirs forever."[117]

Concerns such as these galvanized the opposition to the Alito nomination in the Senate. After the hearings on the nomination, John Kerry, who had remained in the Senate after his defeat in the presidential election, urged Democrats to launch a filibuster to prevent Alito from being confirmed, arguing that Alito's confirmation would be "an ideological coup on the Supreme Court."[118] However, although most Democratic senators opposed the nomination, many refused to join the filibuster, and Alito was confirmed on a vote of 58-42.[119]

V. THE CONSTITUTIONAL JURISPRUDENCE OF THE ROBERTS COURT, 2005–2016

Without question, the replacement of William Rehnquist and Sandra Day O'Connor by John Roberts and Samuel Alito had the effect of moving the political orientation of the Court as a whole at least slightly to the right.[120] While on rare occasions Chief Justice Roberts has taken positions that diverged from those which one would have expected from his predecessor,[121] the impact of the choice of Justice Alito to fill the vacancy created by Justice O'Connor's resignation is relatively easy to describe. As already noted, while most often voting with her conservative colleagues, Justice O'Connor at times sided with the more progressive justices in cases raising ideologically charged issues.[122] In virtually all such cases, by contrast, Justice Alito has been a reliable supporter of the conservative coalition.[123]

Admittedly, despite the changes in the personnel on the Court, progressives won some important victories during the early Roberts era. In *Obergefell v. Hodges*,[124] the Court held that the Constitution required state governments to give legal recognition to same-sex marriages, while in *Whole*

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117. *Id*.

118. David Fitzpatrick, *Kerry Urges Alito Filibuster, But His Reception Is Cool*, N.Y. TIMES, January 27, 2006, at A16.

119. 151 CONG. REC. S348 (daily ed. Jan. 31, 2006).

120. The jurisprudence of the Roberts Court is discussed in detail in MARK TUSHNET, IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT (2013).

121. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 529 (2012) (voting to reject a challenge to the constitutionality of the Affordable Care Act).

122. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (agreeing with the progressive justices on an affirmative action challenge).

123. *See* Marcia Coyle, *Conservative Samuel Alito Channels Liberal Icon Thurgood Marshall on Religion*, NAT'L L. J. (Jan. 24, 2019), https://www.law.com/nationallawjournal/2019/01/24/conservative-samuel-alito-channels-liberal-icon-thurgood-marshall-on-religion/ (Alito is "perhaps the Supreme Court's most reliable conservative").

124. 135 S. Ct. 2584 (2015).

Woman's Health v. Hellerstedt,[125] the justices struck down a state law that imposed significant limitations on access to abortions, and *Fisher v. University of Texas*[126] once again rejected a constitutional challenge to the consideration of race in the college admissions process. In each of these cases, Justice Kennedy provided the crucial fifth vote to produce the result desired by progressives. By contrast, in *National Federation of Independent Business v. Sebelius*,[127] Chief Justice Roberts joined the four progressive justices to form a majority that rejected a challenge to the constitutionality of the Affordable Care Act.

However, the most prominent feature of the jurisprudence of the Roberts Court has been an upsurge in conservative activism. During the period between 2005 and 2016, Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito concluded that the Constitution embodied conservative ideology in cases involving a wide variety of issues. The decisions in *Citizens United v. Federal Elections Commission*[128] and *Shelby County v. Holder*[129] provide two of the most striking examples of this phenomenon.

Citizens United was a First Amendment challenge to a federal statute that prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech that constituted an "electioneering communication" or for speech that expressly advocated the election or defeat of a candidate.[130] Twenty years earlier, in *Austin v. Michigan Chamber of Commerce*,[131] the Court had rejected a challenge to the constitutionality of a state statute that imposed similar limitations on corporate expenditures. In that case, Chief Justice Rehnquist joined the majority opinion that recognized a compelling governmental interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[132]

In *Citizens United*, the five conservative justices viewed the same issues from a quite different perspective. Speaking for the majority, Justice Kennedy characterized the impact of the restriction on the use of corporate funds in near-apocalyptic terms, asserting that "[t]he censorship we now confront is vast in its reach,"[133] that "[t]he Government has 'muffle[d] the

125. 136 S. Ct. 2292 (2016).
126. 136 S. Ct. 2198 (2016).
127. 567 U.S. 519 (2012).
128. 558 U.S. 310 (2010).
129. 570 U.S. 529 (2013).
130. 558 U.S. at 318.
131. 494 U.S. 652 (1990).
132. *Id*. at 660.
133. *Citizens United*, 558 U.S. at 355.

