



EMORY
LAW

Emory Corporate Governance and Accountability
Review

Volume 4
Issue 0 *Presidential Inauguration Issue*

2017

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Recommended Citation

Gregg Ivers, *Conservative Mythology and the Supreme Court*, 4 Emory Corp. Governance & Accountability Rev. 157 (2017).

Available at: <https://scholarlycommons.law.emory.edu/ecgar/vol4/iss0/15>

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CONSERVATIVE MYTHOLOGY AND THE SUPREME COURT

*Gregg Ivers**

President-elect Donald Trump had little to say about the Supreme Court during the presidential campaign season, and what little he did say usually focused on the need to protect the Second Amendment and to appoint justices who were pro-life, would overturn *Roe v. Wade*¹ and would allow the states to take up abortion regulation. Gun owners, Trump claimed, have been “under siege by people like Hillary Clinton,” and he pledged to appoint justices who would restore and protect their rights. As for abortion rights, Trump repeatedly said that “I am pro-life and I will be appointing pro-life judges,” and he would prefer the matter to go “back to the individual states.” In the president-elect’s own words:

The justices that I am going to appoint will be pro-life. They will have a conservative bent. They will be protecting the second amendment. They are great scholars in all cases and they’re people of tremendous respect. They will interpret the Constitution the way the founders wanted it interpreted and I believe that’s very important. I don’t think we should have justices appointed that decide what they want to hear. It is all about the Constitution of, and it is so important. The Constitution the way it was meant to be. And those are the people that I will appoint.

The model Supreme Court justice for Trump is, not surprisingly, Antonin Scalia, who died in February 2016. Throughout his campaign, Trump stated that he would appoint justices to the Court—and presumably judges to the lower federal courts—“very much in the mold of Justice Scalia.” Trump was not the first more recent Republican presidential candidate to hold out Scalia as his model justice. In 2012, Mitt Romney pledged in the pages of the conservative journal, *National Review*, that he supported “the reversal of *Roe v. Wade*, because it is bad law and bad medicine. *Roe* was a misguided

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¹ 410 U.S. 113 (1973).

ruling that was a result of a small group of activist federal judges legislating from the bench.” Consistent with that view, Romney also stated that he would “only appoint justices that adhere to the Constitution and the laws as they are written, not as they want them to be written,” and cited Scalia as a role model for any potential nominee. Four years before, Republican presidential nominee John McCain also touted Justice Scalia as the “type” of justice that he would like to appoint to the Court, although he declined to commit to nominate only justices pledged to overturn *Roe*. And George W. Bush, during the 2000 presidential campaign, also pledged to nominate justices like Scalia. “I have great respect for Justice Scalia,” Bush said, “for the strength of his mind, the consistency of his convictions, and the judicial philosophy he defends.” On this point, President-elect Trump is firmly in line with other recent Republican presidential candidates in his public admiration for the recently deceased Scalia. Considering his bumpy and often confrontational relationship with the Republican Party establishment on almost everything else in the months leading up to his stunning victory over Hillary Clinton, Trump’s alignment with more recent traditional Republican candidates is remarkable.

Moreover, Trump’s firm public commitment to overturning *Roe* and appointing “pro-life” justices who will help him achieve that goal, justices who support his personal opposition to abortion as a matter of principle, not just law, comes like a sudden bolt of lightning on an otherwise pastoral afternoon. After eight years of an Obama Administration unabashedly committed to reproductive rights and access to birth control and the widely misplaced assumption that Hillary Clinton’s certain election would protect the Court for at least four more years from a frontal assault on reproductive rights, there was little talk about a world without *Roe*. This was especially true after the Court’s 5–3 decision in *Whole Woman’s Health v. Hellerstedt*² in June 2016, which invalidated a restrictive Texas abortion law just a few months before the presidential season kicked into high gear. Now, should President Trump have the opportunity to name an additional justice beyond a replacement for Justice Scalia, there will no doubt be a number of states prepared to introduce new abortion measures that will return the law to its pre-*Roe* status. Some states might even choose to ban abortion outright, with no exception for rape, incest or the health or life of the mother.

That assumes, of course, that the Court does not rule that the Due Process Clause of the Fourteenth Amendment protects the fetus as a person. Such a

² 136 S.Ct. 2292 (2016).

decision is highly unlikely, if not completely implausible. Never mind that no current justice on the Court has taken the position that the fetus is a constitutional person entitled to protection as a matter of fundamental right, not even staunch critics of *Roe* such as Justices Samuel Alito, Clarence Thomas and Chief Justice John Roberts. No justice who has *ever* served on the Court has taken that position. And for good reason. The long-standing argument of anti-*Roe* advocates is that the Constitution does not speak to the question of abortion rights, and that responsibility for regulating abortion, in whatever context, is the responsibility of the states.³ The goal, of course, is to reduce the availability of legal abortion, something that would surely happen should the Court return this matter to the states. Congress could also enter the fray, as it did in 2003 when it passed the Partial Birth Abortion Act. That law, which the Court narrowly upheld in *Gonzales v. Carhart*⁴ (2007), gave states far more latitude to restrict access to abortion in the late stages of the third trimester, so long as it provided an exception for the life of the mother. Holding that the Fourteenth Amendment protects the fetus as a constitutional person and obligates the state to protect it by criminalizing abortion would keep the issue in the courts. That would undermine the position that anti-*Roe* justices—and, presumably, any prospective Trump administration nominee—have taken since the case was decided in 1973.

President-elect Trump's position that the Second Amendment has been under siege by "people like Hillary Clinton" and the Obama administration does not hold up to even the barest scrutiny. Currently, every state and the District of Columbia permit residents to carry concealed weapons. Forty-two states and the District of Columbia require a permit to carry a concealed weapon; the eight other states do not require permit. Forty-four states have open-carry laws, which permit residents to carry weapons in public places. Only three states and the District of Columbia prohibit carrying any firearm in public, whether a handgun or a rifle, commonly referred to as "long guns" in state law. Three states prohibit residents from carrying a handgun but not a long gun, and two states prohibit residents from carrying a long gun but not a handgun.⁵ Further protecting the rights of gun owners has been the Supreme Court, which, in two major decisions less than ten years old, *District of Columbia v. Heller*⁶ and *McDonald v. City of Chicago*,⁷ ruled that the Second

³ 410 U.S. 113 (1973).

⁴ 550 U.S. 124 (2007).

⁵ *Open Carrying*, SMART GUN LAWS, <http://smartgunlaws.org/gun-laws/policy-areas/firearms-in-public-places/open-carrying/>.

⁶ 554 U.S. 570 (2008).

Amendment confers an individual right to own a handgun. But Justice Scalia—there he is again—writing for a 5–4 Court in *Heller*, also said that the Second Amendment did not protect the “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”⁷ Still, gun owners have far more rights and are entitled to far more protection under the Second Amendment than they were before President Obama took office in January 2009.

President-elect Trump’s insistence that a liberal Court has stood in the way of a return to the pre-*Roe* abortion rights landscape and barely held the line against “people like Hillary Clinton” and presumably any Democratic president determined to undermine the Second Amendment parallels, in many respects, not just similar criticism from recent Republican candidates. His criticism of the Court echoes the rhetoric of Republican presidential candidates dating back to Richard Nixon. During the 1968 presidential campaign, Nixon emphasized the need to return to “law and order” after the chaotic events of the decade had left many Americans at odds with the criminal justice decisions of the Earl Warren-led Supreme Court. The Warren Court had dramatically expanded the rights of the criminally accused during an era in which the nation, by the time of the 1968 presidential campaign between Nixon and Democratic nominee Hubert H. Humphrey, was on the verge of a collective nervous breakdown. Nixon blamed the Court for creating an environment that protected criminals at the expense law enforcement. Appointing justices who favored a “strict construction” of the Constitution would be among his highest priorities. In 1980, Ronald Reagan, then considered the most conservative Republican nominee since Barry Goldwater in 1964, also put the Court in his crosshairs during the campaign. Reagan emphasized that the Court had unmoored the Constitution from its true meaning, and promised he would appoint justices committed to the original intent of the Framers. And that meant reversing *Roe*, revisiting the Court’s decisions prohibiting state-sponsored religious practices and government funding for parochial schools, calling for an end to affirmative action and other measures designed to address racial discrimination and rethinking the relationship between the police and criminal defendants. His successor, George H.W. Bush, made similar promises during the 1988 campaign. Like Reagan, Bush pledged to appoint justices who would overturn *Roe* and carry out the conservative social agenda through the courts.

⁷ 561 U.S. 742 (2010).

⁸ 544 U.S. 570 (2008).

For almost fifty years, Republican presidential candidates have campaigned against the Supreme Court. And the charges are familiar from year to year and campaign to campaign. The Court represents the nation's legal, social and cultural elite and not "the people." A rotating cabal of liberal justices has behaved like politicians in robes rather than jurisprudential seekers of truth. And that the effect of all this has been to substitute a politically correct Constitution for the original one created by the Framers, who would be horrified if they knew that the Court had done to the document they so carefully crafted. Justice Scalia, the idealized justice of every Republican presidential candidate since Ronald Reagan appointed him to the Court in 1986, often criticized his colleagues on the bench for all the above reasons, especially in cases involving abortion rights, marriage equality and sexual privacy. Perhaps his most famous and dyspeptic shot at not just the Court but entire legal profession came in his *Lawrence v. Texas*⁹ dissent, where he excoriated the majority for embracing the "law-profession culture that has largely signed on to the so-called homosexual agenda," which was dedicated to "eliminating the moral opprobrium that has traditionally attached to homosexual conduct." Scalia believed the *Lawrence* majority had made the grievous error of taking sides in the "culture war" because "[s]o imbued is the Court with the law profession's anti-homosexual culture that it is seemingly unaware that the attitudes of that culture are not obviously 'mainstream.'"

Justice Scalia had not even been interred before Senate Majority Leader Mitch McConnell (R-KY) announced in February 2016 that the Senate would not hold hearings on any nominee that President Barack Obama would nominate to fill his vacancy. True to his word, McConnell did not budge from his position, leaving the president's nominee, Merrick Garland, to twist in the wind for the better part of nine months before the November 2016 election decided his fate. Restoring the Constitution to its true meaning by appointing justices who will carry out Scalia's vision for the Court would seem fundamental to Donald Trump's campaign theme of making America great again. The problem, though, for Trump, as it has been for all Republican presidents since Richard Nixon, has not been a wrecking crew of liberal justices appointed by Democratic presidents taking their cues from a secretive network of liberal law professors. Rather, it has been the justices appointed by Republican presidents that have erected the barrier to many of the Court's foundational decisions on the Bill of Rights dating back decades, established

⁹ 539 U.S. 558 (2003).

new rights of the sort that so irritated Justice Scalia and taken positions on executive and legislative power at odds with conservative constitutionalists.