voices that best represent the most significant segments of the economy'"[134] and that, because of the restriction, "the electorate [has been] deprived of information, knowledge and opinion vital to its function."[135] Moreover, although the prohibition at issue in *Citizens United* did not apply to media corporations, Kennedy insisted that the anti-distortion rationale of the *Austin* decision would allow the government to restrict the use of funds for political purposes by those entities as well.[136] Thus, the five justice majority overruled *Austin*, holding that the restriction on corporate expenditures violated the First Amendment.[137]

Shelby County presented the justices with a very different set of issues. In that case, the Court revisited a question that it had first confronted in its 1966 decision in *South Carolina v. Katzenbach*.[138] *Katzenbach* was a challenge to the constitutionality of a number of the provisions in the Voting Rights Act of 1965.[139] In addition to a general prohibition on the use of criteria that were designed to limit access to the ballot on the basis of race, the statute included a variety of other restrictions on state power that by their terms were made applicable only to jurisdictions that met a set of criteria that focused primarily on a history of low voter participation in the electoral process.[140] These criteria were clearly designed to provide for the coverage of many Southern states, while at the same time excluding most Northern jurisdictions.[141]

In covered jurisdictions, the statute not only suspended the use of literacy tests and provided for the appointment of federal examiners to register voters, but also decreed that new voting regulations adopted by covered jurisdictions could not become effective unless precleared by either the Justice Department or a three-judge panel of the Federal District Court for the District of Columbia.[142] Invoking the original jurisdiction of the Supreme Court, a number of the covered jurisdictions challenged the constitutionality of these provisions.

The limitations imposed by the Voting Rights Act were by any standard an extraordinary federal intrusion into the power of state governments to structure their own political processes. Nonetheless, in *Katzenbach*, the majority concluded that all provisions of the statute were constitutional. Speak-

134. *Id*. (citation omitted).
135. *Id*. (citation omitted).
136. *Id.* at 351.
137. *Id.* at 318.
138. 383 U.S. 301 (1966).
139. Pub. L. No. 89-110, 79 Stat. 437.
140. *See Katzenbach*, 383 U.S. at 315 ("The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant.").
141. *See id.* at 318 (listing covered jurisdictions).
142. *See id*. at 315-16.

ing for the Court, Chief Justice Earl Warren conceded that the imposition of the preclearance requirement in particular was "an uncommon exercise of federal power."[143] At the same time, however, he observed that "exceptional conditions can justify legislative measures not otherwise appropriate."[144] Thus, noting that "Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution"[145] and that less dramatic measures had failed to solve the problem,[146] he concluded that section two of the Fifteenth Amendment provided Congress with the authority necessary to pass all provisions of the Voting Rights Act.

Warren also rejected the contention that Congress had run afoul of the Constitution in this context by subjecting a small group of states to particularly stringent federal regulations.[147] He observed that "[Congress] had learned that substantial voting discrimination presently occurs in certain sections of the country, and it knew no way of accurately forecasting whether the evil might spread elsewhere in the future . . . [and] in acceptable legislative fashion . . . chose to limit its attention to the geographic areas where immediate action seemed necessary."[148] Focusing on the specifics of the coverage formula, Warren also asserted that "a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters" and concluded that "the coverage formula is [therefore] rational in both practice and theory."[149]

At the time that the Voting Rights Act was enacted in 1965, the preclearance requirement had been scheduled to expire in five years.[150] However, Congress repeatedly extended the duration of this provision and ultimately adopted a twenty-five year extension of the mandate in 1982[151] and renewed the extension for another twenty-five years in 2006.[152] While the coverage formula had undergone some minor revisions in the interim, the determination of whether a particular jurisdiction was subject to the preclearance requirement was still based on the conditions that existed in the late 1960s and early 1970s.[153]

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143. *Id*. at 334.
144. *Id.* (footnote omitted).
145. *Id*. at 309.
146. *Katzenbach*, 383 U.S. at 309.
147. *Id.* at 328–29.
148. *Id*. at 328 (footnote and citation omitted).
149. *Id*. at 330.
150. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 199 (2009).
151. *Id.* at 200.
152. Voting Rights Act Reauthorization and Amendments Act of 2006, Pub L. No. 109-246, 120 Stat. 577.
153. *Austin*, 557 U.S. at 198.