Since the October 1969 Term, there have never been more than four justices appointed by Democratic presidents serving on the Court at one time. The last time Democratic appointees were a majority on the Court was during the October 1968 Term. Chief Justice Earl Warren, appointed by Republican President Dwight D. Eisenhower in 1953, resigned at the conclusion of the term. President Nixon appointed Warren E. Burger to replace Earl Warren as chief justice. Abe Fortas, who President Lyndon Johnson had appointed in 1965, resigned at the conclusion of that term as well. President Nixon twice attempted to fill Fortas's seat, first nominating federal appeals court judges Clement Haynsworth, who was rejected by the Senate, and then Harold Carswell, who also failed to win confirmation. In June 1970, Harry Blackmun, Nixon's third choice and a childhood friend of Chief Justice Burger, filled Fortas's seat, which had been vacant for the entire October 1969 Term, leaving the Court evenly divided between justices appointed by Republican and Democratic presidents. Blackmun's appointment tipped the balance to the Republicans, and justices appointed by Republican presidents have been in the numerical majority ever since then.

In contrast, Republican presidents were able to appoint ten consecutive justices over an uninterrupted twenty-four year period, from 1969–1993, reshaping the party and political dynamics on the Supreme Court. Each Republican president during that period was able to appoint at least one justice to the Court. From 1969–1971, Nixon appointed four justices, Burger, Blackmun, Lewis Powell and William Rehnquist. In 1975, Gerald Ford, who served only sixteen months, appointed John Paul Stevens. Democrat Jimmy Carter did not make an appointment in his one term in office. During his two-term presidency, Republican Ronald Reagan appointed Sandra Day O'Connor, Scalia, Anthony Kennedy and elevated Rehnquist to chief justice. Republican George H.W. Bush appointed David Souter and Clarence Thomas during his one term in office. In 1993, Bill Clinton appointed Ruth Bader Ginsburg to fill the vacancy created by the retirement of Byron White, whom John F. Kennedy had appointed in 1962. That finally ended the twenty-six-year drought by Democratic presidents that dated back to 1967, when Johnson appointed legendary civil rights lawyer and then-Solicitor General Thurgood Marshall to the Court. A year later, Clinton appointed Stephen Breyer to fill Blackmun's

seat. Republican George W. Bush had two appointments, John Roberts and Samuel L. Alito, both of which came during his second term, replacing Rehnquist and O'Connor, respectively. Bush's appointment of Roberts to replace Rehnquist marked the third consecutive chief justice appointed by a Republican president. In fact, the last Democratic president to appoint a chief justice was Harry S. Truman, who tapped Fred Vinson in 1946 to replace Harlan Fisk Stone, an appointee of Democrat Franklin D. Roosevelt. Donald Trump's election in November 2016 ensures that it will be seventy years and counting since a Democratic president last appointed a chief justice to the Supreme Court.

After Powell and Rehnquist took their seats within a day of each other in January 1972, the party alignment on the Court shifted to seven Republican appointed justices and two Democratic appointed justices. From 1972–2009, that distribution would remain consistent, even over the course of six presidential elections, with the exception of 1991–1993, when the Court counted only one Democratic appointed justice, Bryon White, among its members. That distribution is even more remarkable when you consider that three Democratic presidents, Carter in 1976, Clinton in 1992 and 1996, and Barack Obama in 2008, and three Republican presidents, Reagan in 1980 and 1984, George H.W. Bush in 1988 and George W. Bush in 2000 and 2004, were elected during this time. In 2009, Obama appointed Sonia Sotomayor to replace David Souter, and a year later, he appointed Elena Kagan to replace John Paul Stevens. For the first time since the October 1970 Term there were four justices appointed by Democratic presidents serving on the Court. Had Merrick Garland been confirmed and been able to join the Court prior to the beginning of the October 2016 Term, it would have been the first time in forty-eight years that the Court would have begun a term with a majority of justices appointed by Democratic presidents on the bench.

By January 1972, after Nixon had remade the Court by appointing four new justices in less than three years, there were no shortage of predictions that a "Nixon Court" would soon begin an assault on the liberal legacy of the Warren Court, particularly those cases that expanded the scope of the Bill of Rights and the Fourteenth Amendment. That concern even extended to the New Deal, given some of the newer justices' comments on federalism and the power of Congress to regulate the economy. Rehnquist, who, as an assistant attorney general in the Nixon Justice Department, had advocated for far less federal

intervention on a range of matters, including public school desegregation, greater latitude for religion in public life and economic regulation, he believed were properly for the states. Lewis Powell, who had been Nixon's first choice to fill the seat that ultimately went to Harry Blackmun, had been commissioned by the United States Chamber of Commerce in 1971 to write a confidential memo outlining a strategy on how to combat the new economic and environmental regulation coming out of Washington. Titled "Attack on the American Free Enterprise System," Powell wrote that "no thoughtful person can question that the American economic system is under attack" by powerful tide of liberal forces.¹⁰ The "Powell Memo," as the report soon became known, encouraged the business community to step up its efforts to shape the public debate by identifying and promoting scholars and speakers to get this message out. Powell also suggested to the Chamber that it create and fund conservative, business-oriented organizations that had the capacity to litigate and contest consumer and environmental groups in the courts. Cases do not arrive at the steps of the Supreme Court like an orphan in the night. Public interest organizations, often supported by well-funded think tanks and specialized law firms with clear points of view and representing all points on the political spectrum, have a great deal to do with the ebb and flow of Supreme Court litigation. The Powell Memo offered a clear blueprint to conservative groups who viewed the Burger Court as one that would be hospitable to their interests, and contributed greatly to the rise of conservative interest group litigation.

But not too far into the post-Warren Court era a funny thing happened on the way to the predicted constitutional apocalypse. The Court had not only refrained from disturbing any landmark precedent. Solid majorities, consisting of Republican appointed justices, were actually *extending* the meaning of the Bill of Rights and the Fourteenth Amendment in politically sensitive areas that went far beyond some of the Warren Court's most controversial decisions. In 1971, in *Swann v. Charlotte-Mecklenburg Board of Education*,¹¹ the Court unanimously ruled that federal courts had jurisdiction under Article III to create and impose remedies for school districts that had not met the Court's long-standing requirement dating back to *Brown v. Board of Education*¹² to eliminate state-imposed racial segregation in public education. And those remedies included court-ordered busing and the remedial alternation of attendance zones to create racially integrated schools. That same year, a

¹⁰ Memorandum from Lewis F. Powell, Jr. to Mr. Eugene B. Sydnor, Jr. (Aug. 23, 1971).

¹¹ 402 U.S. 1 (1971).

¹² 349 U.S. 294 (1955).

unanimous Court, in *Lemon v. Kurtzman*,¹³ also held that religious schools were ineligible to receive taxpayer funds that would have the effect of impermissibly entangle them with the government, further strengthening the wall between church and state the Court had established in previous decades. And, in *Reed v. Reed*,¹⁴ the Court, for the first time, extended the reach of the Equal Protection Clause of the Fourteenth Amendment to prohibit sex discrimination, a decision it would reinforce and strengthen over the next several decades.

But by far the most controversial decision of the early Burger Court—and one of the Court’s most controversial decisions ever—came in January 1973 when it ruled, in *Roe v. Wade*, that the right to privacy established in *Griswold v. Connecticut*¹⁵ extended to the right of women to obtain a legal elective abortion. Only four states had laws that survived the Court’s sweeping decision, including the approximately dozen states that had modified their criminal abortion statutes in accord with a model law developed by the American Law Institute (ALI) to permit abortion when the mother’s health or life was threatened, or when the women was the victim of rape or incest. Of the seven justices that formed the majority, five—Burger, Stewart, Brennan, Powell and Blackmun, *Roe*’s author—were Republican appointees. They were joined by Marshall and Franklin D. Roosevelt appointee William Douglas, who had authored the Court’s majority opinion in *Griswold*. Dissenting were White and Rehnquist, a position they would take until their respective departures from the Court. For the nearly two decades, pro-life organizations attempted to narrow and, by the 1980s, argue for the outright reversal of *Roe*. On six separate occasions between 1983 and 1992, the Reagan and Bush administrations filed amicus curiae briefs asking the Court to overturn *Roe*. In *Planned Parenthood v. Casey*,¹⁶ the Bush administration had supported Pennsylvania’s decision to use this case to confront *Roe* squarely. Solicitor General Charles Fried, who, appearing as amicus curiae, had asked the Court to overturn *Roe* four years before in *Webster v. Reproductive Health Services*¹⁷ on behalf of the Reagan administration, took the same position on behalf of the new administration. Even Kathryn Kolbert, the ACLU attorney representing Planned Parenthood in *Casey*, asked the Court to either affirm or discard *Roe*

¹³ 403 U.S. 602 (1971).

¹⁴ 401 U.S. 934 (1971).

¹⁵ 381 U.S. 479 (1965).

¹⁶ 505 U.S. 833 (1992).

¹⁷ 492 U.S. 490 (1989).

rather than letting it twist in the wind, as it had since the Reagan administration had made overturning the landmark decision a priority.

On the last day of the term, the Court stunned observers who believed, not without good reason, that *Roe* was slated for the constitutional dustbin. A five-member majority, all of whom were appointed by Republican presidents, affirmed the centrality of *Roe* that protected the right of women, in consultation with their physician, to decide whether or not to continue their pregnancy. In a remarkable joint opinion, O'Connor, Kennedy and Souter expressed their exasperation with the Reagan and Bush administration's continuous effort to overturn *Roe*. "Liberty finds no refuge in a jurisprudence of doubt,"¹⁸ began the opinion. "After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are to conclude that the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."¹⁹ Justice Blackmun, the only member of the *Roe* Court on the bench for *Casey*, saluted his colleagues for their "act of personal courage and constitutional principle." Nineteen years after five Republican appointed justices joined two Democratic appointed justices to establish a constitutional right to abortion, an almost entirely different Republican majority affirmed that right. And it not so many words they sent a clear message to anyone thinking of asking the Court to reconsider *Roe* in the future.

Stop.

Fifteen years later, in *Gonzales v. Carhart*,²⁰ the Court upheld the constitutionality of the federal Partial Birth Abortion Act of 2003, which bars late term abortions under certain circumstances. But the Court also ruled seven years before in *Stenberg v. Carhart*²¹ that states may not restrict late term abortions by criminalizing medical procedures used to perform abortions during the second trimester of a woman's pregnancy. And most recently the Court, minus Scalia, ruled in *Whole Woman's Health* that a Texas law regulating where and when physicians could perform abortions placed an "undue burden" on women and bore no relationship to maternal health. This time, though, the composition of the pro-*Roe/Casey* majority was very different. Kennedy joined the Court's Clinton and Obama appointees to strike

¹⁸ *Casey*, 505 U.S. 833, 844 (1992).

¹⁹ *Id.* at 845.

²⁰ 550 U.S. 124 (2007).

²¹ 530 U.S. 914 (2000).

down the Texas law. A day after the court's ruling, it refused to hear appeals from Wisconsin and Mississippi to similar laws, which had been invalidated by federal appeals courts. Of note was Alito's dissent, which did not address the question of *Roe's* constitutional fitness, instead arguing that the Court should have never heard the case. Roberts joined but offered no opinion on *Roe*. Since coming to the Court in 2005, Roberts has never said a word about revisiting the Court's abortion precedents.