Against this background, the concept of preclearance was subjected to constitutional challenges on a number of occasions in the late twentieth century.[154] However, it was not until 2009 that a majority of the justices first indicated that they had serious doubts about the constitutionality of the 2006 extension.[155] While the Court did not definitively resolve the constitutional issue at that time, in *Shelby County*, Chief Justice Roberts joined the four justices who would have held that the Affordable Care Act was unconstitutional in *Sebelius* in explicitly concluding that the extension of the preclearance requirement was unconstitutional.

Speaking for the majority, Roberts characterized the preclearance requirement as "extraordinary legislation otherwise unfamiliar to our federal system"[156] that constituted an "extraordinary departure from the traditional course of relations between the States and the Federal Government."[157] In addition, he contended that the decision to impose the requirement on some but not all state governments ran afoul of the principle that "all the States enjoy equal sovereignty"[158] and that any departure from this principle required a showing that the disparate treatment of the states was "sufficiently related to the problem that it targets."[159]

Roberts conceded that, in 1965, both the imposition of the preclearance requirement itself and the content of the formula that determined which jurisdictions would be subject to the requirement were had been justified by the conditions that existed at that time.[160] At the same time, however, Roberts also cited a variety of evidence that in his view demonstrated that African-Americans in the Southern states had far greater opportunity to participate in the political process than the statistics from the 1960s and 1970s would suggest.[161] Thus, insisting that the 2006 extension "imposes current burdens and must be justified by current needs,"[162] Roberts concluded that the original coverage formula could no longer be used to identify the states that would be required to preclear changes in the electoral process.[163]

The same five justices who supported the decisions in *Citizens United* and *Shelby County* have also embraced a vision of constitutional doctrine that advanced the conservative agenda in a variety of other contexts in the

154. *See* Georgia v. United States, 411 U.S. 526 (1973); City of Rome v. United States, 446 U.S. 156 (1980); Lopez v. Monterey Cty., 525 U.S. 266 (1999).

155. *See Austin*, 557 U.S. at 193 (expressing doubts about the constitutionality of the preclearance requirement).

156. *Shelby*, 570 U.S. at 545 (quoting *Austin*, 557 U.S. at 211).

157. *Id.* (quoting *Presley v. Etowah County Comm'n*, 502 U.S. 491, 501–02 (1992)).

158. *Id.* at 540 (quoting *Austin*, 557 U.S. at 211).

159. *Id.* at 542 (quoting *Austin*, 557 U.S. at 202–03).

160. *Id.* at 545–46.

161. *Id.* at 547–58

162. *Shelby*, 570 U.S. at 542 (quoting *Austin*, 557 U.S. at 203).

163. *Id.* at 557.

decade following the confirmation of Justice Alito. During this period, in addition to expanding the constitutional protections for property rights,[164] conservatives scored notable victories in cases dealing with, among other things, the regulation of firearms[165] and the consideration of race to promote racial balance in elementary and secondary schools.[166] However, in 2016, for a time it seemed that the era of conservative dominance that had been extended by the election of George W. Bush was very likely to come to an end.

VI. EPILOGUE: THE DEATH OF ANTONIN SCALIA, THE FAILED NOMINATION OF MERRICK GARLAND, THE ELECTION OF DONALD TRUMP, AND THE PRESERVATION OF THE CONSERVATIVE MAJORITY

On February 13, 2016, the conservative majority on the Supreme Court lost its best-known member when Antonin Scalia died suddenly of a heart attack, leaving the Court equally divided between conservatives and progressives. Unlike 2005, when Republican George Bush was given the opportunity to fill the vacancies that had been created by the departure of two conservative justices, in 2016, Democrat Barack Obama held the presidency. Even prior to Scalia's death, the departures of David Souter and John Paul Stevens in 2009 and 2010, respectively, gave Obama the opportunity to appoint two members of the Court. But unlike Scalia, at the time that Souter and Stevens retired, both had been members of the progressive wing of the Court. Thus, when Obama chose progressives Sonia Sotomayor and Elena Kagan to fill the vacant seats, the appointments did not threaten the existence of a conservative majority on the Court. By contrast, all parties understood that Obama's nomination of Merrick Garland to succeed Scalia had the potential to dramatically change the political dynamic of the Court's decision-making process.

Garland, who was the Chief Judge of the United States Court of Appeals for the District of Columbia, was described as a "moderate" by some commentators.[167] However, the Republicans who controlled the Senate in 2016 clearly believed that, if he in fact joined the Court, Garland would be likely to join holdovers Ruth Bader Ginsburg, Stephen Breyer, Sonia So-

164. *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013).