In the thirty-seven-year period between 1971 and 2008, the Court counted at least seven Republican justices among its membership. In the thirty-six-year period between 1969 and 2005, five different Republican presidents appointed twelve different justices to the Court, compared to just two justices appointed by the two Democratic presidents elected during this time. Between 1969 and 1993, Republican presidents appointed ten justices to the Court without a Democratic president making an appointment in the interim. Moreover, Republican presidents appointed two chief justices, and then a third in 2005. That remarkable run notwithstanding, the Court nonetheless moved the law left in many key areas. In *Regents, University of California v. Bakke*,²² a five-member majority, with Nixon appointee Lewis Powell writing the controlling opinion, ruled that public universities could take race into account in their admissions decisions, as long as it avoided racial quotas or did not make race the sole admissions factor. Despite repeated opposition by the Reagan and both Bush administrations to affirmative action, the Court held the line. In *Grutter v. Bollinger*,²³ the Court, with O'Connor writing the majority opinion, ruled that public universities could continue to consider race in an "individualized considerations" in admissions decisions, handing a defeat to the Bush administration, which had asked the justices in a friend of the court brief to find the University of Michigan Law School's admissions program unconstitutional. Of the five justices forming the *Grutter* majority, three were Republican appointees. O'Connor's opinion was notable for another reason, as it marked the first time she had voted to uphold an affirmative action after twenty-two years on the Court.

Just this past term, a 4–3 Court upheld a University of Texas affirmative action program, holding that student body diversity was a compelling state interest that warranted the use of race-conscious means to achieve the

²² 438 U.S. 265 (1978).

²³ 539 U.S. 306 (2003).

university's stated objective. And who authored the majority opinion? None other than Justice Kennedy. Like O'Connor in *Grutter*, *Fisher* was the first time Kennedy had voted to uphold an affirmative action program in his twenty-nine years on the Court. Nine years before, in *Parents Involved in Community Schools v. Seattle School District No. 1*,²⁴ Kennedy was in the 5–4 majority that struck down voluntary efforts by local school districts to desegregate their public schools. Kennedy wrote separately to emphasize that, while he agreed with the Court's judgment, he did not subscribe to Chief Justice Roberts's "all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account."²⁵ In *Fisher*, Kennedy followed the blueprint he laid down in *Parents Involved* and cast the deciding vote to uphold diversity-based affirmative action in higher education. On the question of judicial oversight of school desegregation, there is no doubt that the Court, beginning in the early 1990s, does not resemble in the slightest the *Swann* Court of 1971. But on affirmative action, the underlying principles of which inform much more public policy than just admissions in higher education, the law seems secure. And the irony of two Reagan appointees providing the crucial support to uphold affirmative action against a sustained legal attack that has its roots in the administration that put them on the Court should not be lost.

In *Romer v. Evans*,²⁶ a 6–3 Court ruled that an amendment to the Colorado state constitution barring the state or any political subdivision from enacting or enforcing any act designed to protect persons from discrimination based on "homosexual, lesbian, or bisexual orientation, conduct, practices or relationships" violated the Equal Protection Clause of the Fourteenth Amendment. Justice Kennedy wrote for the Court, and was joined by O'Connor, Souter, Stevens, Ginsburg and Breyer, putting four Republican appointed justices in the majority. *Romer* marked the first time the Court concluded that the Fourteenth Amendment barred a state from discriminating on the basis of sexual orientation, Kennedy wrote that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Furthermore, Kennedy used the

²⁴ 551 U.S. 701 (2007).

²⁵ *Id.*

²⁶ 517 U.S. 620 (1996).

word “animus” to describe Colorado’s motive here, holding that the provision advanced no legitimate state interest. Forget whether or not Colorado had failed to offer a compelling or even important state interest, the requirement a state must meet if it uses a racial or sex-based classification in the law. Six justices concluded there was nothing even rational about Colorado’s effort to exclude gay men and women from the right to seek legal protection under law. Foreshadowing his dissent in *Lawrence*, Scalia wrote that the Court had taken sides in the “cultural wars,” and accused the majority of substituting their own personal preferences for the right of Coloradans to legislative their own conception of sexual morality.

Scalia might have been stretching it a bit by suggesting that *Romer* would give states a green light to enact laws permitting polygamy—to date, no state has done so—but he was right when he observed that *Romer* put the Court on a collision course with *Bowers v. Hardwick*.²⁷ There, a sharply divided 5–4 Court upheld a Georgia sodomy law, concluding that the Constitution included no “fundamental right to homosexual sodomy” even though the statute applied to all persons, not just gay men and women. *Romer*, Scalia wrote, placed the Court’s “prestige” behind the belief that “opposition to homosexuality is as reprehensible as racial or religious bias.” “This Court,” he protested, “has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that ‘animosity’ toward homosexuality is evil.”

To Scalia’s great dismay, the Court, just seven years after *Romer*, overturned *Bowers* when, just seven years later, it ruled that a Texas law banning consensual sex between members of the same sex violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Writing for the 6–3 majority, Kennedy found that Texas had offered “no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”²⁸ O’Connor, who had joined the original *Bowers* majority, agreed with the Court that the Texas law was unconstitutional, but declined to join the five other justices, including Souter, Stevens, Ginsburg and Breyer, in setting aside *Bowers*. Nonetheless, that still put four Republican appointed justices in the majority invalidating the law. And it set up what Scalia correctly predicted was a constitutional path to the recognition of same-sex marriage. If a state could not prevent its citizens from engaging the political process to

²⁷ 478 U.S. 186 (1986).