165. McDonald v. City of Chicago, 561 U.S. 742 (2010); Dist. of Columbia v. Heller, 554 U.S. 570 (2008).

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

167. *See, e.g.*, Tom S. Clark et al., *How Liberal is Merrick Garland?*, WASH. POST (Mar. 17, 2016, 1:36 PM), https://www.washingtonpost.com/news/monkey-cage/wp/2016/03/17/how-liberal-is-merrick-garland/; Timothy Noah & Brian Mahoney, *How Liberal is Merrick Garland?*, POLITICO (Mar. 16, 2016, 8:42 AM), https://www.politico.com/story/2016/03/supreme-court-merrick-garland-220904.

tomayor and Elena Kagan to form a progressive majority in most of the cases in which the justices were split along ideological lines. Thus, observing that Obama was in the last year of his presidency and asserting that "[Garland] would move the court dramatically to the left,"[168] Senate Majority Leader Mitch McConnell of Kentucky refused to even schedule hearings on the nomination.

The dispute over the Garland nomination and the recognition that the outcome of the 2016 election would almost certainly determine which faction would control the Supreme Court for the foreseeable future raised the profile of the issue in the contest between Democrat Hillary Clinton and Republican Donald Trump. With over one quarter of Trump's supporters describing the impact of the election on the makeup of the Supreme Court as the most important issue in the campaign,[169] just as in 2004, the Republican candidate won a narrow victory and, with it, the right to nominate the successor to Justice Scalia. Trump selected Judge Neil Gorsuch and, after the Republican majority changed the Senate rules to eliminate the possibility of a filibuster, on April 6, 2017, three Democrats joined the united Republicans to confirm Gorsuch by a vote of 54-45.[170]

The confirmation of Justice Gorsuch essentially reestablished the ideological balance of power that had been created in the wake of the 2004 presidential election. As expected, in general, Gorsuch proved to be a reliable ally of Chief Justice Roberts and Justices Kennedy, Thomas, and Alito during the 2017 term of the Court, providing the fifth vote necessary to create majorities that invoked the First Amendment in support of positions generally associated with conservative ideology[171] and rejected a constitutional attack on the immigration restrictions decreed by the Trump administration.[172] At the same time, however, the decisions in *Carpenter v. United States*[173]

168. Rebecca Savransky, *McConnell: Garland Is Not a Moderate*, HILL (Mar. 20, 2016, 8:42 AM), https://thehill.com/blogs/ballot-box/presidential-races/273682-mcconnell-garland-is-not-a-moderate.

169. Philip Bump, *A Quarter of Republicans Voted for Trump to Get Supreme Court Picks—and It Paid Off*, WASH. POST (June 20, 2018, 2:23 PM), https://www.washingtonpost.com/news/politics/wp/2018/06/26/a-quarter-of-republicans-voted-for-trump-to-get-supreme-court-picks-and-it-paid-off/?utm_term=.06af828124dd.

170. Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed By Senate as Supreme Court Justice*, N.Y. TIMES, April 7, 2017, at A1.

171. Janus v. Am. Fed'n of State, Cty., & Mun. Emp. Council 31, 138 S. Ct. 2448 (2018) (holding that government employees could not be required to pay representation fee to union); Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) (notice requirements imposed on pro-life crisis pregnancy centers probably violate First Amendment).

172. *See* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

173. 138 S. Ct. 2206 (2018) (holding that a warrant was required to access certain cell site location information).

and *Sessions v. Dimaya*[174] reflected the ongoing tenuousness of conservative control of the Court, as defections by Chief Justice Roberts and Justice Gorsuch, respectively, led to decisions that were more closely aligned with progressive doctrines.

Most observers believe that the subsequent confirmation of Brett Kavanaugh to fill the vacancy created by the retirement of Justice Kennedy at the end of the 2017 term is likely to move the overall tenor of constitutional jurisprudence in an even more conservative direction.[175] However, one point remains clear. If John Kerry had been elected president and been given the opportunity to choose even one progressive justice, progressives would have retained a majority even after the selections of Justices Gorsuch and Kavanaugh. Thus, the outcome of the 2004 presidential election, and by extension the ripple effect of the backlash against the drive for same-sex marriage, continues to have a profound influence on the development of constitutional jurisprudence in general, and that influence is almost certain to continue for the foreseeable future.