²⁸ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

advocate for laws protecting gay men and women from discrimination or criminalize consensual sexual relations between adults, regardless of their sexual orientation, then all signs pointed to what he called the “judicial imposition of homosexual marriage.”²⁹

By the time the Court decided *United States v. Windsor*,³⁰ which, by a 5–4 margin, invalidated the federal Defense of Marriage Act (DOMA) and *Obergefell v. Hodges*,³¹ which held that states could not restrict marriage to heterosexual couples, the nation’s attitudes towards sexual privacy and same-sex marriage had changed dramatically. Between *Bowers* and *Lawrence*, not one state enacted a law restricting either consensual heterosexual or homosexual sexual conduct. In fact, a dozen states had either repealed their sodomy statutes or had them declared unconstitutional as a matter of state law by state supreme courts. Only twelve states had some sort of criminal sodomy law in place when *Lawrence* was decided. By the time the Court decided *Obergefell*, same-sex marriage was legal in 37 states and the District of Columbia. With the exception of the Sixth Circuit, which, in November 2014, overturned lower court decisions in Kentucky, Michigan, Ohio, and Tennessee, every federal appeals court that had heard a challenge to state marriage laws in the time between *Windsor* and *Obergefell* had ruled that the Fourteenth Amendment prohibited states from restricting marriage to heterosexual couples. Moreover, according to a May 2016 Pew Research Center report,³² fifty-seven percent of Americans supported same-sex marriage, as was the case shortly before *Obergefell* was decided. A May 2016 Gallup Poll³³ showed support for same-sex marriage at sixty-one percent. Both reports noted that public support for same-sex marriage had literally doubled from where it stood in 2001. Scalia’s nightmarish vision may well have come true, but one can hardly argue that *Lawrence* and *Obergefell* somehow “judicially imposed” rulings at odds with trends in public opinion. *Obergefell* offered a different alignment and distribution of votes on the Court than *Lawrence*, with Kennedy, joined by Ginsburg, Breyer, Sotomayor and Kagan, the only remaining Republican appointee in the majority. No one, in 1987, no one would have taken the bet that Anthony Kennedy would become forever linked with sexual

²⁹ *Id.* at 604.

³⁰ 133 S.Ct. 2675 (2013).

³¹ 135 S. Ct. at 2695–96 (2015).

³² Pew Research Center, *Changing Attitudes on Gay Marriage*, PEW FORUM (May 12, 2016), <http://www.pewforum.org/2016/05/12/changing-attitudes-on-gay-marriage/>.

³³ Justin McCarthy, *Americans’ Support for Gay Marriage Remains High, at 61%*, GALLUP (May 19, 2016), <http://www.gallup.com/poll/191645/americans-support-gay-marriage-remains-high.aspx>.

privacy and marriage equality, just as Harry Blackmun became forever associated with *Roe*. But that is exactly what happened.

For sure, constitutional development on the post-Warren Court has not been an inexorable march on behalf of social, economic and political liberalism. The Court, on multiple occasions, has turned aside challenges to the death penalty, most notably in *McCleskey v. Kemp*³⁴ and *Baze v. Rees*³⁵. In several, low-visibility decisions, the Court's Republican appointees have made it much more difficult for individuals and organizations to meet standing requirements to challenge public funds slated for religious schools and organizations. Prosecutors and law enforcement have much more discretion to gather evidence, obtain confessions and limit defendant's rights than they did during the heyday of the Warren Court's criminal procedure revolution. On three separate occasions, beginning in 1995, the Court has invalidated congressional legislation as beyond the scope of the Commerce Clause, something it had not done since 1937. Most recently, the Court ruled, in *National Federation of Businesses v. Sibelius*,³⁶ that Congress lacked power under the Commerce Clause to enact the Patient Protection and Affordable Care Act, passed in 2010 without the support of a single Republican in the House or the Senate. Instead, Chief Justice Roberts concluded that the Taxing and Spending Clause authorized Congress to impose a tax on parties who refused to purchase health insurance under the program. Justices Ginsburg, Breyer, Sotomayor and Kagan, who joined Roberts's opinion on the taxing and spending argument, believed that the ACA represented a valid exercise of congressional commerce power. Even though Roberts was widely praised by supporters of Obamacare for his "judicial statesmanship" in *National Federation of Independent Businesses*, his opinion on the Commerce Clause put the Obama administration on notice that any future ambitious legislation rooted in the Commerce Clause would not receive the traditional deferential review afforded to economic regulation. And it is important to note that the Court's Republican appointees succeeded in striking down the law's provision forcing states to expand their contributions to Medicaid or risk losing federal funding, an extraordinary departure from its extant federalism jurisprudence.

³⁴ 481 U.S. 279, 319–20 (1987).

³⁵ 553 U.S. 35, 41 (2008).

³⁶ 132 S.Ct. 2566, 2608–09 (2012).

And there is, of course, more on the conservative side of the constitutional ledger. Most notable are the Court's decisions in *Shelby County v. Holder*,³⁷ which, in striking down key provisions of Sections 4 and 5 of the Voting Rights Act of 1965, has severely constricted the federal government's power to oversee states and localities with long histories of racial discrimination, and *Citizens United v. Federal Election Commission*,³⁸ which held that the First Amendment prohibits limits on corporate campaign expenditures. Chief Justice Roberts, who wrote for the 5–4 majority in *Shelby County*, offered an alarmingly naïve understanding of the racial dynamics of Southern electoral politics. Acknowledging that “voting discrimination still exists; no one doubts that,” Roberts nonetheless concluded that conditions under states still covered by the law, which Congress had reauthorized on multiple occasions with little or no controversy, had improved to the point where substantial federal oversight was no longer necessary. The decision's impact has been considerable in the nearly four years since *Shelby County* was decided, encouraging a number of states to enact photo ID laws, close down voter registration centers and enact other measures clearly intended to suppress minority voters. States most likely to enact photo ID laws and other restrictions are those where Republicans control both the governor's mansion and state legislatures and have significant African American populations. Roberts also wrote for the 5–4 majority in *Citizens United*, the consequences of which have been enormous for the role of big money in political campaigns. In both decisions, Kennedy was back with the Court's conservatives, although he had nothing to say about either case, merely signing on to Roberts's opinions.

On the other hand, the Court has left standing many landmark decisions that conservatives, through a concerted electoral, legislative and legal attack, have wanted to exorcise for nearly fifty years. Criminal defendants are still entitled to their *Miranda* rights; law enforcement, despite numerous and carefully carved out exceptions, must still follow the exclusionary rule; public schools cannot require their students to pray in school or sponsor religious ceremonies on their campuses; states may not execute juveniles and the mentally disabled or sentence them to life without parole; states could not usurp the federal government's authority on immigration by enforcing contradictory laws of their own; and, in four remarkable decisions between 2004 and 2008, the Court ruled that presidential power in times of crisis was not unlimited. Invoking Justice Robert H. Jackson's concurring opinion in

³⁷ 133 S.Ct. 2612, 2631 (2013).

³⁸ 558 U.S. 310 (2010).

Youngstown Sheet & Tube v. Sawyer,³⁹ a revolving majority of predominately Republican appointees ruled that the Bush administration could suspend the writ of habeas corpus for either American citizens or “enemy combatants” being held in military prisons simply because it believed the unprecedented nature of global terrorism authorized the president to take unprecedented measures. In one such case, *Hamdan v. Rumsfeld*,⁴⁰ a 5–3 majority, which included Stevens, Kennedy and Souter along with Ginsburg and Breyer, overturned the D.C. Circuit Court of Appeals unanimous opinion upholding the Bush administration’s position that it had Article II power to establish a military commission and that the Geneva Convention did not apply to enemy combatants. Roberts was a member of the D.C. Circuit panel that decided *Hamdan*. And the Court has resisted numerous efforts by Congress, states and localities to criminalize unpopular speech and expressive conduct, invalidating laws that have attempted to punish everything from flag burning and the display of Nazi swastikas and burning crosses to sexually explicit material on the Internet. And it was the Rehnquist Court that unanimously ruled, in *Reno v. American Civil Liberties Union* (1997), that government regulation of the Internet was subject to the same First Amendment analysis that governed any treatment of free speech—prior restraint and “content-based” restrictions were permissible under only the most compelling of circumstances.

Simply because the Court, for almost fifty years, has resisted the consistent and often emphatic desire of Republican presidents and their allies in the worlds of law, academia and politics to abandon one landmark decision after another does not mean, of course, that it will continue to maintain that posture going forward under a Trump administration. Legal academics, political scientists, journalists and others who think and write about the Court and the social and political context in which it operates often reach for grand theories to explain everything from how the justices should interpret the Constitution to why it decides cases the way that it does. Some emphasize the law and legal norms, as well as theories that inform them, believing that logic and the search for objective rules, rather than politics, experience and—wait for it—evolving societal standards animate the Court’s institutional behavior and the individual decision-making of the justices. Others argue that law, to paraphrase Clauswitz, is simply the extension of politics through other means. For a

³⁹ 343 U.S. 579 (1952).

⁴⁰ 548 U.S. 557, 567 (2006).

significant number of others, the truth is somewhere in between. The justices are indeed motivated by certain policy preferences and they are conditioned to advance those preferences through the language of law and the norms that coincide with it. Indeed, no one can seriously argue that the justices are chosen based on their academic and professional “qualifications” alone. A good deal of thought goes into who gets selected for reasons that have nothing to do with where what they made on the LSAT or how young they were when they made partner or advanced to a higher political office. Ideological rigor and commitment to a president’s agenda drive the appointment process more so than ever before.

There are certain instances, however, when long-established principles, whether in the law (the First Amendment protects unpopular speech, and the justices’ continued commitment to the marketplace model is about fidelity to a higher abstract principle rather than an endorsement of any particular point of view) or the Court’s institutional role (absent a clear constitutional error the judiciary should defer to the political process on economic regulation and protect those rights considered fundamental and beyond the reach of political majorities) that supersede a particular ideological agenda. And one should not doubt the importance of prestige, both individual and institutional, that can lead justices to make decisions that depart from how they might vote if their position would not make a difference. Judges, no less than legislators and other elected officials, are strategic actors. Certainly, there were other motives in play when Sandra Day O’Connor, Anthony Kennedy and David Souter formed an alliance in *Casey* to save *Roe* from a full-scale, frontal assault from the Bush administration. Their plurality opinion struck a tone that was at times defensive, not so subtly reminding the Bush and Reagan administrations that, while they might have put them on the Court, the justices were not there to do their bidding. But the opinion also spoke about the need for the Court to retain its “legitimacy.” How the public viewed the Court was directly related to its willingness to follow its decisions. If the public believed the Court merely responded to the social and political pressures of the day and did not make decisions based on principle, its legitimacy would be lost. Legitimacy, integrity, law as foundation rather than political expedient—these were considerations O’Connor, Kennedy and Souter emphasized throughout the opening part of their opinion before they even turned their attention to the Pennsylvania law.