VII. CONCLUSION

The impact that the dispute over same-sex marriage has had on many areas of constitutional law that, on their face, have little or nothing to do with the campaign for LGBT rights is a byproduct of the confluence of a number of different factors, which, taken together, determine the makeup of the federal courts. One of the most critical factors is the method created by the Constitution for the selection of federal judges. In an ideal world, one might wish for the justices of the Supreme Court to be selected without regard to political affiliation or ideological orientation. However, at least in modern times, the process outlined in Article III has not proven to be well-suited to the production of such a result.

Admittedly, in recent years, those who have been nominated to serve on the Supreme Court by presidents from both political parties have generally been viewed as accomplished lawyers and judges who were thought to be highly skilled in the analysis of technical legal arguments. But in addition, with the possible exception of John Paul Stevens,[176] each of the nominees

174. 138 S. Ct. 1204 (2018) (holding that the statutory description of "aggravated felonies" for immigration purposes is unconstitutionally vague).

175. *See, e.g.*, Dylan Matthews, *America Under Brett Kavanaugh: How Trump's Nominee Will Affect Abortions, Prisons, Affirmative Action and Gay Rights*, VOX (Oct. 5, 2018, 2:50 PM), https://www.vox.com/2018/7/11/17555974/brett-kavanaugh-anthony-kennedy-supreme-court-transform.

176. The process by which Stevens was chosen is described in detail in Victor H. Kramer, *The Case of Justice Stevens: How to Select, Nominate and Confirm a Justice of the United States Supreme Court*, 7 CONST. COMMENT. 325 (1990).

has been chosen in large measure because the president making the choice believed that the judicial philosophy of the nominee would lead him or her to make decisions that would advance the political agenda of that president.[177] In other words, the nominations have become a vehicle for what Jack M. Balkin and Sanford Levinson have described as "partisan entrenchment"[178]—a device by which the party in power seeks to both enhance its influence over public policy in the present and to project that influence into a potential future time in which that party might have lost its leverage over other branches of the government.

Of course, as Balkin and Levinson observed, the precise nature and magnitude of that influence will depend in large measure on a variety of other contingencies.[179] Thus, for example, Democrat Jimmy Carter, who won a narrow victory over Republican Gerald Ford in 1976, had no opportunity to alter the course of the Supreme Court's decision making simply because no seat on the Court became vacant during Carter's time in office. Alternatively, as the failure of the Garland nomination demonstrates, the requirement that the Senate confirm appointees to the Court will also at times limit the ability of any particular president to put his stamp on the Court. Further, as with the case of David Souter, on occasion, presidents might simply be mistaken about the judicial philosophy of a person who is appointed to the Court (although the fate of the Miers nomination suggests that such mistakes are likely to become increasingly rare in the future). Nonetheless, at its core, the basic point remains the same. The selection of the members of the Supreme Court is and has been for some time viewed by presidents as little more than a device by which they can empower political allies whom the president hopes will continue to use that power to advance the political agenda of the president long after that president has left office.

Given this reality, anything that affects the outcome of a presidential election also has the potential to profoundly influence the evolution of constitutional doctrine for an extended period following the election itself. Moreover, in extremely close elections like that of 2004, any factor that moves even a small number of votes can have an outsized influence on the evolution of constitutional doctrine for years to come. Thus, the course of the development of constitutional law becomes contingent on the interaction among a variety of considerations which have little or nothing to do with

177. The forces that led to the increasing politicization of the process by which the justices are selected is described in detail in LAURA KALMAN, THE LONG REACH OF THE SIXTIES: LBJ, NIXON, AND THE MAKING OF THE CONTEMPORARY SUPREME COURT (2017). *See also* NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT (2019) (describing increasing polarization of Supreme Court).

178. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–83 (2001).

179. *Id*. at 1076–77.

those that a hypothetical "neutral" judge would consider to be relevant to legal analysis.

Against this background, for progressives, the 2004 election and its aftermath should serve as a sobering reminder of the dangers inherent in the practice of judicial review as it has evolved in the United States. To be sure, progressives can point to the nationalization of same-sex marriage and the continuing protection for abortion rights as examples of progressive triumphs that could only have been derived from judicial review. But the same system that countenances *Obergefell* and *Hellerstedt* has proven to be at least equally likely to produce decisions that progressives find abhorrent, such as *Citizens United* and *Shelby County*. Of course, some might argue that, in the long run, the benefits associated with judicial review will outweigh the costs associated with the practice. However, the costs are very real, and cannot be ignored if one is to accurately evaluate the efficacy of the current system.