In fact, the O’Connor-Kennedy-Souter opinion offers a perfect example of what I call “the burning building theory of constitutional law.” And it goes

something like this: Have you ever been in a conversation where you insisted that you would go back into a burning apartment building to retrieve your favorite things, rescue your family cat, pull the kindly old gentleman who lives four doors down from you and always remembers your birthday or to save the single grandmother who looks after other kids in the building and listens to your personal problems. Of course. We all have. It's like telling off your boss or quitting your job in the mirror and then deciding once you've gotten to work and also remembered your car note is due that day, today is not the best time. Would we actually risk our lives to go back into a burning building to save a cat, retrieve some photo albums or rescue two people unrelated to us? The only honest answer is we don't know. Until you are actually faced with a choice that has, so far, only been an abstract consideration, you really have no idea what you are going to do. I believed then and still do that the burning building theory of constitutional law better explains the outcome in *Casey* than anything. Judging is complex. Oliver Wendell Holmes did not write that the life of the law was not experience but logic. Rather, he wrote that the life of the law was not logic but experience. General propositions do not decide concrete cases, and neither does constitutional fundamentalism.

Should President Trump have the opportunity to appoint two justices over the coming years, Chief Justice John Roberts will, more likely than not, find himself having to make decisions that are as strategically calculated towards maintaining the Court's institutional prestige, which took some time to return after the clear hit it took in *Bush v. Gore* (2000), a case that surely ranks behind few others in terms of its obvious political transparency. *Whole Woman's Health* is further away from *Casey*—twenty-four years—than *Casey*—nineteen years—was from *Roe*. Does Roberts want to be remembered as the Chief Justice who presided over the demise of a decision that has been in place almost fifty years and enjoys the support of a majority of the American public? And what happens if the Court returns the issue to the states, and some take the opportunity to enact really restrictive laws or complete bans on abortion? Who will go to jail under new criminal abortion statutes beside the women who obtain abortions illegally? Their doctors, as co-conspirators? The person that drove and accompanied them and perhaps paid for the procedure? It would seem so. Often lost in any discussion about *Roe*'s fate is the degree to which Justice Blackmun's opinion tied the right of women to obtain abortions their physicians. *Roe* was, of course, fundamentally, about the right of women to determine their reproductive choices. But it was also about the right of

doctors to practice medicine free from state laws that bore no relationship to maternal health and were intended instead to obstruct them.⁴¹

Rarely does the discussion reach that point anytime the question of *Roe*'s fate comes within a nautical square mile of the Court. Supreme Court decisions do not implement themselves, and about the only guarantee available in a post-*Roe* world would be chaos across the board—complete social and political chaos.

John Roberts has said for the record that he does not want to fail, that he does not want to leave the Court's reputation sullied as the result of failed leadership and that he understands there are institutional and political considerations that inform the Court's decision-making. He famously remarked in his 2005 confirmation hearing that “judges are like umpires. Umpires don't make the rules; they apply them. The role of the umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see an umpire I will remember that it's my job to call balls and strikes and not to pitch or bat.” Only someone who never played the game or studied baseball very closely could make that statement and keep a straight face. The strike zone is what the umpire says it is.⁴² Yes, there is a rulebook definition, but the strike zone varies from pitcher to pitcher and from batter to batter. Umpires reward pitchers who hit their spots consistency, even if the pitch is just a bit outside the zone. Established veterans, especially stars, get more benefit of the doubt from umpires, as do batters who have high batting averages and on-base percentages. Rookies and other players just breaking into the major leagues have to earn an umpire's respect before they can begin to question his calls.⁴³

Chief Justice Roberts finds himself in a place that few expected when the polls opened on the morning of November 8th, 2016. Since Hillary Clinton was the consensus pick to win the election, few people bothered to think much about whether a justice “in the mold of Scalia” was in the offing. Rather, the conversation was about the opportunity for a Democratic president to achieve something that none had done since Lyndon Johnson—have a Court with a

⁴¹ “For an extension discussion of Justice Blackmun's opinion and how it linked women and their physicians to the concept of liberty and privacy under the Fourteenth Amendment, see David Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*. New York: Macmillan, 1994.”

⁴² Cork Gaines, *What An MLB Strike Zone Really Looks Like And Why Players Are Always so Mad About it*, BUSINESS INSIDER (Sep. 17, 2014), <http://www.businessinsider.com/mlb-strike-zone-2014-9>.

⁴³ Ian York, *The Human Element: Umpire Strike Zones*, SONS OF SAMHORN (Apr. 8, 2015), <http://sonsofsamhorn.com/baseball/umpires/the-human-element-umpire-strike-zones/>.

working majority of Democratic appointed justices. Now, all eyes will be on Roberts, and what will happen if Trump manages to appoint two justices eager to side with Alito and Thomas. How this scenario unfolds, of course, depends entirely on the justices Trump will replace. If Ginsburg, Breyer or even Kennedy retires, that opens up far different strategic considerations for Roberts than if Trump merely replaces Alito or Thomas or does not get an appointment beyond Scalia's vacant seat. Will Roberts place the Court's reputation above the Republican political agenda, leaving the Trump administration as frustrated as his Republican predecessors in persuading the Court to uproot long-standing decisions? Or will he allow the Court to unsettle areas of law that will have a profound impact on the social and political order? His decision in *National Federation of Independent Businesses* to join the Court's four Democratic appointees to uphold Obamacare offers some evidence that Roberts is not immune to the strategic and institutional concerns that come with being chief justice.

No, the burning building theory of constitutional law and judicial decision-making doesn't have the elegance of some mathematical model that purports to explain how the Court works. But it does offer a partial explanation for how a Republican dominated Court has navigated the terrain of constitutional politics for the nearly fifty years. Retracting rights is not something the Court does easily, if at all. For better or worse, the Constitution's fate has been in the hands of a majority of Republican appointed justices since 1970 and that is not about to change anytime soon. How Roberts, who this term will complete the sixty-fourth consecutive year of having a Republican appointee in the Court's middle seat, balances the competing forces in front of him will determine whether he succeeds on a personal and institutional level, or burns his and the Court's reputation to the ground.